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Dispute Settlement Body
26 September 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 SEPTEMBER 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

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1.1. The Chairperson noted that there were eight sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. She recalled that Article 21.6 required that: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time … and shall remain on the DSB's

Agenda until the issue is resolved". Under this Agenda item, she invited delegations to provide up-to-date information about their compliance efforts. She also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record". She then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.187)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.187, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain 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 13 September 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that Japan thanked the United States for its latest status report and the statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings in order to resolve this matter.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.162)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.162, 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 13 September 2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that the United States had submitted its 163rd status report in this dispute, which was not materially different from the reports submitted by the US ahead of previous DSB meetings, or from the first one submitted by the United States in November 2004. No further progress toward implementation was reported at the present meeting. He said that China wished to know the reasons why the US had failed to implement the DSB's recommendations and rulings adopted 18 years ago. China said that as a result of such persistent non-compliance, Section 110(5) of the US Copyright Act, which had long ago been found inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. He said that the US continued to fail to accord to intellectual property right holders the minimum standard of protection required by the TRIPS Agreement. He said that as such, the US remained the only Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement long after the expiration of the reasonable period of time (RPT). Article II.2 of the Marrakesh Agreement Establishing the World Trade Organization provided that: "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 are … binding on all Members". China urged the

United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute. China again strongly suggested that the United States consider including in its next status report the specific reasons as to why there was no implementation of the DSB's recommendations and rulings in this dispute.

1.10. The representative of the United States said that as the United States had noted at prior meetings of the DSB, by intervening under this item, China attempted to give the appearance of concern for intellectual property rights. The United States said that China had been engaging in industrial policy which had resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and its workers and businesses. China's stated intention was to achieve global dominance in advanced technology. This caused harmful trade-distortive policies and practices. These unfair policies and practices affected all Members, not just the United States. The aggregate impact of China's policies worldwide was much higher than the estimated US$50 billion in annual harm some of China's policies were causing to the United States. These policies and practices forced innovators to hand over their technology and know-how as the price of doing business in China. China also used non-economic means to obtain technology, such as using State-controlled or -influenced funds and companies to buy up businesses solely for purposes of acquiring technology for domestic use, or imposing burdensome intellectual property licensing requirements in China. The best way for China to support fairness in the world trading system was to remedy the problems it had created. China should change its behaviour: stop distorting markets, stop forcing companies to transfer technology, and create a level playing field that would give all countries a better chance to succeed. For now, the United States could say that, as the companies and innovators of China and other Members well knew, the intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other Member. Indeed, as China also well knew, none of the damaging technology transfer practices of China that the United States had discussed at recent DSB meetings were practices that Chinese companies or innovators faced in the United States.

1.11. The representative of China said that the US intervention tried to derail the discussion under this Agenda item by suggesting that its intellectual property protection was superior to that of China. China disagreed. First, one thing was obvious: China had fully complied with the TRIPS Agreement while the United States had not. China believed that until the United States faithfully and entirely honoured its obligations under the TRIPS Agreement, the comparison suggested by the United States was clearly deprived of legal basis. Second, Article 21.6 of the DSU entitled any Member to raise any issue regarding the implementation of the DSB's recommendations or rulings before the DSB at any time following their adoption by the DSB. The situation of the Member raising implementation issues was by no means a precondition for exercising that right, nor did it prejudice the merit of that Member's statement. Third, as to the false claims against China's protection of intellectual property, China referred to its statement made at the 28 May 2018 DSB meeting. As always, China welcomed and was willing to engage in good faith and objective discussions with other Members regarding any intellectual property issue. Finally, China emphasized that the issue was whether the United States had implemented the DSB's recommendations and rulings in this dispute. China said that the answer was negative. China, once again, urged the United States to faithfully and promptly meet its implementation obligation.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/ADd.125)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.125, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.14. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. On 11 September 2018, two draft authorizations were presented for vote to the member States committee: one for the renewal of a genetically modified

maize seed[1] and one new authorization for genetically modified maize.[2] He said that as the votes had resulted in "no opinion", the draft measures would be submitted for a vote to the Appeal Committee in October. The EU remained committed to acting in line with its WTO obligations. More generally, the EU recalled that its approval system was not covered by the DSB's recommendations and rulings.

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

1.16. The representative of the European Union said that the EU wished to respond to the second part of the US statement. He said that the United States had referred to what it called the "opt-out Directive" of the EU. He then repeated some of the points that the EU had already made in previous DSB meetings. The first point was that no EU member State had imposed any ban thus far. The second point was that, under the terms of the "opt-out Directive", an EU member State could adopt measures prohibiting or restricting cultivation only if such measures: were in line with EU law; were reasoned, proportional and non-discriminatory; and were based on compelling grounds. The third point was that this opt-out Directive was not covered by the DSB's recommendations and rulings in this dispute.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.9)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.9, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping and countervailing measures on large residential washers from Korea.

1.19. The representative of the United States said that the United States had provided a status report in this dispute on 13 September 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the United States Trade Representative had requested that the US Department of Commerce make a determination under section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce had reviewed those comments and rebuttal comments and had taken them into account for purposes of preparing the final determination. On 4 June 2018, Commerce had issued a final determination, in which Commerce had revised certain aspects of its original determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programs, in accordance with findings adopted by the DSB. The

[1] Maize NK603 x MON 810.
[2] Maize MON 87427 x MON 89034 x 1507 x MON 88017 x 59122.

United States continued to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute.

1.20. The representative of Korea said that Korea thanked the United States for its status report and the statement made at the present meeting. He noted however that two years after the DSB had adopted the Panel and Appellate Body reports, the United Stated had not yet implemented the DSB's recommendations and rulings. Korea, once again, urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute in order to fully comply with its obligations under the covered Agreements.

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

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

E. European Union – Anti-dumping measures on biodiesel from Indonesia: Status report by the European Union (WT/DS480/8/Add.1)

1.23. The Chairperson drew attention to document WT/DS480/8/Add.1, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on biodiesel from Indonesia.

1.24. The representative of the European Union said that the EU intended to comply with the recommendations and rulings of the DSB in this dispute by the agreed reasonable period of time, which would expire on 28 October 2018. On 28 May 2018, the European Commission had reopened the anti-dumping investigation in this case by publication of a Notice in the Official Journal of the European Union.[3] On 24 July 2018, the European Commission had disclosed the findings of this investigation to interested parties who were given the opportunity to provide their comments. The relevant procedures on the basis of this Notice were ongoing and were expected to be finalized in the near future.

1.25. The representative of Indonesia said that Indonesia thanked the EU for its status report and its statement made at the present meeting. Indonesia welcomed the fact that the EU had reopened the anti-dumping investigation (the "Investigation") concerning imports of biodiesel originating notably in Indonesia by publication of a Notice in the Official Journal of the EU on 28 May 2018 (the "Notice"). Indonesia also took note of the Notice's invitation to interested parties to provide views, information and supporting evidence. She said that Indonesia was an interested party to the Investigation. Accordingly, Indonesia had provided its views, relevant information and evidence in the Investigation. As stated by the EU at the present meeting and at previous DSB meetings, the ongoing Investigation was expected to be finalized in the near future, Indonesia hoped that the Investigation would be completed before the expiry of the reasonable period of time on 28 October 2018, and that it would be in line with the DSB's recommendations and rulings 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. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.1)

1.27. The Chairperson drew attention to document WT/DS471/17/Add.1, 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.

[3] OJ C 181, 28.05.2018, p. 5.

1.28. The representative of the United States said that the United States had provided a status report in this dispute on 13 September 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.29. The representative of China said that China thanked the United States for its status report and its statement made at the present meeting. However, China was, once again, very disappointed with the US status report and deeply concerned that the United States remained in the process of consulting with interested parties on options to address the DSB's recommendations in this dispute. China noted that the status report had further confirmed that the United States had not yet made any concrete effort nor had initiated any substantive action for the implementation of the DSB's recommendations and rulings. The US inaction and delay regarding implementation had been seriously infringing China's legitimate economic and trade interests and was harming the rule-based multilateral trading system as well as the interests of all Members. China had thus requested authorization from the DSB to suspend concessions or other obligations under Article 22.2 of the DSU, and the matter had been referred to arbitration under the covered agreements pursuant to Article 22.6 of the DSU. China, once again, urged the United States to faithfully implement the DSB's recommendations in this dispute in order to fully comply with its obligations under the covered agreements.

1.30. The representative of the United States said that the United States took note of China's statement and would convey it to capital. The United States was willing to discuss this matter with China on a bilateral basis. To be clear, however, it was incorrect to suggest that the United States had taken no action. As the United States had previously reported to the DSB, the United States continued to consult with interested parties on options to address the DSB's recommendations in this dispute. That internal process was ongoing. In addition, the United States was aware of China's request pursuant to Article 22.2 of the DSU for authorization to suspend concessions and other obligations. China's decision to proceed in that regard was disappointing and not constructive. On 19 September 2018, the United States had objected to the level of suspension proposed by China on 9 September 2018, referring the matter to arbitration pursuant to Article 22.6 of the DSU.

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

G. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18)

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

1.33. The representative of Indonesia said that Indonesia was submitting its status report in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted its recommendations and rulings in this dispute. At the DSB meeting on 22 January 2018, Indonesia had informed the DSB of its intention to implement the recommendations and rulings of the DSB regarding this dispute. Indonesia and Brazil had then informed the DSB, on 15 March 2018, of their agreement on a reasonable period of time (RPT) for Indonesia to implement the recommendations and rulings of the DSB in this dispute. The RPT had elapsed on 22 July 2018. She said that Indonesia had undertaken the necessary steps to adjust the relevant measures by amending its regulations, namely: (i) Ministry of Agriculture Regulation No. 23/2018, which entered into force on 24 May 2018; and (ii) Ministry of Trade Regulation No. 65/2018, which entered into force on 31 May 2018. Indonesia had notified these regulations to the Committee on Import Licensing on 13 August 2018 in documents G/LIC/N/2/IDN/39 and G/LIC/N/2/IDN/41. Indonesia stood ready to continue to consult and remained in constant communication with Brazil with respect to any matter relating thereto.

1.34. The representative of Brazil said that Brazil thanked Indonesia for its status report and its statement made at the present meeting. The Panel in this dispute had found that the Indonesian import licensing regulations created unjustified restrictions on trade in at least three respects: (i) the regulations established, through a "positive list requirement", a selective list of products subject to licensing, which excluded some tariff lines for chicken meat and chicken products; (ii) the regulations

limited the purposes of use or place of sale of imported products by means of distribution plans and distribution reports; and (iii) the regulations did not allow under any circumstances the introduction of changes to the terms of the import licenses that were granted. She said that according to the Panel, Indonesia had also been in breach of the SPS Agreement because it delayed, without plausible justification, the approval of the Brazilian veterinary health certificate. She said that the Panel had not identified any sanitary reasons for Indonesia's delay. Brazil understood that Indonesia had taken some steps towards the implementation of the DSB's recommendations and rulings regarding this dispute. In this regard, Brazil noted that Indonesia's positive list requirement had not ceased to exist. Indonesia had chosen to maintain the list and to include some of the HS codes of chicken meat and chicken products that had been the subject of Brazil's complaint. However, one HS code had yet to be included to Indonesia's positive list. Indonesia had further eliminated the requirement of distribution reports with information regarding use or place of sale of imported chicken meat and chicken products. However, the requirement of distribution plans continued to be in force by virtue of Article 22(1)(l) of Ministry of Agriculture Regulation 34/2016. Moreover, Indonesia had introduced the possibility of making changes to the terms of the import licenses. Notwithstanding this, amendments to import licenses were subject to several requirements and sanctions on importers in the event that these requirements were not strictly observed continued to apply. Brazil noted that any measure taken by Indonesia was to no avail if Indonesia failed to approve Brazil's veterinary health certificate for the importation of chicken meat and chicken products. As had been confirmed in this dispute, Indonesia had caused an undue delay in the approval of the veterinary health certificate in a way that was inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement since at least 2009, that is, almost ten years ago. Recently, at Indonesia's request, Brazil had sent responses to a new questionnaire so that Indonesia could approve Brazil's veterinary health certificate. Brazil reiterated its understanding that there had never been outstanding information that had prevented Indonesia from completing the approval procedure. The fact that Indonesia seemed to consider that there was a need for updated information that had already been submitted resulted from a delay that the Panel had found to be "undue" and to have been caused by Indonesia, something that could not be attributed to Brazil. Brazil therefore urged Indonesia to approve Brazil's veterinary health certificate in a timely manner and to fully comply with the DSB's recommendations and rulings in this dispute. Brazil remained ready to work with Indonesia with respect to any aspect of this dispute.

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

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

1.36. The Chairperson drew attention to document WT/DS488/12, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain oil country tubular goods from Korea.

1.37. The representative of the United States said that the United States had provided a status report in this dispute on 13 September 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.38. The representative of Korea said that Korea thanked the United States for its status report. Korea had been closely monitoring actions taken by the US regarding the implementation of the DSB's recommendations and rulings in this dispute. He said that the reasonable period of time for the implementation of the DSB's recommendations and rulings would expire on 12 January 2019. Korea expected that the United States was working in good faith to keep up with its obligation to implement the DSB's recommendations and rulings in this dispute. He said that Korea however had yet to learn how the US had taken necessary steps, including procedures under Sections 123 and 129 of the Uruguay Round Agreements Act, to implement the DSB's recommendations and rulings. Korea considered the information contained in the US status report to be insufficient for Members to be aware of US implementation plans. Korea strongly requested that the United States resolve the uncertainty surrounding implementation without delay, and that it eventually bring its measures into conformity with the covered agreements within the reasonable period of time.

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

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

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

A. Statement by the European Union

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

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

2.3. The representative of Canada said that Canada thanked the EU for having placed this item on the Agenda of the DSB. Canada shared the EU's view that this item would continue under surveillance by the DSB until the United States had ceased to apply the Continued Dumping and Subsidy Offset Act of 2000.

2.4. The representative of Brazil said that as an original party to this dispute, Brazil once again thanked the EU for placing this item on the Agenda of the DSB. The main aspect of this item on the Agenda – beyond the discussion about the obligation or not for the concerned Member to continue to submit status reports – was that after more than 15 years of the DSB's recommendations and rulings in this dispute, and more than 12 years after the date of the Deficit Reduction Act that had repealed the Byrd Amendment, millions of dollars in anti-dumping and countervailing duties charged on Brazilian and other Members' exports were still being illegally disbursed to US domestic petitioners. Brazil called on the United States to fully comply with the DSB's recommendations and rulings in this dispute.

2.5. The representative of Chile said that Chile wished to be associated with the concerns expressed by the EU, Canada and Brazil on this Agenda item. Chile hoped that compliance with the DSB's recommendations and rulings in this dispute would be achieved shortly and that this matter would be resolved.

2.6. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States said that it 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, almost 11 years ago. With respect to the EU's request for status reports in this matter, as the United States had explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. The United States was pleased that Canada had clarified at the 27 August 2018 DSB meeting that it disagreed with the EU's view on the requirement to provide status reports. The United States said that Canada had explained that it did not consider that a Member had to submit a status report where the Member announced that it had taken all actions necessary to comply with the DSB's recommendations and rulings. As the United States had noted

many times previously, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute. Once again, this month the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance. This included the "EC – Large Civil Aircraft" dispute (DS316), in which the DSB had recently adopted two further reports finding that the EU had not complied. The EU's decision to initiate yet another compliance proceeding under Article 21.5 of the DSU did not distinguish that dispute from the present dispute: the EU had claimed compliance, and the United States disagreed. Based on the position taken by the EU, the United States would have expected the EU to file a status report for that Agenda item. The United States failed to see how the EU's behaviour was consistent with the alleged systemic view it had been espousing under this Agenda item for more than ten years. As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to this dispute about the situation of compliance.

2.7. The representative of the European Union said that in the second part of its statement, the United States had mentioned that the EU had allegedly "failed to provide status reports" in various disputes that involved the EU. He said that the EU disagreed with that part of the US statement. The EU reminded delegations that the EU had provided status reports for all relevant disputes. For the present meeting of the DSB, the relevant disputes were the "EC – Approval and Marketing of Biotech Products" (DS291) dispute and the "EU – Biodiesel (Indonesia)" (DS480) dispute. The United States had also mentioned the "EC – Large Civil Aircraft" (DS316) dispute. The European Union noted that the United States had placed on the Agenda of the present meeting an item related to this dispute. He said that the EU would respond to the United States in the context of the discussion of that Agenda item.

2.8. The DSB took note of the statements.

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

A. Statement by the United States

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

3.2. The representative of the United States said that the United States noted that, once again, the EU had not provided Members with a status report concerning the "EC – Large Civil Aircraft" dispute (DS316). The United States had raised the same issue at recent past DSB meetings, where the EU similarly had chosen not to provide a status report. Interestingly, at the DSB meeting of 27 August 2018, the EU had argued that Article 21.6 of the DSU required that "the issue of implementation … shall remain on the DSB's agenda until the issue is resolved". Also of interest, the EU had then argued that where the EU did not agree with another Member's "assertion that it had implemented the DSB recommendations and rulings", "the issue remained unresolved for the purposes of Article 21.6 DSU". The United States therefore found it difficult to reconcile this stated EU position with the EU's actions in this dispute. At the 27 August 2018 DSB meeting, the EU had admitted that there remained a disagreement as to whether the EU had complied with the DSB's recommendations and rulings in this dispute. The United States said that under the EU's own view, therefore, the EU should have been providing status reports. Yet it had failed to do so. The only difference that the United States could see was that, now that the EU was a responding party, the EU was choosing to contradict the reading of Article 21.6 of the DSU it had long promoted. The EU's purported rationale was that it need not provide a status report because it was pursuing a second compliance panel under Article 21.5 of the DSU. But as the United States had explained at past DSB meetings, there was nothing in Article 21.6 of the DSU to support this position. In short, the conduct of every Member when acting as a responding party, including the EU, showed that Members understood that a responding party had no obligation under Article 21.6 of the DSU to continue to supply status reports once that Member announced that it had implemented the DSB's recommendations. As the EU allegedly disagreed with this position, it should for future DSB meetings provide status reports. At the present meeting, the EU should welcome the opportunity that the United States was affording it to update the DSB for the first time with any detail on its alleged implementation efforts.

3.3. The representative of the European Union said that as the EU had indicated in previous DSB meetings, there was a difference between the "EC – Large Civil Aircraft" dispute (DS316) and the "US — Offset Act (Byrd Amendment)" (DS217) dispute. In the Byrd Amendment case, the dispute had been adjudicated and there were no further compliance proceedings pending. He said that under Article 21.6 of the DSU, the issue of implementation shall remain on the DSB's Agenda until the issue was resolved. In the Byrd Amendment case, the European Union could not and did not agree with the US assertion that the United States had implemented the DSB's recommendations and rulings. Therefore, the issue remained unresolved for the purposes of Article 21.6 of the DSU. As to the "EC – Large Civil Aircraft" dispute (DS316), once the Appellate Body report on compliance had been issued, the European Union had notified to the WTO a new set of measures in a compliance communication contained in document WT/DS316/34 and tabled at the DSB meeting of 28 May 2018. He said that with respect to the measures included in that communication, the United States had expressed the view that the EU had not yet fully complied with the recommendations of the DSB. In response, on 29 May 2018, the EU had requested consultations with the United States under Articles 4 and 21.5 of the DSU, and, after failure of the latter, had requested the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. He said that compliance proceedings in this dispute were therefore still ongoing. Whether or not the matter was resolved was the very subject matter of this ongoing litigation. The European Union would be very concerned with a reading of Article 21.6 of the DSU which would require the implementing Member to provide status reports regarding implementation while litigation on this issue was ongoing.

3.4. The DSB took note of the statements.

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

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

4.2. The representative of China said that first China wished to make some general comments regarding this matter. China recalled that at the 27 August 2018 DSB meeting, the United States had included an item on the Agenda of that meeting and had express its views on Article 17.6 of the DSU and appellate review of panel findings of fact, including domestic law. In its statement, the United States had addressed two related issues: first, the scope of the Appellate Body's review of panels' factual findings; and, second, the scope of its review of the meaning of municipal law as part of panels' factual findings. The United States claimed that the Appellate Body had exceeded its mandate. A few Members, including China, had also shared their preliminary thoughts on this matter at that DSB meeting. He said that the WTO dispute settlement system was an effective and successful international system for dispute settlement. Over the past 23 years, it had received 566 cases and had helped Members to address hundreds of disputes. The Appellate Body, which was the subject of this debate, was an extremely important part of the WTO dispute settlement system. It was widely regarded as having made important contributions towards clarifying WTO rules and providing security and predictability to the multilateral trading system. However, due to continuous failures to launch the AB selection processes and to reappoint one Appellate Body member, the Appellate Body and the WTO dispute settlement system were in a historically serious crisis. Under these circumstances, the issues that the United States had raised at the 27 August 2018 DSB meeting were important. China believed that further discussions could be necessary for improving the operation of this Member-driven institution which would serve the interests of all Members. Through this statement, China wished to share some observations and comments. First, based on its understanding of relevant DSU provisions and practices, China wished to comment on whether an objective assessment of facts made by a panel under Article 11 of the DSU was within the scope of appellate review. Second, China wished to comment on the characterization of a Member's municipal law as a long-lasting vexation among adjudicators, especially when an international tribunal was called upon to assess the conformity of municipal law with relevant international obligations.

4.3. With regard to the issue of whether a panel's objective assessment of facts was within the jurisdiction of the Appellate Body, China said that the WTO dispute settlement system was founded on a two-tier system of review that consisted of panels and the Appellate Body and which had different tasks within the system. A panel's tasks were to make findings regarding the facts and the

applicable law, and to apply the law to the facts in order to reach a decision. He said that in carrying out its work, a panel should act under the legal constraints prescribed by the DSU. Article 11 of the DSU provided that a panel "should" make an objective assessment of the matter before it, including facts. Article 17.6 of the DSU provided that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". The Appellate Body had consistently recognized that it played a limited role in the WTO dispute settlement system, as compared with panels. The Appellate Body deferred to a panel's role as the "trier of fact", and did not make factual findings of its own. He said that the Appellate Body had, therefore, undertaken only limited reviews of panels' factual findings. At the 27 August 2018 DSB meeting, the United States had argued that panels were not legally required to make an "objective assessment", because Article 11 of the DSU used the word "should" rather than "shall". The United States had gone on to argue that, absent a legal requirement to make an objective assessment, the Appellate Body could not review a panel's assessment of the facts. China was surprised by the US argument. In China's view, although "should" and "shall" may bear some differences in meaning, it was inconceivable that the Members had not imposed, in the DSU, a legal requirement for panels to make an objective assessment. The Members' use of the word "should" in Article 11 of the DSU was more than adequate to convey that panels were legally required to make an objective assessment. This wording supported the position that the Appellate Body and Members had taken in past appeals. Members had conferred authority on panels to resolve disputes; however, the DSU required that panels must do so only through an objective assessment. This limitation on panels' authority was both appropriate and necessary to ensure that panels made decisions that were independent and neutral. If the objective assessment was not the standard, China could not imagine what other type of assessment the United States would consider appropriate. Article 17.6 of the DSU did not prevent the Appellate Body from considering the legal question of whether a panel had properly discharged its objective assessment obligation in accordance with Article 11 of the DSU.[4] In an appeal based on Article 11 of the DSU, the Appellate Body was mandated to review the manner in which a panel had made factual findings. In its approach to the review of panel decisions, the Appellate Body had applied this standard to ensure that panels remained within the legal limits of their authority under the DSU. The Appellate Body had rejected any possibility of engaging in fact-finding of its own, because that would have usurped the role of panels. Instead, the Appellate Body had restricted its role to ensuring that panels' assessment of facts was objective. Thus, the Appellate Body had, by and large, struck the right balance in reviewing a panel's fact-finding. China said that the Appellate Body had not engaged in fact-finding itself. In a limited number of disputes, the Appellate Body had reversed a panel's fact-finding under Article 11 of the DSU. Nevertheless, it had done so only when a panel had exceeded its authority by having failed to make an objective assessment of the facts. The bar for reversal was set high: a panel would be reversed only if it failed to meet basic standards of objectivity that did not – to China at least – appear to be controversial. For example, the Appellate Body had said that a panel's fact-finding must be supported by coherent and consistent reasoning that could be reconciled with evidence in the panel record; it had required that panels treat similar evidence in an even-handed manner; and it had called for panels to respect due process in making factual findings.[5] China said that these requirements of objectivity were the hallmarks of independent and neutral adjudication. In doing so, the Appellate Body applied a legal standard of objectivity consistent with Article 11 of the DSU. The practices of the Appellate Body also demonstrated that it was not an easy task for appellants to succeed in appeals under Article 11 of the DSU. The Appellate Body had stressed that a claim that a panel had failed to conduct an objective assessment of the facts was "a very serious allegation".[6] It had cautioned that such claims must be "clearly articulated

[4] Tania Voon and Alan Yanovich, "The Facts Aside: The Limitation of WTO Appeals to Issues of Law" 40(2) Journal of World Trade 239(2006), p. 247.

[5] See DSU Article 21.5 Appellate Body Report, "United States – Subsidies on Upland Cotton", WT/DS267/AB/RW, adopted 20 June 2008, paras. 291-294, footnote 618; Appellate Body Report, "Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear", WT/DS461/AB/R, adopted 22 June 2016, para. 5.18; Appellate Body Report, "Argentina – Measures Affecting the Importation of Goods", WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, adopted 26 January 2015, footnote 543; Appellate Body Report, "Australia – Measures Affecting the Importation of Apples from New Zealand", WT/DS367/AB/R, adopted 17 December 2010, para. 270; DSU Article 21.5 Appellate Body Report, "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products", WT/DS381/AB/RW, adopted 3 December 2015, para. 7.177.

[6] Appellate Body Report, "United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India", WT/DS436/AB/R, adopted 19 December 2014, para. 4.79; Appellate Body Reports, "China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum", WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 29 August 2014, para. 5.227; Appellate Body Report, "European Communities – Measures Affecting Importation of Certain Poultry Products", WT/DS69/AB/R, adopted 23 July 1998, para. 133.

and substantiated with specific arguments", and must not be "ambiguous, vague, or subsidiary to another alleged violation".[7] It had also stated that, for a claim under Article 11 of the DSU to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts".[8]

4.4. China said that most Members, if not all, agreed that the manner of a panel's fact-finding was within the scope of appellate review. As the United States had explicitly put it on one occasion, "[t]he meaning and operation of municipal law fell within the panel's role as finder of fact, and was outside the scope of appellate review unless the finding was inconsistent with the obligation to make an objective assessment of the facts, in accordance with Article 11 of the DSU".[9] He said that in practice, Members had taken Article 11 of the DSU as a vehicle for appellate reviews frequently and consistently. As one commentator had observed, "appeals based on DSU Article 11 have become increasingly common. While reversals based on such an appeal were rare, parties continue to make such arguments".[10] For example, the United States itself had appealed panel reports based on Article 11 of the DSU in many disputes, including "US – Tuna II (Mexico)" (DS381), "US – Carbon Steel (India)" (DS436), "US – COOL" (DS384), "US – Clove Cigarettes" (DS406), "US – Large Civil Aircraft (2nd complaint)" (DS353), "US – Continued Zeroing" (DS350), "US – Oil Country Tubular Goods Sunset Reviews" (DS268), "US – Countervailing Duty Investigation on DRAMS" (DS296), "US - Gambling" (DS285), "US – Steel Safeguards" (DS252), etc. He said that in sum, a panel was obliged to carry out an objective assessment of facts according to Article 11 of the DSU, and that the Appellate Body could review whether a panel had properly discharged its objective assessment obligation in accordance with Article 11 of the DSU.

4.5. With regard to the characterization of a Member's municipal law as a complex issue, China said that while municipal law was usually at the heart of international disputes, it was principally recognized as an issue of fact by various international tribunals. He said however that while stating the principle in the abstract was one thing, applying it to specific cases could be more complicated. In public international jurisprudence, a "classical" view of municipal law had been well stated by the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice (ICJ) in the "Case concerning Certain German Interests in Polish Upper Silesia", that "municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[11] According to this view, municipal law would be proven by using the tool of factual inquiry. However, the practices of the PCIJ and ICJ suggested that such "classic" view might not always be accurate. On one occasion, the PCIJ had recognized that "the dispute relates to a question of municipal law rather than to a pure matter of fact".[12] These practices indicated a certain ambivalence in the treatment of municipal law by international tribunals, especially when the court had been called upon to determine the conformity of domestic legal measures with international law. He said that a number of scholars had registered their scepticism over the aforementioned "classic" view. For example, Ian Brownlie had stated that "the general proposition that international tribunals take account of municipal law only as facts is, at most, a debatable proposition the validity and wisdom of which are subject, and call for, further discussion

[7] Appellate Body Report, "United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India", WT/DS436/AB/R, adopted 19 December 2014, para. 4.196; Appellate Body Reports, "United States – Definitive Safeguard Measures on Imports of Certain Steel Products", WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, para. 498; Appellate Body Report, "Australia – Measures Affecting the Importation of Apples from New Zealand", WT/DS367/AB/R, adopted 17 December 2010, para. 406; Appellate Body Report, "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China", WT/DS379/AB/R, adopted 25 March 2011, para. 337; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 499.

[8] Appellate Body Report, "United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India", WT/DS436/AB/R, adopted 19 December 2014, para. 4.79; Appellate Body Report, "United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities", WT/DS166/AB/R, adopted 19 January 2001, para. 151.

[9] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/119, 1 February 2002, para. 27 (statement of the United States).

[10] Simon Lester, "The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement" 4(1) Trade Law and Development 125 (2012) 135.

[11] "Case Concerning Certain German Interests in Polish Upper Silesia" (Judgment) [1926], PCIJ Series A No 7, p. 19.

[12] "Case concerning the Payment of Various Serbian Loans Issued in France" (Judgment) [1929], PCIJ Series A No 20, p. 19.

and review".[13] Judge Giorgio Gaja had suggested that treating municipal law as fact "may not seem inappropriate" as an approach when an international tribunal was considering the conduct of a State so as to ascertain whether it violated the State's international legal obligations. Judge Gaja had nevertheless viewed the description of domestic law as fact as "go[ing] too far", in the sense that "it appears to call into question the legal nature of rules pertaining to a different system".[14] He said that in addition, many major jurisdictions took split views on the treatment of foreign law. While foreign law was often treated as a question of fact in the British judicial system, the "determination of foreign law 'must be treated as a ruling on a question of law,' rather than as a finding of fact" in the US federal court system.[15] In the WTO system, the proper assessment of municipal law was critical to the success of dispute settlement in a variety of ways. In an "as such" case regarding laws and regulations, the assessment of municipal law lied at the heart of the dispute. In cases regarding ongoing conduct and measures involving systematic application, the assessment of municipal law was central to both the existence and content of the measure. In certain "as applied" cases, the municipal law underpinning the measure at issue could also be important as part of the surrounding context of that measure. China said that by contrast with the ambivalence in public international law jurisprudence, the Appellate Body had stated that the meaning of municipal law was to be established as a matter of fact, using evidence. There was a long line of disputes to this effect, such as "India – Patents (US)" (DS50), "US – Carbon Steel" (DS213), "US – Corrosion-Resistant Steel Sunset Review" (DS244), "Thailand – Cigarettes (Philippines)" (DS371), "EU – Biodiesel (Indonesia)" (DS480). He said that a panel's enquiry into municipal law did not end with establishing its meaning as a matter of fact. A crucial part of the enquiry consisted of characterizing municipal law as a matter of WTO law. Every dispute involving municipal law was likely to raise such a legal characterization question which usually was very important to the heart of the dispute. For example, did a municipal law involve WTO-inconsistent conduct, such as: the grant of a "prohibited subsidy"; the "less favourable treatment" of imported goods; and so on? Or, in a dispute involving a Member's ongoing conduct, did a municipal law entail conduct that could properly be characterized as a "measure" under WTO law? Countless such questions of characterization could arise. Applying the law required a substantial factual analysis, and the fact-identification and law-application determinations were closely linked.[16] China said that the characterization of facts, including the characterization of municipal law, was a legal issue under the WTO law. In characterizing the facts, a panel was not engaged in fact-finding but was applying the law to the facts. Taking the examples just listed, a panel could be required to determine whether the relevant municipal law involved a "subsidy" or "less favourable treatment", or whether it amounted to a "measure". China understood that the United States agreed that such questions of legal characterization were questions of law that could be appealed, and that these appeals did not arise under Article 11 of the DSU. These appeals arose under the legal provision that a panel was applying. Thus, the characterization of municipal law as a "subsidy" could arise under Article 1 of the SCM Agreement; its characterization as involving "less favourable treatment" could arise under Article III of the GATT 1994; and its characterization as a "measure" could arise under Article 6.2 of the DSU. The Appellate Body did not need to defer to a panel's authority as trier of fact when it reviewed such questions of legal characterization because the panel was not finding facts. Instead, the panel was applying law to the facts. China said that in sum, therefore, it seemed that the Appellate Body had attempted to draw a line between: a panel's findings on the meaning of municipal law, which had to be appealed under Article 11 of the DSU and would be upheld unless the panel's assessment was not objective; and its findings on the characterization of municipal law, as a matter of WTO law, which had to be appealed under the legal provision that the panel had applied. In China's view, in light of the DSU, the Appellate Body had been correct in its effort to draw this line. Not surprisingly, this line was not easy to draw in practice, since questions regarding the meaning and characterization of municipal law were very often difficult to untangle. There was no clear-cut rule with respect to drawing this line. All had to deal with the imperfections within this system.

[13] Ian Brownlie, Principles of Public International Law (7th ed, OUP 2008) 38.

[14] Giorgio Gaja, "Dualism: A Review", in: Janne Nijman and André Nollkaemper (eds), New Perspectives on the Divide between National and International Law (OUP 2007) 58.

[15] Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al., 138 S.Ct. 1865 (2018), 1873; Federal Rules of Civil Procedure, Rule 44.1.

[16] Simon Lester, "The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement" 4(1) Trade Law and Development 125 (2012) 128.

4.6. In conclusion, China said that it welcomed Member's comments and ideas on this important issue. China believed that Members' contributions would help to ensure the proper functioning of the dispute settlement system. China would be ready to exchange views with other delegations in the future.

4.7. The representative of the United States said that the United States welcomed China's placement of this item on the Agenda of the present meeting. Article 17.6 of the DSU and appellate review of panel findings of fact, including domestic (or municipal) law, was an important systemic issue with significant implications for the operation of the dispute settlement system. At the 27 August 2018 DSB meeting, the United States had provided in its statement a detailed analysis of two particular aspects of this issue: (i) the Appellate Body's lack of authority to review a panel's findings of fact; and (ii) the Appellate Body's assertion that it could review panel findings concerning the meaning of a Member's municipal law. He referred delegations to that statement for a thorough discussion of these issues. In its statement at the present meeting, the United States intended to highlight a few of the key issues and comments of other Members speaking under this item at the 27 August 2018 DSB meeting and to provide some initial reactions to China's statement at the present meeting.

4.8. With regard to the Appellate Body's lack of authority to review a panel's findings of fact, the United States had highlighted for Members the relevant provisions of the DSU and had discussed the Appellate Body's failure to analyse the text of those provisions when it had first asserted it had the authority to review panel fact-finding. In particular, in DSU Article 11, Members had agreed that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". In other words, WTO panels were to make factual and legal findings. By contrast, under DSU Article 17.6, Members had agreed that the Appellate Body would have a significantly more limited role than panels. Article 17.6 of the DSU expressly limited the scope of appellate review: "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". The United States said that on its face, this would not include panel fact-finding and, thus, appellate review of factual findings would appear to be contrary to the Appellate Body's limited authority under Article 17.6 of the DSU. Several Members who had spoken under this item at the 27 August 2018 DSB meeting had agreed with this basic characterization. For example, the EU had suggested that Article 17.6 of the DSU reflected the idea that only panels were the triers of fact and that the scope of appellate review should be limited to legal issues. China had also agreed that factual issues generally fell outside the scope of appellate review. Japan and Australia had both commented that the text of the DSU clearly limited the scope of issues that could be properly put before the Appellate Body to legal issues contained in a panel report. However, contrary to the clear text of DSU Article 17.6, the Appellate Body had asserted that it could review panel factual findings. The United States had highlighted for Members that the appellate report in which the Appellate Body had asserted that it could review panel fact-finding under Article 11 of the DSU contained no analysis of the text of that Article. In particular, the Appellate Body had provided no interpretation of the term "should make" nor had it explained how it could be understood as expressing a "duty" or legal obligation. In China's statement at the present meeting, China appeared to misunderstand this point. The United States had not argued that a panel did not need to conduct an objective assessment of the matter before it. As the US had explained at the 27 August 2018 DSB meeting, the language in Article 11 of the DSU that the Appellate Body had relied upon was: "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case". Key to this text was the word "should". As the US had noted, Members were all familiar with the difference between "should" and "shall" and chose carefully whether to use "should" or "shall" in specific parts of the agreements that they negotiated. In fact, Members had been known to spend weeks or even longer negotiating over exactly this point – whether to use "should" or "shall". Yet, in describing the text of Article 11 of the DSU, the Appellate Body had not engaged with this important textual issue. Instead, the Appellate Body had simply referred to this "should make" language as a "mandate" and a "requirement" for panels. To the contrary, the decision of Members to use the term "should" indicated that Members had not intended to create a legal obligation subject to appellate review, a conclusion that was directly reinforced by the limitation on appeals to issues of law in Article 17.6 of the DSU. The United States had also pointed out that the Appellate Body's approach under Article 11 of the DSU had shifted over time, which appeared to be a result of the fact that Members had never agreed that the Appellate Body would review a panel's factual findings and that they had therefore never negotiated the basis or standard for such a review. Instead, the Appellate Body had struggled to formulate its own approach, without the benefit of guidance from Members. And, as previously discussed, the Appellate Body's

decision to undertake a review of panel fact-finding had a number of adverse effects on the dispute settlement system, including an increased workload due to the number of appeals under Article 11 of the DSU. This, in turn, had increased the complexity of appeals, the length of submissions, and the need for the Appellate Body to devote additional time and resources to such appeals to become familiar with the basis for panels' factual findings.

4.9. With regard to the Appellate Body's lack of the authority to review a panel's factual findings on the meaning of a Member's domestic law, the United States said that in the WTO system, as in any international law dispute settlement system, the meaning of municipal law was an issue of fact. The interpretation and application of the relevant covered agreement would be the issues of law for the WTO dispute settlement system. At the 27 August 2018 DSB meeting, the United States had noted that the relevant provisions of the DSU – including Articles 6.2, 11, and 12.7 – reflected this straightforward division between issues of fact and law. The DSU made clear that the measure at issue was the core fact to be established by a complaining party, and the WTO consistency of that measure was the issue of law. The United States had also pointed out that the proposition that municipal law was an issue of fact was well-recognized in other international legal systems generally. In the WTO context in particular, the United States had noted that a number of WTO panels and Members had routinely analysed, argued, or found that the meaning of a Member's domestic law was an issue of fact. The United States had cited a number of examples at the 27 August 2018 DSB meeting. In its statement at the present meeting, China appeared to suggest that this was a disputed proposition. However, two of the examples the United States had provided at the 27 August 2018 DSB meeting had been instances in which China had argued the meaning of municipal law was a factual issue. In particular: China, in the "EC – Fasteners (China)" dispute (DS397): "China submits that the issue of the 'meaning' or 'scope' of Article 9(5) of the Basic AD Regulation is an issue of fact … [t]herefore, it rejects the European Union's argument that the scope of Article 9(5) of the Basic AD Regulation is a legal issue and hence subject to appellate review pursuant to Article 17.6 of the DSU"[17]; China, in the "US – Countervailing and Anti-Dumping Measures (China)" dispute (DS449): "[t]he meaning of prior municipal law must be determined as a matter of fact, by reference to the laws themselves and the manner in which those laws have been interpreted by domestic courts".[18] These appeared to be clear and unambiguous statements by China of its understanding that the meaning of municipal law was a factual issue. The United States asked China how it reconciled these statements with its statement at the present meeting and which of these statements accurately reflected China's position.

4.10. The United States noted with agreement Japan's statement made at the 27 August 2018 DSB meeting that there was little room for debate that municipal law itself was a matter of fact in WTO law. The United States also agreed with Australia's statement at that same DSB meeting that domestic law and the meaning of domestic law was a question of fact, to be determined by a panel on the basis of the evidence put before it by the parties to a dispute and, as such, was not subject to appellate review. The United States had also highlighted for Members that the basis for the Appellate Body's treatment of the meaning of municipal law as a legal issue, to be decided by the Appellate Body *de novo* in an appeal, was flawed and without textual support in the DSU. He said that the Appellate Body often attempted to justify its approach by citing its own prior reports, and the United States had illustrated that those reports themselves reflected a failure to engage with the text of the DSU. At the 27 August 2018 DSB meeting, the United States had also explained the flawed logic of the Appellate Body's approach. The Appellate Body reasoned that when a panel examined municipal law to assess compliance with the WTO Agreements, the panel's examination of the meaning of that municipal law became a legal question. This did not follow logically. It was one thing to determine what a municipal law meant and how it operated. It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations. At the 27 August 2018 DSB meeting, Australia had noted that the Appellate Body in the "US – Upland Cotton" dispute (DS267) had indicated in its DSU Article 21.5 report that the distinction between issues of law and issues of fact "can be difficult to draw", but Australia considered it to be incumbent on the Appellate Body and Members engaged in appellate proceedings to maintain the distinction and respect the limits placed on the scope of appellate review by the DSU. The US agreed. The Appellate Body's erroneous approach to municipal law eliminated

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

[18] Panel Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/R and Add.1, as modified by Appellate Body Report WT/DS449/AB/R, adopted 22 July 2014, para. 7.142 (emphasis added). See also idem, paras. 7.160, 7.228.

the lines explicitly drawn by Members in the DSU between factual and legal issues, and was inconsistent with the appropriate functioning of the dispute settlement system. It departed from the basic division of responsibilities where panels determined issues of fact and law, and the Appellate Body might be asked to review specific issues of law and legal interpretations. In Brazil's statement at the 27 August 2018 DSB meeting, Brazil had asked what would be the relevance of the Appellate Body's role as set out in the DSU if the meaning of domestic law were to be considered a factual question and therefore not subject to appeal. The answer to this question was simple. The Appellate Body's role would remain what had been agreed by Members in Article 17.6 of the DSU, which provided that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". In other words, the Appellate Body would continue to determine whether, based on the factual evidence (which includes the municipal law at issue), to uphold, modify, or reverse the legal findings and conclusions of the panel that had been appealed.[19] China in its statement had noted that the United States had filed DSU Article 11 appeals of panel findings of fact. Once the Appellate Body had taken upon itself the role of reviewing panel findings of fact, having relied incorrectly on Article 11 of the DSU, it had unfortunately become a feature of the system – unless the Appellate Body had reversed itself, or it had been addressed by Members. Until that had happened, the United States wondered which Member had explained to its domestic stakeholders that it would not avail itself of that opportunity even if other Members had been making use of that second bite at the apple. As a result, the fact that Members had raised such challenges did not answer the question of whether the DSU gave to the Appellate Body the authority to review panel findings of fact on appeal. He said that for the reasons provided at the 27 August 2018 DSB meeting, and again at the present meeting, the United States did not see how one reconciled the Appellate Body's review of panel fact-finding with the express limitation in Article 17.6 of the DSU of appellate review to legal issues. The United States had not heard a compelling explanation in China's statement at the present meeting. The United States asked how would China explain this.

4.11. To conclude, the United States said that as with the Appellate Body's impermissible review of panel findings of fact more generally, the Appellate Body's treatment of municipal law represented a departure from the agreed text of the DSU and a serious waste of the limited resources of the WTO dispute settlement system. Numerous Members had regretted the complexity of and delays to WTO dispute settlement system, and here was one reason, added to the system by the Appellate Body. The US appreciated Members' engagement and comments on these important issues. And the US welcomed the statement at the 27 August 2018 DSB meeting that "any proposal to change established rules of the DSU" "should be tested and argued in light of the values they embody or the new values Members may want it to embody". Here, Members were discussing a departure by the Appellate Body from the established rules of the DSU.

4.12. The representative of Japan thanked China for its statement made at the present meeting. He said that Japan had offered its observations at the 27 August 2018 DSB meeting on this matter and would not repeat them again. He said that as approvingly noted by the Appellate Body, in public international law, "municipal laws are mere facts which express the will and constitute the activities of States".[20] As Japan had summarized in its statement at the 27 August 2018 DSB meeting, with respect to the issue of appellate review of a panel's determination of the meaning of municipal law, the Appellate Body had stated as follows: "a panel's examination of the municipal law of a Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU"[21]; "[t]his [appellate] review would include text and context, as well as the 'structure

[19] Article 17.13 of the DSU.

[20] Appellate Body Report, "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products", WT/DS50/AB/R, adopted 16 January 1998, para.65, quoting "Case Concerning Certain German Interests in Polish Upper Silesia" (Judgment) [1926], PCIJ Series A No 7, p. 19.

[21] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.99, citing Appellate Body Report, "United States – Section 211 Omnibus Appropriations Act of 1998", WT/DS176/AB/R, adopted 1 February 2002, para.105. See also Appellate Body Report, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para.225; Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para.177; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para.295; Appellate Body Report, "European Union – Anti-Dumping Measures on Biodiesel from Argentina", WT/DS473/AB/R, adopted 26 October 2016, para.6.155.

and logic', of a legal instrument"[22]; "there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements. With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal"[23]; such "factual elements" may include "evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts", the examinations of which "are more likely to be factual in nature"[24]; "an examination of whether [relevant elements which need to be examined in ascertaining the meaning of municipal law] are legal characterizations, or involve also factual elements, depends on the circumstances of each case"[25]; "[a]lthough factual aspects may be involved in the individuation of the text and of some associated circumstances" such as "whether the text is official in more than one language, its date of enactments, publication and enforcement, the issuing authority, etc."[26], "an assessment of the meaning of a text of municipal law … is a legal characterization"[27]; "[s]imilarly, whether or when a domestic court ruling has been rendered and finalized, or what a writing by a recognized scholar contains, may involve factual aspect. However, the examination of the legal interpretation given by a domestic court or by a domestic administrative agency as to the meaning of municipal law with respect to the measure being reviewed for consistency with the covered agreements may be a legal characterization"[28]. In short, Japan said that the Appellate Body appeared to make a distinction between text, context and the "overall structure and logic" of a particular legal instrument at issue, including presumably "the legal interpretation given by a domestic court or by a domestic administering agency"[29], on the one hand, and other elements of a factual nature, on the other hand, and opined that "as a matter of legal characterization"[30], the examination of municipal law based on the former "is not a 'factual matter'

[22] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.99 and footnote 467, citing Appellate Body Report, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 238. See also Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para.177; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para 296; Appellate Body Report, "European Union – Anti-Dumping Measures on Biodiesel from Argentina", WT/DS473/AB/R, adopted 26 October 2016, para.6.169.

[23] Appellate Body Report, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 225. See also Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.99; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para.296; Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para.177.

[24] Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para.177, citing Appellate Body Report, "United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan", WT/DS244/AB/R, adopted 9 January 2004, para.168. See also Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, paras. 4.100–4.101, citing Appellate Body Report, "United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany", WT/DS213/AB/R, adopted 19 December 2002, para. 157; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para.296.

[25] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.101. See also "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.100 and footnote 469 quoting Appellate Body Report, "United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany", WT/DS213/AB/R, adopted 19 December 2002, para. 157.

[26] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, footnote 471.

[27] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.101.

[28] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.101.

[29] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, para. 4.101.

[30] Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 297.

and is not excluded from appellate review"[31] whereas the examination of the latter would likely involve a factual inquiry.[32] He said that the question Members had to ask themselves was whether this was the right approach given the adjudicative functions as defined and circumscribed in Article 17.6 of the DSU, and if not, how Members should respond.

4.13. The representative of Brazil said that with the inclusion of this item on the Agenda of the present meeting by China, Members had a second opportunity to exchange views regarding the correct interpretation of Article 17.6 of the DSU and about the proper scope for appeals, the delimitation of factual and legal issues and the status of domestic law before panels and the Appellate Body. Brazil said that this discussion was welcome, as were other discussions on matters that affected the functioning of the WTO dispute settlement system. The framing of ideas and opinions on the basis of solid rational discourse was fundamental for any fruitful collaboration among interested Members. It bore reminding, however, that this exercise could not serve as an argument to block, pre-emptively, the adequate functioning of the system. No Member was entitled to make the system hostage of its own concerns, justified or not: the WTO framework offered other alternatives for the discussion and solving of concrete or conceptual concerns. Brazil made the following comments to some of the topics that the United States had raised in its statement at the 27 August 2018 DSB meeting. The first, more general comment was that, in principle and in theory, probably no Member disagreed with the proposition that the Appellate Body was called to review issues of law covered in panel reports and legal interpretations developed by panels (Article 17.6 of the DSU) and, as the United States had said in its statement at the 27 August 2018 DSB meeting, quoting the Appellate Body, "findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate body".[33] Brazil agreed with that statement and believed that most Members also agreed with it. This principle, however, was simply a guiding light that would illuminate the Appellate Body in respect of each concrete panel report that was brought before it for review. In practice, the intricacies of each dispute, and the delimitation that had been made or not made by a panel between questions of fact and law entailed challenges specific to the task faced by the Appellate Body. In practice, and not in principle, the situation could in some cases be more nuanced than one might have assumed. If one were to draw an analogy, one could compare the different ways Members saw the same legal phenomenon regarding scenarios of fact and law with the debate about the nature of light. Light was sometimes described as a wave, and in other instances as a stream of particles (or quanta). In the present situation, it seemed that the United States was using equipment that allowed it to observe certain phenomena only as factual situations, whereas most Members were observing the situation as it probably was in reality: a mix of fact and law, not always easy to disentangle. Given the very detailed examples given by the United States in its statement made at the 27 August 2018 DSB meeting, Brazil intended to address more specific aspects of the debate. The United States submitted in its statement that the Appellate Body had skipped over the key threshold question, which it framed as whether, in light of the limitation of appeals in Article 17.6 of the DSU to "issues of law and legal interpretations", the Appellate Body was authorized to "review" a panel's "ascertainment of facts". Contrary to the US argument, the Appellate Body had not "skipped" over this question. The Appellate Body had explained that whether a panel had made an objective assessment of the facts was an issue of law and, as such, fell within the scope of appellate review under Article 17.6 of the DSU.[34] He said that there was thus no contradiction between the Appellate Body's review of the objectivity of panels' factual findings and the text of Article 17.6 of the DSU.

4.14. With regard to the issue of shall/should and Article 11 of the DSU, Brazil said that when the United States criticized the Appellate Body's position that Article 11 of the DSU had set out a "standard of review", the US focused on the use of the term "should" in that provision and

[31] Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 297.

[32] See i.e., Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted 22 July 2014, paras. 4.99 – 4.101; Appellate Body Report, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 225; Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para.177; Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 296.

[33] Appellate Body Report, "European Communities — Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 132.

[34] See, for example, Appellate Body Report, "United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities", WT/DS166/AB/R, adopted 19 January 2001, para. 151.

distinguished it from the term "shall". According to the statement of the United States made at the 27 August 2018 DSB meeting, "the decision of Members to use the term 'should' indicates that Members did not intend to create a legal obligation subject to review, a conclusion that is directly reinforced by the limitation on appeals to issues of law in Article 17.6 [of the DSU]". Taken to its logical conclusion, the US argument that Article 11 of the DSU had not been intended to create a legal obligation meant that – because of the use of the term "should" – it was not mandatory for panels "to make an objective assessment of the matter before it" or "an objective assessment of the facts of the case". Brazil said however that the notion that making an objective assessment had not been intended to be mandatory, but rather optional, was absurd. Brazil asked whether the United States was saying that panels did not have the obligation to perform an objective assessment in all cases or that they could make a subjective assessment or an assessment not based on the proper analysis of the evidence before it. In the context of Article 11 of the DSU, it was clear that the "should" had established a legal obligation or duty. He said that according to Oxford English Dictionary Online the ordinary meaning of "should" included "[u]sed to indicate obligation, duty, or correctness". The distinction that the United States sought to draw based on the use of the term "should" in Article 11 of the DSU thus had no merit and the argument itself seemed to bear no connection with the underlying issue.

4.15. With regard to the "EC – Hormones" disputes (DS26, DS48) and Article 11 of the DSU, Brazil said that the United States had traced the Appellate Body's original error back to the "EC – Hormones" disputes (DS26, DS48) and had spent considerable time criticizing the reasoning in that Appellate Body report. He said however that when one reviewed the statements made at the DSB meeting of 13 February 1998, when the Appellate Body report in the "EC – Hormones" disputes (DS26, DS48) had been adopted, one could not find any hint of criticism by the United States regarding the Appellate Body's approach to the review of factual findings or to a standard of review being set out in Article 11 of the DSU.[35] He said that the US representative had stated without hesitation that "his country supported the adoption of the Appellate Body and the Panel Reports".[36] This did not suggest a long-standing or reiterated position of the United States, but rather a more recent attempt to constrain the Appellate Body which was motivated by other considerations.

4.16. With regard to the issue of threshold under Article 11 of the DSU, Brazil said that the United States was selective in choosing the statements by the Appellate Body regarding Article 11 of the DSU. He said that the Appellate Body had in many respects made it more difficult for an appellant to succeed in a DSU Article 11 claim. For example, in the "Chile – Price Band System" dispute (DS207), the Appellate Body had explained that: "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements".[37] Another example could be found in the "EC – Fasteners (China)" dispute (DS397), where the Appellate Body had incorporated a requirement of materiality to a claim challenging a panel's assessment of the facts under Article 11 of the DSU and had found that: "when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment".[38]

4.17. With regard to the Appellate Body's activism on Article 11 of the DSU, Brazil said that a review of Appellate Body reports circulated during the last three years (2016-2018) showed that the Appellate Body had been extremely restrained in accepting challenges under Article 11 of the DSU. The Appellate Body had found a violation of Article 11 of the DSU in only two of the 13 reports that had been circulated since 1 January 2016. He said that with such an extremely low rate of success, the Appellate Body could hardly be accused of encouraging appellants to raise claims under Article 11 of the DSU.

[35] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/42, 13 February 1998.
[36] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/42, 13 February 1998, p. 8.
[37] DSU Article 21.5 Appellate Body Report, "Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products", WT/DS207/AB/RW, adopted 22 May 2007, para. 238.
[38] Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 442.

4.18. With regard to the Appellate Body's review of factual findings, Brazil said that as an appellant, the United States had asked the Appellate Body to interfere with factual findings made by panels. For example, the US Notice of Appeal in the DSU Article 21.5 proceedings regarding the "US - Tuna II (Mexico)" dispute (DS381) included the following claim: "[t]he United States also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter before it, as called for by Article 11 of the DSU, with regard to the so-called 'determination provisions'. The Panel had drawn its conclusions with regard to these provisions based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation".[39] In this claim, the United States was not only recognizing the authority of the Appellate Body to review a panel's assessment of the facts, but was going further by actually requesting the Appellate Body to exercise that authority.

4.19. With regard to the meaning of municipal law, Brazil said that at the 27 August 2018 DSB meeting, the United States had protested strongly against the Appellate Body's review of the meaning of municipal law and had argued that the meaning of municipal law was an issue of fact that fell outside of appellate review. The US position seemed to be that a party that disagreed with a panel's findings on the meaning of a municipal law was left without recourse and simply had to accept those findings without having the possibility of having them reviewed on appeal. He said that unsurprisingly, these constraints did not appear to apply when it was the United States that disagreed with the findings of a panel on the meaning of a particular municipal law. Brazil referred for example, to the US appeal of the panel's finding regarding the Second Siting Provision in the recent "US – Tax Incentives" dispute (DS487). The Second Siting Provision was a legislative provision of the State of Washington. It seemed uncontested that the Second Siting Provision constituted municipal law. Given that the Second Siting Provision was municipal law, the United States should have accepted the panel's findings regarding that provision's meaning. He said that an appeal of the panel's findings, according to the United States, would not have been possible. Yet, that was not the position that the United States had taken in that case, either with arguments under Article 3.1(b) of the SCM Agreement or Article 11 of the DSU. Brazil said that in its Notice of Appeal, the United States had raised the following claim: "[t]he Panel failed to make 'an objective assessment of the matter before it, including an objective assessment of the facts of the case,' as required by Article 11 of the DSU in finding that the Second Siting Provision concerns the use of certain goods, and specifically the origin of those goods that enter into the production process for the 777X, as a condition for the continued availability of the B&O aerospace tax rate for the 777X program. Were the Appellate Body to consider the meaning and operation of the Second Siting Provision as an issue of law for purposes of the DSU, then the United States considers the Panel erred as a matter of law in its understanding or interpretation of the Second Siting Provision".[40] In this claim, the United States had not only asked the Appellate Body to review the Panel's assessment of the facts, but had specifically asked the Appellate Body to review the Panel's findings on the meaning of its municipal law. It was difficult not to see a contradiction between the position taken by the United States in the "US – Tax Incentives" dispute (DS487) and the position it had taken at the present meeting and at the 27 August 2018 DSB meeting.

4.20. With regard to the criticism of the Appellate Body's approach to municipal law, Brazil said that the United States claimed that its criticisms of the Appellate Body's approach to municipal law were widely shared among the Membership. This assertion did not stand up to scrutiny. The United States referred to the "EU – Biodiesel" dispute (DS473) as emblematic of the Appellate Body's erroneous approach and recalled the criticisms it had raised when the report had been adopted by the DSB in October 2016. Tellingly, no other Member had endorsed the US criticisms or had raised other concerns about the Appellate Body's approach at that DSB meeting.[41] Nor had any other Member endorsed the US criticism of the Appellate Body Reports in the "US — Section 211 Appropriations Act" dispute (DS176)[42], the "China – Auto Parts" disputes (DS339, DS340, DS342)[43] or the "US - Countervailing and Anti-Dumping Measures (China)" dispute (DS449)[44] when the United States had formulated such criticisms at the corresponding DSB meetings. Brazil said that

[39] Notification of an Appeal by the United States, "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products", Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/24, 5 June 2015, para. 4.

[40] Notification of an Appeal by the United States, "United States – Conditional Tax Incentives for Large Civil Aircraft", WT/DS487/6, 16 December 2016, para. F (footnotes omitted).

[41] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/387, 26 October 2016.

[42] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/119, 1 February 2002.

[43] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/262, 12 January 2009.

[44] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/348, 22 July 2014.

while the United States had also criticized the Appellate Body Report in the "China – Publications and Audiovisual Products" dispute (DS363), the US had not raised any concerns regarding this aspect of the report at the DSB when the report had been adopted.[45] Nor had the US raised any concerns about the Appellate Body's treatment of municipal law in the "EC – Fasteners (China)" dispute (DS397). On the contrary, when the DSB adopted the Appellate Body Report, the United States had praised the Appellate Body for its strict application of the standard of review: "[t]he United States said that it would also like to draw Members' attention to the Appellate Body's articulation of the standard of review for a claim of error under Article 11 of the DSU. The Appellate Body usefully reminded Members that '[a]n attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope' of Article 11 of the DSU. Further, the Appellate Body highlights that '[i]t is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim'. The United States agreed with these statements and believed that they were a useful reminder to Members regarding the proper scope of Article 11, as well as reflecting the limited scope of appellate review under Article 17.6 of the DSU".[46]

4.21. In conclusion, Brazil said that the discussions at the present meeting and at the previous DSB meeting held on 27 August 2018 seemed to give the impression that there was considerable disagreement among Members about the scope of appellate review. Brazil did not see it this way. The disagreement was actually very narrow and there was broad convergence on the understanding that Article 17.6 of the DSU provided the guiding principle for the appeal task. Some dissonance arose only regarding very few cases and was a consequence of the difficulty to precisely delimitate the analyses of factual and legal issues. Brazil recalled that the Appellate Body had to operate on the basis of panel reports and parties' arguments, in which all aspects tended to be interwoven. Brazil believed that a dispute settlement system where the appeal instance could not assess the compatibility between domestic legislation and WTO agreements was not the one that Members had established in 1995.

4.22. The representative of Canada said that Canada wished to take the opportunity to comment on the issue raised by China at the present meeting and by the United States at the 27 August 2018 DSB meeting regarding the appellate review of factual findings by panels. First, he emphasized that Canada was open to further discussion of this issue and encouraged Members to actively engage to resolve the concerns that had been raised. Canada considered that attempts to address those concerns were worth exploring. Canada notably believed that efforts to reduce the number of issues before the Appellate Body in an appropriate way would be a useful means to streamline proceedings and reduce the workload of the Appellate Body. Canada urged the Appellate Body to closely scrutinize pleadings and distinguish factual from legal issues. Pursuant to Article 11 of the DSU, it was appropriate for the Appellate Body to establish a standard of review for factual findings made by panels. A rigorous application of that standard would discourage Members from advancing extensive and unnecessary arguments that ignored the DSU Article 11 standard and simply sought to have factual findings overturned on appeal, effectively on the basis of a *de novo* review. He said that the comprehensive, terse, and consistent disposition of such arguments would have a salutary effect on the Appellate Body's workload and be consistent with the mandate set out in Article 17.6 of the DSU. It would also encourage Members to focus their arguments on areas where there was a reasonable argument that the standard of review had been met. Canada noted however that as presented by Brazil, the theory of the standard of review might require a more nuanced approach. Canada asked those Members who consider that the Appellate Body should entirely refrain from any review of factual findings to contemplate a scenario where an egregious panel finding of fact resulted in an outcome that had serious and negative consequences for a key industry in that Member's jurisdiction. In such a scenario, Canada asked whether those Members would be prepared to refrain from seeking to overturn that factual finding on appeal. And if so, whether that would be a positive outcome. He also asked whether access to resolution would instead be possible on appeal through the application by the Appellate Body of the standard of review set out in DSU Article 11 to a panel's factual findings. He said that while Canada was certainly willing to discuss this issue and to work towards a solution of the concerns that have been raised, Canada's view was that the latter of these two options was preferable.

4.23. The representative of Mexico thanked the United States for having shared its views with the Membership on Article 17.6 of the DSU at the 27 August 2018 DSB meeting, and also thanked China

[45] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/278, 19 January 2010.
[46] Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/301, 28 July 2011, para. 10.

for placing this item on the Agenda of the present meeting. At the outset, Mexico expressed its concerns regarding the process. Members could not continue to raise concerns without engaging in finding solutions. Members were in the middle of the worst crisis of the WTO dispute settlement mechanism. Without proposals, it would be difficult to find solutions. With regard to the substantive aspects of the US statements, Mexico was surprised that this was the first time, after more than 500 disputes and more than 20 years, that the United States took the view that there had been "an invention of an authority to review fact-finding". If the United States had now taken the view that Article 11 of the DSU gave no authority to the Appellate Body to review findings of fact, Mexico strongly disagreed. The United States focused on the word "should" to construct its interpretation, without regard to the context of this provision. Mexico could not find a dispute in which the United States had expressed this view which could have given the opportunity for the Appellate Body to disagree or agree with such a view. As the Appellate Body had said in the "Canada – Aircraft" dispute (DS70), the word "should", in certain contexts, could be "used in a normative, rather a merely exhortative sense".[47] Mexico asked, if "should" in Article 11 of the DSU was not mandatory, what would be the source of a panel's authority and what would be the standard to assess the facts and the applicability of and conformity with the covered agreements. She asked what would be the basis for a panel to look at the evidence or to apply a covered agreement. Regarding the review of domestic law, Mexico disagreed with the United States to the extent that it suggested that this was a "black and white" issue. Understanding domestic laws of the Membership could be a very complex exercise which might involve looking at the legislative history and judicial precedents, which in some cases might be contradictory. This exercise clearly involved fact-finding that certainly should be only within the authority of panels. However, it should be distinguished from a scenario where the law, on its face, could be WTO-inconsistent. Mexico said that impeding, or using this issue as an excuse to prevent the Appellate Body from engaging in an exercise of looking at domestic law and determining whether, on its face, it was inconsistent with a covered agreement would be "a serious waste of limited resources of the WTO dispute settlement system".

4.24. The representative of the European Union said that one possible legal issue that could arise on appeal was whether a panel had complied with Article 11 of the DSU. This would include, among others, the question of whether the panel had made an objective assessment of the matter before it. He said that such claims on appeal were not rare and had been raised by many Members in a number of disputes. While the panels were the triers of facts and enjoyed the necessary discretion in that regard, the question of whether a panel had exceeded its authority as the trier of the facts was a legal question that fell within the scope of appellate review, if a claim under Article 11 of the DSU was properly raised on appeal. It was only natural and desirable in a two-stage adjudicative process that such issues were subject to appellate review and this was consistent with the provisions of the DSU. He repeated that the European Union was open to discussions on possible improvements in the operation of the dispute settlement mechanism.

4.25. The representative of Chile thanked the United States for its statements and for having shared its comments and concerns regarding the functioning of the Appellate Body. Chile reiterated its willingness to work on solutions. Chile agreed with some of the well-substantiated arguments of the United States and looked forward to sharing possible solutions amongst Members.

4.26. The representative of the United States expressed appreciation for the engagement by Members under this Agenda item at the present meeting. Several issues appeared to warrant further discussion by Members, and the United States looked forward to such discussions. The United States said however that there was a particular assertion that was important to correct at the present meeting. One Member had suggested that US concerns with appellate review of panel fact-finding were new and had been only recently raised by the United States. In its statement made at the 27 August 2018 DSB meeting, the United States had quoted from a statement it had made in 2002 that expressed concerns on this issue. That Member's assertion therefore did not reflect reality.

4.27. The representative of China welcomed the statements by the United States and other Members' engagement under this Agenda item. China wished to make further comments in order to avoid any possible misunderstanding of its statement made at the present meeting. First, China echoed some Members' observations that, though open to discuss the concerns raised by the United States on this particular issue, China could not agree to combining this issue with the AB selection processes. China strongly opposed the fact that the United States had taken the selection of

[47] Appellate Body Report, "Canada — Measures Affecting the Export of Civilian Aircraft", WT/DS70/AB/R, adopted 20 August 1999, para. 187.

Appellate Body members hostage in in its attempt at solving other unrelated concerns it had. Second, China believed that the Article 17.6 and Article 11 of the DSU gave the Appellate Body the mandate to review the factual findings of panels subject to certain qualifications. A panel's assessment of the meaning of municipal law always had to remain within the bounds of the objectivity standard under Article 11 of the DSU and was, therefore, subject to appeal on these limited grounds. The characterization of municipal law under WTO law was a question of law that could be appealed under the legal provision that the panel was applying in the course of its legal characterization. Third, he said that it seemed that the United States had based its arguments primarily on the difference between the words "should" and "shall". However, China did not think that the US argument was solid and persuasive. The US idea was neither supported by other Members, nor was it consistent with Members' practices. In that regard, China referred to a number of examples. In the "Canada – Periodicals" dispute (DS31), Canada in its appellant submission had argued that "the Panel disregarded the evidence before it, and based its finding on a speculative hypothesis, thus failing to make 'objective assessment of the facts of the case' as required by Article 11 of the DSU".[48] In the "US — Anti-Dumping Measures on Oil Country Tubular Goods" dispute (DS282), the US had argued in the appeal that "the Panel failed to apply the correct standard in its assessment of the consistency of the SPB, as such, with [DSU] Article 11.3, and, in doing so, the Panel also failed to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case', as required by Article 11 of the DSU".[49] In the "EC and Certain Member States – Large Civil Aircraft" dispute (DS316), the EU in its appellant submission "makes a claim under Articles 5(c) and 6.3(c) of the SCM Agreement, alleging an error of application, as well as a claim under Article 11 of the DSU, alleging a failure by the Panel to make an objective assessment of the facts".[50] China concluded its statement by thanking Members who had intervened. China was willing to stay engaged in further constructive discussions with other Members on this important issue. As China had stated previously, appellate review was systemically important to the well-functioning of the WTO dispute settlement system. While it was important to ensure that appellate review would not add to or diminish the rights of Members under the covered agreements, it was equally important to make sure that the ambit of appellate review would not be added to or diminished due to inappropriate interpretations of the relevant provisions under the covered agreements.

4.28. The DSB took note of the statements.

5 CANADA – MEASURES GOVERNING THE SALE OF WINE

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

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 27 August this year and had agreed to revert to it. to the Chairperson drew attention to the communication from Australia contained in document WT/DS537/8. She then invited the representative of Australia to speak.

5.2. The representative of Australia said that as Australia had stated at the 27 August 2018 DSB meeting, Australia had requested consultations with Canada on 12 January this year regarding a range of measures which discriminated against Australian wine imports in a manner that Australia considered to be inconsistent with Canada's obligations under the GATT 1994. She said that unfortunately, the consultations, held on 1 March 2018, and subsequent informal technical discussions with Canada, had failed to resolve this matter. While Australia remained ready to engage in bilateral discussions with Canada, Australia was disappointed that it had still not seen any concrete steps in response to its concerns. As a result, Australia requested at the present meeting, for a second time, that the DSB establish a panel to examine this matter with standard terms of reference. She said that Australia greatly valued its strong bilateral relationship with Canada and that it remained open to further discussions with Canada, both at federal and provincial levels, in an effort to resolve the issues that Australia had raised. Australia said that a panel had already been established by the DSB at the request of the United States in the "Canada – Wine (US)" dispute (DS531) on 20 July 2018, which was related to the same matter. These disputes overlapped

[48] Appellate Body Report, "Canada – Certain Measures Concerning Periodicals", WT/DS31/AB/R, adopted 30 July 1997, p. 5.

[49] Appellate Body Report, "United States - Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico", WT/DS282/AB/R, adopted 28 November 2005, para. 191.

[50] Appellate Body Report, "European Communities – Measures Affecting Trade in Large Civil Aircraft", WT/DS316/AB/R, adopted 1 June 2011, para. 1313.

with respect to the same measures and legal claims related to the province of British Columbia. In these circumstances, Australia considered it appropriate that the disputes be procedurally linked as provided for under Article 9.3 of the DSU, by creating separate but harmonized panels with the same panelists serving on the panels. Australia said that this would promote efficiency and consistency in the dispute settlement process by allowing the overlapping claims to be dealt with at the same time by the same panelists, that this would avoid a duplication of effort and resources for the WTO Secretariat and the parties, and that this would guard against the risk of inconsistent findings and recommendations by different panels. Australia said that it was ready to cooperate with the US and Canada to agree on harmonized procedures to apply to the disputes.

5.3. The representative of Canada said that Canada was disappointed by Australia's decision to request the establishment of a panel with respect to Canadian measures governing the sale of wine. As Canada had stated continually, Canada remained open to discussions with Australia. Canada remained convinced that the best solution to the matters raised by Australia remained further discussion between the parties with a view to arriving at a mutually satisfactory solution in the near future. Therefore, Canada continued to consider that the panel request was premature. Canada reiterated that Australia's request was deficient from a legal standpoint. Australia had not clearly articulated the legal basis of its challenge, nor had Australia adequately identified the measures that it alleged were problematic. As a result, Canada had been deprived of its due process rights. As Canada had noted at the 27 August 2018 DSB meeting, it appeared that the panel request replicated some of the defects of the consultations request. As a result, Canada believed it was unlikely that the panel request met the requirements of Article 6.2 of the DSU. Canada reserved its right to raise its concerns under DSU Article 4.4 and DSU Article 6.2 before a panel. On the issue of harmonization, Canada was of the view that the parties should meet to discuss the difficulties with, and any potential benefits of, harmonization at a meeting in the near future. However, as Canada had noted, Australia's consultations and panel requests had significant deficiencies which could make harmonization impractical. In light of this, Canada's believed that harmonization was likely to raise many more procedural difficulties, and to create an unnecessary resource burden on both the WTO Secretariat and the parties, and thus could undermine one of the rationales for harmonization. In closing, Canada reiterated that it remained open to continuing discussions with Australia with a view to resolving this matter. Canada was hopeful that the parties would meet to discuss next steps in the near future.

5.4. The representative of the United States said that the United States fully supported Australia's request for the establishment of a panel in this dispute. With respect to the US concerns with British Columbia's regulations governing the sale of wine in grocery stores, the US referred to its statements made at prior DSB meetings. On 20 July 2018, the DSB had established a panel in the "Canada – Wine (US)" dispute (DS531). At the present meeting, the DSB would establish a panel to examine Australia's complaint in the "Canada — Wine (Australia)" dispute (DS537). The United States said that Australia made identical claims in this dispute concerning the same measures that were addressed in the "Canada – Wine (US)" dispute (DS531), while Australia also made additional claims concerning other Canadian measures. Under these circumstances, and in light of Article 9.3 of the DSU, the United States considered that the same persons serving on the panel in the "Canada – Wine (US)" dispute (DS531) should serve on the panel in the "Canada — Wine (Australia)" dispute (DS537). The United States was ready to cooperate with the Panels and the parties to these disputes with a view to harmonizing the timetable for the panel process in these disputes.

5.5. The representative of Australia reiterated Australia's views on certain comments made by Canada which questioned the adequacy of its consultations request and its panel request in this dispute. As Australia had stated at the 27 August 2018 DSB meeting, Australia did not accept Canada's claims that Australia's request for consultations and its subsequent panel request did not meet the requirements of the DSU. She said that Australia's requests fully complied with the requirements of the DSU: the legal basis of Australia's concerns were well set out and simply reflected the breadth of concerns which Australian producers had been raising over a number of years in respect of a range of measures governing the sale of wine in Canada and their WTO inconsistency.

5.6. 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.

5.7. The representatives of Argentina, Chile, China, the European Union, India, the Republic of Korea, Mexico, New Zealand, the Russian Federation, South Africa, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

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

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

6.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 27 August this year and that it had agreed to revert to it. The Chairperson drew attention to the communication from Korea contained in document WT/DS545/7. She then invited the representative of Korea to speak.

6.2. The representative of Korea said that on 14 August 2018, the Government of Korea had submitted its request for the establishment of a panel regarding the matter "United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products" (DS545). At the DSB meeting of 27 August 2018, the United States had not agreed to the establishment of a panel. Korea therefore put its request for the establishment of a panel to examine the matter on the Agenda of the DSB for the second time. As Korea had explained in its request for the establishment of a panel, Korea considered that the US safeguard measure was inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. Accordingly, Korea respectfully requested once again that the DSB establish a panel to examine the matter set out in Korea's request for the establishment of a panel, with standard terms of reference.

6.3. The representative of the United States said that as the United States had stated at the 27 August 2018 DSB meeting, the WTO Agreement recognized the right of Members to temporarily suspend concessions and other obligations when a product was being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry. The United States had exercised this right with respect to imports of crystalline silicon photovoltaic (CSPV) products. The United States had imposed a safeguard measure after the competent authority, the US International Trade Commission, had determined that increased imports of CSPV products were the substantial cause of serious injury to the domestic industry producing like or similar products. Accordingly, the United States regretted that Korea had chosen for a second time to request the establishment of a panel with regard to this matter. The United States was prepared to engage in these proceedings and to explain to the Panel that Korea had no legal basis for its claim.

6.4. 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.

6.5. The representatives of Brazil, Canada, China, Egypt, the European Union, India, Japan, Kazakhstan, Malaysia, Norway, the Philippines, the Russian Federation, Singapore, Chinese Taipei, Thailand and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

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

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

7.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 27 August this year and that it had agreed to revert to it. The Chairperson drew attention to the communication from Korea contained in document WT/DS546/4. She then invited the representative of Korea to speak.

7.2. The representative of Korea said that on 14 August 2018, Korea had submitted its request for the establishment of a panel regarding the matter "United States – Safeguard Measure on Imports of Large Residential Washers" (DS546). At the 27 August 2018 DSB meeting, the United States had not agreed to the establishment of a panel. Korea therefore placed its request for the establishment of a panel to examine the matter on the Agenda of the DSB for the second time. As explained in its request for the establishment of a panel, Korea considered that the US safeguard measure was

inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. Accordingly, Korea respectfully requested, once again, that the DSB establish a panel to examine the matter set out in Korea's request for the establishment of a panel, with standard terms of reference.

7.3. The representative of the United States said that as the United States had stated at the 27 August 2018 DSB meeting, the WTO Agreement recognized the right of Members to temporarily suspend concessions and other obligations when a product was being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry. The United States had exercised this right with respect to imports of large residential washers. An independent investigative authority, the US International Trade Commission, had determined that the domestic industry producing like or similar products had been seriously injured and that the cause of that injury had been increased imports of the products at issue. The US process had been open and transparent, and fully in accord with both domestic US safeguard laws and WTO obligations. Accordingly, the United States regretted that Korea had chosen for a second time to request the establishment of a panel with regard to this matter. The United States was prepared to engage in these proceedings and to explain to the Panel that Korea had no legal basis for its claims.

7.4. 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.

7.5. The representatives of Brazil, China, Egypt, the European Union, India, Japan, Kazakhstan, Norway, the Russian Federation, Thailand and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

8 KOREA – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON STAINLESS STEEL BARS

A. Request for the establishment of a panel by Japan (WT/DS553/2)

8.1. The Chairperson drew attention to the communication from Japan contained in document WT/DS553/2. She then invited the representative of Japan to speak.

8.2. The representative of Japan said that this case concerned Korea's measures to continue the imposition of anti-dumping duties on imports of Stainless Steel Bars from Japan. Japan considered that Korea's measures to be inconsistent with its obligations under the GATT 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), as explained in Japan's panel request. In particular, Japan considered that Korea had failed to demonstrate the nexus between the expiry of the duties and a continuation or recurrence of injury and to comply with the fundamental requirement that such determination shall rest on a sufficient factual basis and reasoned and adequate conclusions. Therefore, Korea's measures were not consistent with the obligations set forth in Article 11.3 of the Anti-Dumping Agreement. Japan also considered that Korea had used third-party data regarding the production capacity of Japanese exporters and had thereby resorted to facts available in a manner that was inconsistent with Articles 11.4 and 6.8 and paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement. Furthermore, Japan considered that Korea had failed to follow several procedural obligations set forth in Articles 11.4, 6.5, 6.5.1, 6.9, 12.2, 12.2.2 and 12.3 of the Anti-Dumping Agreement. Japan had requested consultations on 18 June 2018 and had held consultations with Korea on 13 August 2018 with a view to reaching a mutually satisfactory solution. Unfortunately, the parties had been unable to resolve their differences. Japan therefore 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 terms of reference in accordance with Article 7.1 of the DSU.

8.3. The representative of Korea said that Korea regretted that Japan had chosen to request the establishment of a panel with regard to this matter. As referred to in Japan's request for the establishment of a panel, Korea and Japan had held consultations in August 2018 with a view to reaching a mutually acceptable solution. Unfortunately, it seemed that, rather than continuing the constructive dialogue that Korea had engaged in, Japan appeared to consider that no such solution could be found. The Agreement on Implementation on Article VI of the General Agreement on Tariffs and Trade 1994 provided that Members had the right to take anti-dumping measures to counteract dumping which was causing injury caused by dumped imports and to maintain such measures if

there was a likelihood of continuation or recurrence of dumping and injury. Korean authorities had determined, through an objective review of the matter based on all the available evidence before it, that it was highly likely that dumping and injury would recur if the duties were terminated. Based on this objective examination, Korea had thus reasonably concluded that it was necessary to maintain the anti-dumping measures on stainless steel bars from Japan. Korea remained willing to engage constructively with Japan on this matter and to respond to any further requests for information that Japan could have. Finally, Korea noted that Japan's request for the establishment of a panel did not clearly identify, in accordance with the relevant agreements, the measure or measures that it was challenging. Furthermore, it appeared that Japan had unduly expanded the scope of the matter to include issues not previously raised in its request for consultations. Its request for the establishment of a panel was thus in various ways inconsistent with Article 6.2 of the DSU. Korea, therefore, respectfully disagreed with the establishment of a panel at the present meeting.

8.4. The representative of Japan said that Korea had stated that Japan's request for the establishment of a panel was inconsistent with Article 6.2 of the DSU. Japan disagreed with Korea's statement. Japan's request for the establishment of a panel was fully consistent with that provision. He also said that there was no discrepancy between Japan's consultations request and its panel request. There was therefore no basis for Korea's claim.

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

9 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA AND VIET NAM (WT/DSB/W/609/REV.5)

9.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. She then drew attention to the proposal contained in document WT/DSB/W/609/Rev.5 and invited the representative of Mexico to speak.

9.2. The representative of Mexico, speaking on behalf of the proponents, said that 68 delegations referred to in document WT/DSB/W/609/Rev.5 had agreed to submit a joint proposal, dated 13 September 2018, to launch the selection processes to fill the vacancies in the Appellate Body. Mexico welcomed Egypt as a new co-sponsor of the proposal. Mexico said that the considerable number of Members that had submitted this joint proposal reflected a common concern with the current situation in the Appellate Body, which was seriously affecting its functioning and the overall dispute settlement system against the best interest of its Members. He said that Members had a responsibility to safeguard and preserve the Appellate Body and the dispute settlement and multilateral trading systems. It was therefore Members' obligation to proceed with the launching of the selection processes to appoint new Appellate Body members, as submitted at the present meeting. This proposal sought to: (i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy that resulted from the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office would expire on 30 September 2018; (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 recommendations within 60 days after the deadline for nominations of candidates. The proponents were flexible in the determination of the deadlines for the selection processes, but Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading and the dispute settlement systems.

9.3. The representative of Mexico said that as his country had stated on several occasions, the Appellate Body was a key part of the dispute settlement system, which was why ensuring the proper functioning of this system should be a priority for all Members to. To do so, it was fundamental for the Appellate Body to have a full contingent. According to the DSU, the dispute settlement system

was "a central element in providing security and predictability to the multilateral trading system", and it had benefitted all Members. However, despite many attempts made by various delegations, in a few days there would only be three Appellate Body members left out of the seven that the Appellate Body should comprise. Mexico still had grave concerns, and these concerns were becoming increasingly pressing. Mexico, once again, called on Members to address, in a responsible manner, the current situation whereby Members had been unable to launch the processes to select Appellate Body members, a situation which had already lasted over a year and a half. By failing to do so, Members were clearly disregarding the obligation under Article 17.2 of the DSU to fill such vacancies as soon as they arose. This situation was unacceptable and would have a serious systemic impact on the Organization. There were currently 11 ongoing appeals in addition to various disputes at the panel stage which could reach the Appellate Body. There would be a major delay in the issuance of Appellate Body reports if the situation did not change. He said that Members must stop the practice of raising concerns without proposing solutions, mainly with regard to the crisis faced by the multilateral dispute settlement system. Mexico reiterated its call for Members to ensure that the AB selection processes were initiated as a matter of urgency. Mexico asked this Member who had raised concerns to take into consideration the willingness demonstrated by other Members to engage in discussions and seek a solution to these concerns. Mexico emphasized that the achievement of such a solution must not prevent compliance with the legal obligations of Members. There must therefore be no link between the selection process to fill the Appellate Body vacancies and other issues.

9.4. The representative of the United States said that the United States thanked the Chairperson for her continued work on these issues. As the United States had explained in prior DSB meetings, the US was not in a position to support the proposed decision. The systemic concerns that the US had identified remained unaddressed. For example, at the DSB meeting in August 2017, the United States had made clear its concerns with the issuance of appellate reports by individuals who were no longer members of the Appellate Body. Yet, one year later, an individual who was not currently a member of the Appellate Body continued to decide appeals. As the United States had explained many times, it was for the DSB, not the Appellate Body, to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal.[51] The United States referred to the US statements made at previous DSB meetings for more elaboration on US concerns. The United States would therefore continue its efforts and discussions with Members and with the Chairperson to seek a solution on these important issues

9.5. The representative of Japan said that Japan thanked the co-sponsoring Members for their proposal contained in document WT/DSB/W/609/Rev.5, which Japan supported. Japan referred to its statements made at previous DSB meetings on this matter.

9.6. The representative of India said that India referred to its statements made at previous DSB meetings on this matter and reiterated its serious concerns about the current impasse in filling vacancies in the Appellate Body and its effect on the credibility of the WTO. As a co-sponsor of the proposal by 68 Members, India recognized the centrality of the WTO dispute settlement system in providing security and predictability to the rules-based trading system. With the resurgence of unilateral measures and protectionism, the role of an independent and effective guarantor of these rules became all the more important. And yet, with the strength of the Appellate Body soon to be reduced to the minimum mandated number of three members and no resolution in sight, Members were moving even closer to the imminent paralysis of the dispute settlement system. This was a grave situation that had already begun to undermine the rights and obligations of all Members not just in terms of longer delays, but also with respect to uncertainty regarding their right to have a second stage of review in the form of a standing Appellate Body, a right that had been negotiated and agreed to by all Members. Over the past year and a half, the DSB had witnessed long and impassioned statements in defence of the dispute settlement system and a demonstration of willingness by most Members to start a process to fix the gaps in the system. She said that it was high time that Members acted collectively to translate these declarations of intent into concrete actions. In this context, India welcomed ideas to address the concerns raised by the United States with respect to the functioning of the Appellate Body. India welcomed proposals whose objective was to address these concerns in a comprehensive manner while preserving the essential features of a two-stage review system, negative consensus and an independent Appellate Body. India had repeatedly stated its willingness to engage constructively with other Members in addressing the existing inefficiencies in the dispute settlement system while strengthening its main features and principles. She said however that this exercise could not serve as a pretext to impair and disrupt the

[51] Articles 17.1 and 17.2 of the DSU.

work of the Appellate Body. India reiterated the importance of filling the vacancies in the Appellate Body as a matter of priority.

9.7. The representative of Canada said that Canada deeply regretted that the DSB had been unable to fulfil its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the three current vacancies and the fourth vacancy that would be created following the departure of Mr. Servansing from the Appellate Body. Canada was pleased to join the proposal contained in document WT/DSB/W/609/Rev.5 and urged the DSB to adopt it without further delay. Like other Members, Canada was disappointed that the United States had linked the start of the AB selection processes to the resolution of certain procedural concerns it had shared with the membership. Canada was also disappointed by the US decision to block the reappointment of Mr. Servansing to a second term. Canada thanked Mr. Servansing for his service and wished him well in his future endeavours. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that the US had raised. He said that Canada remained committed to working with other interested Members – including the United States – with a view to finding a way to address those concerns in order to allow the AB selection processes to start and be completed as soon as possible.

9.8. The representative of Egypt said that Egypt wished to be associated with the statement made at the present meeting by Mexico on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.5. Egypt announced its co-sponsorship of that proposal. Egypt deeply regretted that the DSB had been unable to fulfil its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. Egypt agreed that it was time to start a process or, if necessary, several processes, to select new Appellate Body members for the current vacancies. Egypt considered that the well-functioning of the WTO dispute settlement system, including the Appellate Body, was a key priority for the multilateral trading system. For this reason, and in order to overcome the deadlock that Members had been facing for more than a year, Egypt once again encouraged all Members to support the proposal contained in document WT/DSB/W/609/Rev.5. Given the great urgency of the situation, Egypt also appreciated the current and future efforts of the Chairperson to seek possible solutions to resolve this impasse. Egypt believed that the procedures and systemic issues raised before the DSB could be discussed in a separate process. He reiterated Egypt's continued openness and willingness to engage with all Members collectively or individually to discuss their concerns about the system.

9.9. The representative of Argentina said that in addition to co-sponsoring the proposal contained in document WT/DSB/W/609/Rev.5, Argentina expressed its commitment to a rule-based multilateral trading system and its deep concern regarding the current state of play in the multilateral trading system in general and the Appellate Body situation in particular. Argentina had been closely following the concerns raised by some Members in the DSB on the procedural and substantive aspects of the dispute settlement system (some of which date back several years), as well as the recent initiatives aimed at, *inter alia*, addressing these concerns. Argentina welcomed all initiatives that aimed to improve the WTO dispute settlement system. Although the system had proven to be efficient, it had now become clear that there were both procedural and substantive aspects of the system which concerned Members and which had to be addressed. Argentina therefore considered that any discussions on finding solutions to these aspects had to be inclusive and conducted as a matter of urgency. At the 27 August 2018 DSB meeting, Argentina had stated that Members could first address the concerns which, given their procedural nature, would produce results in the short term and unblock the AB selection processes. Members could then address more substantive concerns. Argentina reiterated its willingness to contribute towards the clarification of the relevant rules of the Working Procedures for Appellate Review and the DSU, which were directly related to the issues that were preventing the launch of the AB selection processes, and to address initiatives that would ensure the smooth and more effective functioning of the Appellate Body.

9.10. The representative of the European Union said that the EU wished to refer to its statements made on this issue at previous DSB meetings, starting in February 2017. He said that the gravity and urgency of the situation increased with each passing month. Members had a shared responsibility to resolve this issue as soon as possible. The EU thanked all Members that had co-sponsored the proposal contained in document WT/DSB/W/609/Rev.5. The EU invited all other Members to endorse this proposal, so that appointments to the Appellate Body could be made as soon as possible. The EU also wished to refer to the issue related to the non-reappointment of Mr. Servansing. The EU had taken note of the US statement made at the 27 August 2018 DSB

meeting. The United States had mentioned that it was not prepared to support the reappointment of Mr. Servansing to the Appellate Body. The EU regretted this decision of the United States which only further exacerbated the current crisis. He said that the United States had stated that its position was not a reflection on any one individual, but reflected the US principled concerns. The EU could only reiterate previous statements made many times in the context of the blockage of appointments to the Appellate Body: the EU saw no link between Rule 15 of the Working Procedures for Appellate Review and other issues mentioned by the United States on the one hand and the appointment and reappointment of members to the Appellate Body on the other hand. He said that the discussion on these issues could very well take place without undermining the current operation of the Appellate Body. As always, the EU stood ready to work with the rest of the Membership, and urged all Members to assume their responsibilities so that this crisis could be resolved as soon as possible.

9.11. The representative of Korea said that Korea supported the statement made by Mexico at the present meeting on behalf of the proponents of the proposal contained in document WT/DSB/W/609/Rev.5. Korea wished to refer to its statements made on this matter at previous DSB meetings.

9.12. The representative of Pakistan said that Pakistan wished to register, once again, its concern that no consensus had been reached to allow to start the process of selecting new Appellate Body members. The current impasse had reached a new and worrying level as an Appellate Body member would not serve a second term due to the lack of consensus regarding his reappointment. He said that it was more than ever urgent to call on Members to iron out differences and to work on a solution to allow the smooth functioning of the WTO dispute settlement system. Pakistan believed that the current system was far from being perfect and had room for improvement. However, there was an urgent need to first ensure the functioning of the system before improving the rules. Pakistan fully supported the proposal contained in document WT/DSB/W/609/Rev.5 and called on Members to agree to it in order to start the AB selection processes as soon as possible.

9.13. The representative of Norway thanked Mexico and the other co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.5 on launching the selection process for new Appellate Body members without further delay. Norway deeply regretted the announcement by the United States that it could not support the reappointment of Mr. Servansing. Members were now facing a situation where four out of the seven seats would be vacant. The efficiency and well-functioning of the WTO dispute settlement system was at stake. In many DSB meetings, Members had heard the United States express its various concerns with the dispute settlement system. Members had also heard other Members – including at the present meeting – respond actively and engage in an exchange of views related to those concerns. Despite this demonstration of engagement, the AB selection processes remained blocked. Norway again strongly encouraged the United States to not only come forward with its concerns and engage in discussions, but also to participate in the process of formulating possible ways forward. Norway agreed with other Members that discussions about these concerns should not be linked to Members' legal obligation to fill the vacancies in the Appellate Body. Norway continued to stand ready and willing to engage.

9.14. The representative of Chinese Taipei said that like other Members, Chinese Taipei was disappointed that the DSB had again failed to launch the selection process for three vacancies on the Appellate Body and the process for replacing Mr. Servansing, whose four-year term would expire on 30 September 2018. As stated at previous DSB meetings, Chinese Taipei encouraged all Members to engage in discussions with a view to finding a solution as soon as possible. Chinese Taipei remained committed to working with other Members to find a way to address relevant concerns.

9.15. The representative of Brazil noted that, unfortunately, under this Agenda item Members had never been informed by the United States of any legal basis for its reasons to block the processes for the appointment and reappointment of Appellate Body members and for linking such processes to the systemic concerns. Members had heard the United States claim at the present meeting that its "systemic concerns remained unaddressed". However, simply raising concerns about the functioning of the dispute settlement system was not equivalent to having a firm legal basis to justify the US actions. All Members had a duty to comply with their obligations under the DSU. He said that the United States, in its statement at 27 August 2018 DSB meeting, had referred to "shall" stipulated in many DSU provisions. The word "shall" in DSU Article 17.2 ("the DSB shall appoint persons") was surrounded by other "shall" in the same Article, such as in Article 17.1 (the Appellate Body "shall be composed of seven persons"), in Article 17.2 ("[v]acancies shall be filled as they arise"), Article 17.3 ("[t]he Appellate Body shall comprise persons of recognized authority"), etc. All these provisions

had to be read together. If one were to read the DSU provisions in good faith, it would seem that the appointments foreseen in Article 17.2 of the DSU could arguably not take place only if there were grounds related to the lack of qualification of candidates or similar grounds. Members were in the middle of a crisis and should not lose sight of the fact that they had not been given a legal justification for the serious consequences resulting from blocking of the AB selection processes.

9.16. The representative of Ukraine said that Ukraine reiterated its support for the proposal contained in document WT/DSB/W/609/Rev.5, and regretted that no solution on this matter had yet been reached. Ukraine encouraged all Members to seek solutions, as soon as possible, to a number of concerns that had been raised regarding the functioning of the Appellate Body, and called for a constructive dialogue and cooperation amongst Members. She said that there was a need for all Members to try to preserve the credibility and effectiveness of the Appellate Body. In this regard, Ukraine supported any proposals to address concerns that had been raised, which could improve the functioning of the dispute settlement system while preserving and further strengthening the main features and principles of the system. Ukraine, once again, stressed the need to find solutions in this regard as soon as possible. Ukraine considered that it was the responsibility of the entire Membership to start and be engaged in a meaningful discussion and to move towards the resolution of the concerns raised.

9.17. The representative of Costa Rica, speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC), reiterated the position of the GRULAC regarding the delicate situation that resulted from the deadlock in the AB selection processes. Costa Rica stressed the GRULAC's serious concern about this situation which affected the smooth functioning of one of the central bodies of the WTO. The delay in launching the AB selection processes meant failing to comply with an existing mandate, and implied a blatant breach of a legal obligation set out in a covered agreement. Costa Rica was aware that concerns that had been raised with respect to the functioning of the dispute settlement system and to some specific issues regarding a decision-making process, and that these concerns were preventing the start of the AB selection processes. However, the search for a solution to these concerns should not prevent the system from continuing to function. A proper interpretation of Article 17 together with Article 2 of the DSU would not suggest the need for positive consensus in order to launch the selection process aimed at filling the vacancies in the Appellate Body. Costa Rica requested the Chairperson to continue to seek a solution to this matter together with all Members.

9.18. The representative of Singapore said that Singapore wished to refer to its statements made at prior DSB meetings and reiterated its serious systemic concerns regarding the lengthy delays that had preceded the launch of the AB selection processes. He said that as there had been no consensus for the reappointment of the Appellate Body member whose term would expire on 30 September 2018, the Appellate Body would then be down to three members, which was the bare minimum for the establishment of a division to hear and decide an appeal. Given the strain that the Appellate Body was under, Singapore called on Members to bear this in mind when considering the filing of appeals. Members were now at a turning point in the impasse that called for urgent action, ahead of the next milestone in December 2019 when the terms of two more Appellate Body members would expire. He noted that the systemic concerns that had been raised could be discussed in a separate process. Singapore stood ready to engage constructively and to work with other Members, as well as the Chairperson, in an effort to resolve this impasse.

9.19. The representative of Thailand said that Thailand thanked Mexico and the other Members who had co-sponsored the proposal contained in document WT/DSB/W/609/Rev.5 to fill the vacancies in the Appellate Body. Thailand supported the launching of the AB selection processes as soon as possible. Thailand reiterated its serious systemic concern over the proper functioning of the WTO dispute settlement mechanism. The Appellate Body would soon function with only three members instead of seven. In the absence of new Appellate Body member appointments, Members were moving closer to the complete paralysis of the appellate process. This would put the entire WTO rules-based trading system at risk. Thailand noted that several efforts were ongoing in an attempt to resolve this impasse. Thailand remained committed to working constructively with all Members on this matter as a priority.

9.20. The representative of Switzerland said that with the Appellate Body facing four vacancies, the current impasse was moving to yet another level. She said that the possibility of the Appellate Body losing its minimal quorum was looming. Like other Members, Switzerland regretted that the DSB had thus far been unable to proceed with the AB appointments and was deeply concerned about this

situation. The WTO's dispute settlement system was a key pillar of the multilateral trading system, and that it was a shared responsibility of all Members to move beyond this impasse without further delay. Members needed to engage seriously and urgently in order to address the present challenges. Switzerland reiterated its readiness to engage in discussions of concerns that had been raised in order to explore possible solutions.

9.21. The representative of Mexico said that on behalf of the 68 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.5, Mexico regretted that for the 16th occasion, Members had still been unable to start the selection processes to fill the vacancies in the Appellate Body, and had thus continuously failed to fulfil their duty as Members. Concerns raised by some Members about certain aspects of the functioning of the Appellate Body should not serve as a pretext to impair and disrupt the work of the DSB. There was no legal justification for the current blocking of the AB selection processes, which nullified and impaired the rights of many Members. As Article 17.2 of the DSU clearly stated, "vacancies shall be filled as they arise". By failing to act at the present meeting, Members would maintain the current situation, which was seriously affecting the functioning of the Appellate Body against the best interest of all its Members.

9.22. The representative of South Africa said that South Africa noted with disappointment that no consensus could be reached on the reappointment of Mr. Servansing. South Africa thanked Mr. Servansing for his services and wished him well in his future endeavours. South Africa understood that reappointment was not a right nor was it automatic. The Appellate Body currently had a very busy caseload and more cases that were currently before panels could be appealed. He said that it was unavoidable that the WTO dispute settlement system had become dysfunctional since Article 17.1 of the DSU stated that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case". Only three Appellate Body members would now remain. If one of them were to be unable to hear a particular case, either for reasons of illness or conflict of interest, the appeal function of the Appellate Body would cease to exist. Members would have to think very carefully about how this matter could be addressed in concrete terms within a circumscribed timeframe. South Africa could support a more dedicated discussion of this particular issue in the DSB if Members considered that this could be appropriate.

9.23. The representative of Hong Kong, China said that Hong Kong, China referred to its statements made at previous DSB meetings on this matter. Hong Kong, China reiterated its deep concerns with the prolonged impasse over the AB selection processes. Hong Kong, China was willing to engage in discussions to resolve those matters.

9.24. The representative of Australia said that Australia wished to refer to its statements made at previous DSB meetings on this matter and reiterated its serious concerns regarding the DSB's inability to launch the AB selection processes. She said that this risked the enforceability of the WTO rights all Members had enjoyed for 23 years. Australia remained committed to resolving this impasse as a priority, and was ready and willing to work with others on pragmatic solutions.

9.25. The representative of the Russian Federation said that Russia wished to express its deep concern over the situation with the continued blocking of the AB selection processes by the United States, and the fact that the United States linked this matter to the resolution of a number of concerns it had identified regarding the functioning of the dispute settlement system. For approximately one year, the United States had been raising certain concerns without suggesting possible solutions or engaging meaningfully on that subject with the Membership. Russia was extremely concerned about the US accusations that the Appellate Body had not taken any action in order to resolve the problems put forward by the United States when the one Member who had failed to take any action to address the alleged problems was the United States. The situation was further aggravated by the US blockage of the reappointment of Mr. Servansing. Russia considered that the blocking of Mr. Servansing's reappointment while the Appellate Body was already weakened, was a deliberate action to undermine the functioning of the Appellate Body and the entire dispute settlement system. Russia believed that the US action demonstrated that the continued blocking of the AB selection processes, and its linking with the resolution of certain concerns alleged by the United States, were aimed at paralyzing the functioning of the Appellate Body and of the entire dispute settlement system. They further represented nothing more than attempts by one Member to pursue its own agenda at the expense of the entire Membership. The US unwillingness to unblock the AB selection processes or to engage in discussions about possible solutions to their concerns or about the reappointment of Mr. Servansing made it impossible to effectively challenge the unilateral actions taken by the United States in other areas. She said that it was not a mere coincidence that

the United States had adopted a series of unilateral measures at the same time as the dispute settlement system was severely compromised through deliberate actions of that same Member.

9.26. The representative of Uganda said that Uganda had previously expressed concerns regarding the very way some Members had been behaving. Uganda had called upon the entire Membership to work together to ensure the proper functioning of the Appellate Body. Members could not ask the DSB to fill the vacant positions in the Appellate Body unless Members would previously strengthen the DSB. Members had let the DSB down by not challenging the conduct of some Members. Addressing the concerns of some Members directly was a prerequisite to achieving real progress regarding the functioning of the Appellate Body.

9.27. The representative of Turkey said that Turkey wished to refer to its statements made at previous DSB meetings and reiterated its deep concern about the current deadlock. As a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.5, Turkey believed that Members had to launch the AB selection processes without further delay as required by Article 17.2 of the DSU. Like other Members, Turkey also believed that discussions over concerns of Members should not be linked to the launch of the AB selection processes. He said that given the urgency of the matter, any proposal to address concerns raised should be discussed separately and should not prevent the Appellate Body from performing its functions. Turkey stood ready to engage constructively to help overcome this impasse, and invited all Members to engage in discussions with the Membership in this regard.

9.28. The representative of New Zealand said that New Zealand wished to reiterate its support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.5 and emphasized the importance of launching the AB selection processes. New Zealand referred to its statements made at previous DSB meetings on the importance of the multilateral dispute settlement system.

9.29. The representative of China said that China echoed the statement made by Mexico on behalf of the 68 co-sponsoring Members. China was disappointed that the efforts to launch the AB selection processes had, once again, been frustrated by one Member's persistent and concern-driven blockage. He said that the situation was worsening as the United States had blocked the reappointment of Mr. Shree Servansing. The Appellate Body was the irreplaceable component of the WTO dispute settlement mechanism. It greatly contributed to the effective resolution of disputes and to the stability and predictability of the multilateral trading system. Ensuring the integrity and well-functioning of the Appellate Body served the common interests of all Members. Article 17.2 of the DSU clearly stated that "vacancies shall be filled as they arise". The prompt initiation of the AB selection processes was the responsibility and obligation that had to be undertaken by all Members. China believed that when Members had different views on any specific concern, discussions and negotiations was the only way forward. It was unjustified for any Member to attach any precondition to the launch of the AB selection processes. At present, the Appellate Body was in crisis. There would be only three Appellate Body members in office after 30 September 2018. If Members went along this path, they would face an unprecedented situation. One thing was clear: delaying the AB selection processes would adversely impact the operation of the WTO appellate review mechanism and the functioning of the multilateral trading system. Given that the aftermath would be borne by every Member, Members needed to launch the AB selection processes as soon as possible so that the operation of the Appellate Body could be ensured. It was regretful that the United States continuously refused to engage in meaningful discussions after having raised its concerns with respect to the functioning of the Appellate Body. Once more, China urged the United States to meet its commitments under the WTO Agreements and to interpret all WTO rules in good faith.

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

9.31. The DSB took note of the statements.

10 FOSTERING A DISCUSSION ON THE FUNCTIONING OF THE APPELLATE BODY (JOB/DSB/2): STATEMENT BY HONDURAS

10.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Honduras. She then drew attention to document JOB/DSB/2 and invited the representative of Honduras to speak.

10.2. The representative of Honduras said that as a small developing country and an active Member in the dispute settlement system, Honduras attached great importance to the Appellate Body. In light of the current situation, Honduras believed that action was urgently needed. Honduras believed that a constructive discussion was an essential first step. The survival of the Appellate Body was at stake. All Members had a vital interest in the functioning of the Appellate Body as well as of the dispute settlement system more generally. Members had expressed concerns regarding procedural and substantive issues related to the Appellate Body. However, thus far, there had been no specific proposal put forward in this body by any Member on how to deal with this matter. The AB selection processes had been a standing item on the DSB Agenda. Nevertheless, Members had spent the last 19 meetings repeating themselves and their positions. Honduras had, therefore, taken the initiative of presenting this non-paper for Members' consideration. Honduras aimed at starting an open and inclusive discussion on the basis of concrete and specific proposals that addressed all Members' concerns and respected the principle of "nothing is agreed until everything is agreed". Honduras was fully aware that there were multiple issues that had to be resolved. Honduras believed however that Rule 15 of the Working Procedures for Appellate Review was a key issue towards a more comprehensive discussion. Honduras considered that the discussion should start by addressing the two core issues regarding Rule 15 of the Working Procedures for Appellate Review. These two core issues were: (i) the parameters that governed the extension of Appellate Body members' terms; and (ii) the identity of who decided to extend an Appellate Body member's term in order to complete an ongoing appeal. Rule 15 of the Working Procedures for Appellate Review currently provided that: "[a] person who ceases to be a [m]ember of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a [m]ember, and that person shall, for that purpose only, be deemed to continue to be a [m]ember of the Appellate Body". There were currently no specific criteria for determining when an Appellate Body member should continue to serve on an appeal under Rule 15. In its non-paper, Honduras aimed at reflecting various Members' positions on this matter. Honduras was, however, aware that there could be other possible approaches. Regarding the issue of when an Appellate Body member could continue to serve beyond a four-year term for the purpose of completing an ongoing appeal, Honduras suggested two options: (i) an Appellate Body member shall be able to continue to serve on cases in which the oral hearing had already occurred or started [in a case where a hearing had not yet taken place, the outgoing Appellate Body member should be replaced with an alternate Appellate Body member]; or (ii) no member of the Appellate Body shall be assigned to a new appeal later than 60 days before the final date of their term. Regarding the issue of who should decide whether an Appellate Body member should serve beyond their four-year term, Honduras suggested the following: (i) the Appellate Body could continue to apply Rule 15 of the Working Procedures for Appellate Review, which allowed an Appellate Body member to complete their work on ongoing appeals subject to approval by the Appellate Body and upon notification to the DSB; (ii) in the event that Members would alternatively decide that the DSB should approve the continuation of service of an Appellate Body member beyond their four-year term under Rule 15, the reverse consensus rule would apply. This would avoid a situation where an Appellate Body member who met the relevant criteria could be blocked by a single Member; or (iii) in the event that Members would decide that the DSB should approve the continuation of service of an Appellate Body member beyond their four-year term under Rule 15, an alternative approach could be that the positive consensus – or positive consensus minus the parties to the dispute – could apply. Rule 15 of the Working Procedures for Appellate Review was simply a stepping stone in this discussion. Honduras was conscious of the several procedural and substantive issues that needed to be sorted out. With this non-paper, Honduras was not trying to state its national position nor to give preference to one option over another. Honduras hoped to start a multilateral and constructive discussion in which all Members would engage with the same objective in mind: to restore the full functionality of the Appellate Body and to ensure the proper functioning of the dispute settlement system. Honduras remained available to Members for their questions and comments.

10.3. The representative of Canada thanked Honduras for its initiative. Canada shared its sense of urgency and encouraged Members to take this opportunity to work towards a solution of the concerns that had been raised. Canada would be pleased to further discuss this issue in a forum that was

deemed appropriate by the Chairperson and/or other Members. As for the substance of the non-paper contained in document JOB/DSB/2, Canada believed that the criteria set out in options A or B in section one would be appropriate to determine when an Appellate Body member was eligible to continue to serve on cases beyond the expiry of their term of office. Regarding section two of the non-paper and the issue of who decides if an Appellate Body member should serve after the expiry of their term of office, although Canada did not object to the Appellate Body's use of Rule 15 of the Working Procedures for Appellate Review to date, it seemed clear that the United States had strong objections to this practice. As such, Canada believed that option b, and its proposed application of the reverse consensus rule, could be further explored. If that option did not resolve the concerns raised by the United States, another option would be to have a general and prospective DSB decision taken to authorize the service of Appellate Body members where certain criteria, such as those outlined in section one of the non-paper, were satisfied. He said that it was important that such a decision be general and prospective so that the need for a DSB decision to be taken each time this issue arose was avoided. He also said that that vacancies on the Appellate Body, resulting from Members' failure to launch and conclude a selection process for the replacement of Appellate Body members, were likely to necessitate greater recourse to Rule 15 of the Working Procedures for Appellate Review. The simplest solution to reducing reliance on Rule 15 would be to unblock the launch of the AB selection processes. Once the concerns that had been cited as a justification to block the launch of AB selection processes were resolved, it would be advisable for Members to work towards establishing the automatic launch of AB selection processes so that in the future, chances were minimized of the DSB being confronted with a situation where the failure to launch AB selection processes would threaten the effective functioning of the system.

10.4. The representative of Japan said that Japan thanked Honduras for its statement and contribution. Japan agreed that "constructive dialogue and real engagement from all WTO Members" were needed to find a meaningful solution to the challenge Members were facing. Japan wished to offer a few observations in this respect. First, there appeared to be little disagreement amongst Members as to the usefulness of having a transitional arrangement that would allow outgoing Appellate Body members to continue to serve on an appeal after the expiry of their terms for the purpose of ensuring the continuity and efficiency of the appellate process. Second, the fundamental question was whether the Appellate Body had the authority to allow a person who ceased to be its member to continue their service on specific appeals that they were assigned to while a member and to deem that person to be a member for that purpose. If the answer was no, then it was the responsibility of Members to step in and take necessary action to ensure a proper transitional arrangement. Third, Honduras proposed certain decision-making rules for the DSB. Japan appreciated the objective of Honduras to avoid or reduce the potential for any Member to intervene in the work of the Appellate Body in the midst of ongoing proceedings. However, given the decision-making rule set out in Article 2.4 of the DSU, Japan was not sure how the DSB could make a decision other than by consensus without amending the existing decision-making procedure. For Japan, the question was, rather, what would be the best possible solution which would maintain the integrity, promptness and continuity of the work of the Appellate Body under the existing decision-making procedure. Japan asked whether that would be an amendment to the DSU, a one-time DSB decision of general and prospective application, rules to guide future DSB action, *ad hoc* DSB decisions, a change to the Working Procedures for Appellate Review, or any combination of such options. Fourth, Honduras proposed certain objective criteria for allowing an outgoing Appellate Body member to continue to serve on an appeal after the expiry of their term. Japan agreed that there should be objective criteria for allowing the continued service of an outgoing Appellate Body member not just to maintain the integrity and continuity of the work of the Appellate Body, but also to ensure the proper use of transitional arrangements. Japan looked forward to engaging in further discussions to find a meaningful and lasting solution to this matter.

10.5. The representative of Korea said that Korea welcomed and appreciated the efforts by Honduras to foster a discussion on the functioning of the Appellate Body. Korea would participate in the discussion constructively.

10.6. The representative of the European Union said that the EU took note of the non-paper circulated by Honduras in document JOB/DSB/2, as well as of the statements of Members made on this matter at the present meeting. He said that the European Union was open to discussions aimed at resolving the current crisis.

10.7. The representative of New Zealand said that New Zealand commended Honduras for looking to make a contribution. New Zealand considered that it was important to discuss issues and to look to find solutions among Members through the DSB and under the Chairperson's leadership.

10.8. The representative of Norway said that Norway expressed its appreciation to Honduras for its constructive effort to help resolve the impasse in the AB selection processes. She said that extending the mandate of Appellate Body members to let them complete their work on disputes on which they had been assigned had been practiced for years in the Appellate Body. Other international tribunals also had procedural rules of this type; these rules were a sensible way to address such a practical matter. Although the Appellate Body's application of Rule 15 of the Working Procedures for Appellate Review had not been problematic in Norway's view, Norway appreciated that the criticism and current situation made it timely to address this issue. Norway was therefore grateful for the suggestions by Honduras contained in document JOB/DSB/2, which Norway believed could form a good basis for further discussions. As a way to address criticism of the current Rule 15 of the Working Procedures for Appellate Review, Norway saw merit in providing for rules which specified in what instances an Appellate Body member could continue to serve beyond their four-year term for the purpose of completion of their duties on an ongoing appeal. Norway noted with interest Honduras's non-paper contained in document JOB/DSB/2 especially in relation to the possibility that Members would decide that the DSB should approve the continuation of service as an Appellate Body member, and that the reverse consensus rule could then apply. Norway was hopeful that Honduras's suggestions would form a useful contribution in what should be the Members' joint efforts to immediately exit the current situation.

10.9. The representative of Australia said that Australia welcomed Honduras's contribution contained in document JOB/DSB/2 on the functioning of the Appellate Body. Australia shared the sense of urgency expressed by Honduras and other Members to find solutions to the crisis Members were now facing regarding the WTO dispute settlement system. She said that Australia was willing to engage in discussions on these and other issues of concern regarding the dispute settlement system. In particular, Australia was willing to work on a technical solution to the issue highlighted by Honduras in its non-paper contained in document JOB/DSB/2 – transitional arrangements for outgoing Appellate Body members. This technical solution would need to respect the exclusive authority of the DSB under Article 17.2 of the DSU to appoint Appellate Body members. Australia believed that such a solution would need to consider a number of issues, including: (i) as a threshold question, whether Members agreed that Appellate Body members should complete the assessment of appeals after the expiration of their terms; (ii) the relevant legal authority for continuation of service beyond the expiry of their terms; (iii) whether any objective limits should be placed on a member's continued service; (iv) how continued service should affect collegiality on the Appellate Body; (v) whether the continued service of members already notified under Rule 15 of the Working Procedures for Appellate Review should be addressed; and (vi) what form would such a solution take – for example, a decision of the DSB, an amendment to the DSU, and so on. Australia stood ready to explore these issues with other interested Members with a view to seeking pragmatic and lasting solutions to concerns that had been raised.

10.10. The representative of India said that India thanked Honduras for its non-paper contained in document JOB/DSB/2 and for possible approaches to addressing the concerns raised with regard to Rule 15 of the Working Procedures for Appellate Review. India reiterated its willingness to work constructively with all Members toward a quick resolution to the Appellate Body impasse and to participate in any consultations that the DSB chair would wish to hold on this issue.

10.11. The representative of Switzerland said that Switzerland thanked Honduras for its non-paper contained in document JOB/DSB/2 and for its efforts aimed at fostering a constructive discussion. Switzerland shared the view that Members needed to engage constructively in order to address the different concerns that had been raised with regard to the functioning of the Appellate Body and to find a way forward. In this regard, the non-paper prepared by Honduras certainly represented a positive contribution.

10.12. The representative of Singapore said that Singapore appreciated the efforts of Honduras in preparing its non-paper contained in document JOB/DSB/2 for fostering a discussion on issues relating to Rule 15 of the Working Procedures for Appellate Review. He said that Singapore welcomed and was open to considering ideas from Members to address the Appellate Body impasse, especially given the greater urgency since an additional vacancy on the Appellate Body would arise within four days of the present meeting.

10.13. The representative of Thailand said that Thailand appreciated Honduras's effort to foster a discussion on Rule 15 of the Working Procedures for Appellate Review. Her capital was carefully reviewing all issues that could be linked to the Appellate Body appointment impasse, as well as possible solutions. Without prejudice to Thailand's position, Thailand provided the following preliminary comments on the Rule 15 issue. Given how Rule 15 was currently drafted, it appeared that this transition rule might be applied when: (i) a person ceased to be an Appellate Body member; (ii) that person had been assigned to an appeal before the end of their term; and (iii) the appellate review of that appeal had not been completed. She said that a textual reading of Rule 15 of the Working Procedures for Appellate Review suggested that, as long as these three elements were met, the Appellate Body, upon notification to the DSB, could authorize an Appellate Body member whose term had expired to continue serving on an appeal. In one possible extreme, an outgoing Appellate Body member might be assigned to a newly filed appeal on the last day of their term. The period that such a person could continue to serve should last no longer than an additional 90 days, pursuant to the DSU's time limit for completing appellate proceedings. However, given that most recent appeals had been completed within approximately one year, Rule 15 seemed to allow a person to continue to serve as an Appellate Body member well beyond the prescribed four-year term. She said that without taking a position on whether or not this would run against the DSU, especially the DSB's sole authority to appoint members of the Appellate Body, Thailand considered that further elaboration on criteria regarding how the transition rule should be applied could help improve the transparency, certainty, and predictability of the dispute settlement system. She noted that Honduras had identified certain issues in document JOB/DSB/2 which served as useful starting points for Members' consideration of these criteria. Regarding the issue of when an Appellate Body member could continue to serve beyond their four-year term for the purpose of completion of duties on an ongoing appeal, Thailand believed that an outgoing Appellate Body member should be able to complete an appeal if most of the work in that appeal had already been done, particularly in a case where the substantive meeting with the parties had already occurred. This would be in line with the rationale for having transitional arrangements, namely, the prompt settlement of disputes. She said that Thailand also considered that items (a) and (b) of Section 1 in Honduras's non-paper contained in document JOB/DSB/2 did not have to be mutually exclusive, and thus that these two sub-items could be connected with an "and" instead of an "or". In other words, even if an Appellate Body member were assigned to a new appeal while there remained more than 60 days to their term, this outgoing member could still be replaced with an alternate member if the contemplated substantial work for that appeal had not yet started by the time that their term of appointment had expired. Regarding who would decide the continuation of service of an outgoing Appellate Body member in order to complete an ongoing appeal, Thailand was open to considering an alternative approach whereby that authority would lie in the DSB instead of the Appellate Body. Regarding the issue of how the DSB may make such a decision while minimizing the risk that either party to the dispute might block a selection process, unless the DSU was amended, she noted that currently the DSB would have to make a decision on the transitional arrangements by following the positive consensus rule. Thailand stood ready to further discuss these issues in detail with Members in order to find a positive way forward.

10.14. The representative of China said that China welcomed the non-paper by Honduras contained in document JOB/DSB/2 regarding possible amendments or revisions to Rule 15 of the Working Procedures for Appellate Review. Honduras's non-paper would help facilitate the discussion on this important issue, which could result in a possible solution. China noticed that the non-paper set out an objective standard for outgoing Appellate Body members to continue serving on cases. This objective standard could help ensure the objectivity of the rules and equality in applying those rules. China would continue its study of the non-paper on its merits. Regarding the content of the non-paper, China sought further clarifications regarding the relationship between options 1 and 2. China inquired whether options 1 and 2 were complementary or mutually exclusive. China asked more specifically whether, in the event that the conditions for option 1 were fully satisfied, option 2 would still be relevant in making a final determination on whether an outgoing Appellate Body Member could continue serving on a case. China reiterated its appreciation of Honduras's non-paper contained in document JOB/DSB/2, and said that it was willing to engage in future discussions. In the interim, China called on the prompt initiation of the selection process for Appellate Body members. He said that Members could simultaneously launch the AB selection processes and continue the discussions on concerns of a certain Member. China strongly opposed considering the satisfactory solution of a particular Member's concerns as a precondition to the initiation of the AB selection processes.

10.15. The representative of South Africa said that South Africa thanked Honduras for its non-paper contained in document JOB/DSB/2 and the innovative approach it had taken to this very important matter. South Africa believed that the ideas put forward by Honduras on the application of Rule 15 warranted further discussion. Honduras's non-paper could be the starting point of a more inclusive discussion to address both procedural and substantive issues. He said that more debate was needed on these issues that were of vital importance to the optimal operation of the dispute settlement system. The non-paper certainly was a step in the right direction.

10.16. The representative of the Philippines said that the Philippines welcomed the non-paper by Honduras contained in document JOB/DSB/2 which had been tabled at a very critical juncture. The Philippines had taken good note of other concerns that had been presented at previous DSB meetings and hoped that the discussions on these concerns could promptly lead to a constructive basis among interested Members. The Philippines believed that Honduras's non-paper directly tackled the two core issues regarding Rule 15 of the Working Procedures for Appellate Review, and that it was a suitable starting point for discussions aimed at addressing all specific concerns already raised. The Philippines stood ready to engage in constructive discussions, which in the medium and long term would ideally contribute to the strengthening and improvement of the WTO rules-based system.

10.17. The representative of Chinese Taipei said that Chinese Taipei appreciated the efforts made by Honduras. Chinese Taipei found that the non-paper contained in document JOB/DSB/2 was a concrete and positive contribution to the current discussion of the Appellate Body issue. He said that Chinese Taipei stood ready to engage constructively with Honduras and other Members to discuss the relevant issues and to find solutions to the impasse in the AB selection processes.

10.18. The representative of the United States said that the United States thanked Honduras for its non-paper contained in document JOB/DSB/2 and for having placed this item on the Agenda for the present meeting. He said that the United States looked forward to hearing other Members' views on the options for addressing the concerns that the United States had been raising for over a year. The United States appreciated that the non-paper provided some of the possible options and that it recognized that there may be other possible approaches. He said that the United States would be interested in hearing of other approaches that Members were considering.

10.19. The representative of the Russian Federation said that the Russian Federation welcomed the non-paper by Honduras contained in document JOB/DSB/2, and stood ready to discuss this non-paper and any other proposal that could contribute to the resolution of the situation with the Appellate Body. At the same time, Russia emphasized that Members should approach such issues with great care and aim at achieving the results that would benefit the Appellate Body and the dispute settlement system as a whole as well as the entire membership. Russia looked forward to more detailed discussions of this non-paper and hoped that discussions of substantive issues would take place in a separate forum. Russia thanked Honduras for its initiative.

10.20. The representative of Panama said that Panama thanked Honduras for its non-paper contained in document JOB/DSB/2 and for its willingness to promote a dialogue on the subject. Panama was ready to continue these constructive discussions in order to resolve the impasse regarding the Appellate Body.

10.21. The representative of Ecuador said that Ecuador was grateful for the constructive non-paper submitted by Honduras in document JOB/DSB/2. Ecuador considered that starting a dialogue based on Rule 15 of the Working Procedures for Appellate Review, as suggested by Honduras, was a positive development. Ecuador believed that this was a good foundation for discussions on two substantive issues, namely, when and who should decide if an Appellate Body member should continue to be a member once their four-year term had expired. Ecuador would participate in any future discussions on this non-paper, which would continue to provide elements to help unblock the impasse regarding the Appellate Body.

10.22. The representative of Mexico said that Mexico welcomed the non-paper by Honduras contained in document JOB/DSB/2. She said that Mexico reiterated its willingness to discuss any suggestion which could resolve the current deadlock in the Appellate Body and which could make a constructive contribution to the current dispute settlement system. Mexico underscored that any discussion on Rule 15 of the Working Procedures for Appellate Review should not prejudge or affect the use of this Rule to date.

10.23. The representative of Brazil said that Brazil thanked Honduras for its contribution. Brazil was ready to engage in any discussion on this issue. This discussion presupposed participation and engagement by the Member that had first raised concerns about Rule 15. Listening was not enough. Brazil reiterated once again that this discussion could not justify the blocking of the AB selection processes. Brazil recalled that Rule 15 of the Working Procedures for Appellate Review was a regular rule – also present in rules of other tribunals – that existed mainly to avoid procedural disruption to disputing parties and to the Appellate Body. Brazil said that the authority for completing the disposition of appeals, as referred to in the Working Procedures for Appellate Review, was derived from Article 17.9 of the DSU which stated that: "[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information". Working procedures were drawn up in February 1996 and for 20 years no Member had voiced any concern regarding Rule 15. He said that of course Rule 15 had to be read and had been drawn up within the limits of Article 17.2 of the DSU. The only aspect that had changed over the last 20 years was the length of time needed for the completion of appeals, which was a consequence of the delays that all proceedings were experiencing.

10.24. The representative of Argentina said that Argentina thanked Honduras for its non-paper contained in document JOB/DSB/2. Argentina was currently analysing this non-paper and reiterated its readiness to discuss these important issues.

10.25. The representative of the United States said that Brazil had suggested that Rule 15 of the Working Procedures for Appellate Review was not unlike transitional rules that existed in respect of other international tribunals. The United States referred Members to its statements made at prior DSB meetings which discussed this issue.[52] He said that analogizing with the rules of other international tribunals that Brazil had not named failed to acknowledge a fact apparent from even a cursory review of such rules: that the transitional rules for those other tribunals were based on their constitutive texts. A review of the rules that applied to other international tribunals confirmed that the issue of who could continue to serve and decide a dispute was not a mere "working procedure" to be decided by the tribunal. One example was the Statute of the International Court of Justice, which was annexed to and an integral part of the United Nations Charter.[53] Another example was the Statute of the International Tribunal for the Law of the Sea, which set out for that Tribunal in Article 5(3) a transition rule for departing members.[54] Similarly, for the European Court of Human Rights, Article 23(3) of the European Convention on Human Rights set out a rule for judges who had been replaced.[55] Unlike those other tribunals, Rule 15 of the Working Procedures for Appellate Review was not set out in the constitutive text of the WTO dispute settlement system – the DSU. It had therefore not been agreed to by Members.

10.26. The representative of Turkey said that Turkey thanked Honduras for its non-paper contained in document JOB/DSB/2. Turkey believed that the initiative of Honduras was important, and that it would be helpful in identifying concrete options to address the concerns of Members. However, it was crucial that all Members, including the ones with concerns about Rule 15 of the Working Procedures for Appellate Review, engaged in this discussion constructively. He said that this discussion should not be linked to the launching of the AB selection processes and should be handled separately. Turkey would actively participate in any discussion on this matter.

10.27. The representative of Honduras said that Honduras wished to thank all delegations that had expressed interest in the initiative put forward at the present meeting. Honduras was willing to call for an open-ended meeting to enable all Members to begin their discussions on the non-paper contained in document JOB/DSB/2. Honduras welcomed the fact that the initial exchange of views

[52] See Minutes of Meeting, Dispute Settlement Body, 28 February 2018, WT/DSB/M/409, para. 7.7; see also Minutes of Meeting, Dispute Settlement Body, 27 March 2018, WT/DSB/M/410, para. 9.4.

[53] Statute of the International Court of Justice, Article 13(3) ("[t]he members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun"); UN Charter, Article 92 ("[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter").

[54] Statute of the International Tribunal for the Law of the Sea, Article 5(3) ("[t]he members of the Tribunal shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any proceedings which they may have begun before the date of their replacement").

[55] European Convention on Human Rights, Article 23(3) ("[t]he judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration").

was taking place on this matter, which was very much needed at this point in time. Honduras once again thanked all delegations for their interest in the initiative related to Rule 15 put forward by Honduras.

10.28. The DSB took note of the statements.

11 INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

A. Statement by Indonesia

11.1. The representative of Indonesia, speaking under "Other Business", said that Indonesia intended to implement the recommendations and rulings of the DSB in these disputes. However, Indonesia wished to inform the DSB that it was impractical for Indonesia to comply immediately with the DSB's recommendations and rulings. Indonesia would therefore need a reasonable period of time (RPT) in order to do so. Indonesia wished to discuss the RPT with Chinese Taipei and Viet Nam in this matter.

11.2. The representative of Chinese Taipei said that Chinese Taipei thanked Indonesia for its statement of its intentions to implement the DSB's recommendations and rulings in these disputes. The trilateral talks on the length of the RPT and on the implementation details were ongoing. As provided for by the DSU, prompt compliance with the recommendations or rulings of the DSB was essential to ensure a proactive resolution of disputes to the benefit of all Members. Chinese Taipei, therefore, believed that the best implementation approach for Indonesia in these cases was to abolish the measures at issue at the earliest possible time. Chinese Taipei would continue to work with Indonesia and Viet Nam to resolve these disputes.

11.3. The representative of Viet Nam said that Viet Nam welcomed Indonesia's statement indicating that it intended to promptly comply with the rulings and recommendations of the DSB in these disputes. Viet Nam understood that Indonesia required a certain period of time to remove the WTO inconsistency of duties on iron or steel products. Viet Nam wished to discuss with Indonesia its proposal for a specific time-frame, in accordance with Article 21.3(b) of the DSU. Viet Nam looked forward to promptly restoring the unrestricted trading conditions to which Viet Nam and Indonesia had agreed upon under the auspices of the WTO and their regional trade agreements.

11.4. The DSB took note of the statements.