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Dispute Settlement Body
23 October 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 23 OCTOBER 2017

Chairman: Mr. Junichi Ihara (Japan)

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

A United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status Report by the United States (WT/D184/15/Add.177)

1.2. The Chairman drew attention to document WT/DS184/15/Add.177, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 12 October 2017, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

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

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

B United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.152)

1.6. The Chairman drew attention to document WT/DS160/24/Add.152, 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 12 October 2017, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that his country thanked the United States for submitting a status report in this dispute. However, China regretted to see that Members were still waiting for the final resolution of this dispute and full compliance with the DSB's recommendations and rulings by the United States. China urged the United States to show sincere commitment to the WTO dispute settlement system and full respect for the rights of those copyright holders that had been negatively affected for more than a decade in this dispute.

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

C European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.115)

1.11. The Chairman drew attention to document WT/DS291/37/Add.115, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that, as his delegation had previously indicated, on 14 September 2017, the draft authorisations for one type of genetically modified soybean[1], one type of genetically modified oilseed rape[2] and the renewal of one type of genetically modified maize[3] (for food and feed use) had been submitted for a vote at the member States committee, with a "no opinion" result. These measures had been submitted for a vote to the Appeal Committee on 19 October 2017, also resulting in "no opinion". It was now for the European Commission to decide on these two authorisations. The EU continued to be committed to acting in line with its WTO obligations. But more generally, and as it had previously stated, the EU recalled that the EU's approval system was not covered by the DSB's recommendations and rulings.

1.13. The representative of the United States said that the United States thanked the EU for its status report and its statement at the present meeting. The United States said that it would like to again note that the EU persisted in maintaining measures affecting the approval of biotech products that result in prolonged, unpredictable, and unexplained delays at every stage of the approvals process. The United States urged the EU to ensure that its measures affecting the

[1] 305423 x 40-3-2.
[2] MON88302 x Ms8 x Rf3.
[3] 1507.

approval of biotech products, including measures adopted by individual EU member States, were based on scientific evidence, and that decisions were taken without undue delay. Further, the United States noted that the EU had failed to lift all of the member State bans covered by the DSB findings, and that EU member States had proceeded to adopt additional bans on the same products as those covered by the DSB findings. These bans were unsupported by science and should be removed.

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

D European Union – Anti-dumping measures on biodiesel from Argentina: Status Report by the European Union (WT/DS473/17/Add.4)

1.15. The Chairman drew attention to document WT/DS473/17/Add.4, 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 Argentina.

1.16. The representative of the European Union said that for the present meeting, the EU had provided a final status report with the precise indication of the publication references of Implementing Regulation (EU) 2017/1578. This had amended Implementing Regulation (EU) No 1194/2013 by imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia. The EU recalled that the Implementing Regulation had been published in the Official Journal of the EU on 19 September 2017 (OJ L 239, 19.9.2017, p. 9) and, according to Article 2 of said Regulation, had entered into force on 20 September 2017. The EU reiterated that the adoption of the Regulation ensured the EU's full implementation of the DSB's recommendations and rulings in this dispute.

1.17. The representative of Argentina said that his country welcomed the EU's status report. Argentina reiterated its satisfaction with the Commission's Implementing Regulation (EU) No. 2017/1578, adopted on 18 September 2017, that had amended Regulation (EU) No.°1194/2013 of 19 November 2013. Argentina continued to closely monitor an appeal that had been brought to the European Court of Justice, by the European Commission, against the decision of the General Court, annulling the imposition of a definitive anti-dumping duty on imports of biodiesel in November 2013. Finally, Argentina reiterated its serious concern about a European Biodiesel Board press release published on 27 September 2017, announcing that it would submit a petition to the European Commission to initiate a subsidy investigation against Argentinean biodiesel imports. Argentina considered that any decision of initiation of such a procedure would be unwarranted, given that Argentinean biodiesel producers received no subsidies. In any case, Argentina would defend its WTO rights vigorously.

1.18. The DSB took note of the statements.

E Canada – Anti-dumping measures on imports of certain carbon steel welded pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu: Status report by Canada (WT/DS482/7/Add.2)

1.19. The Chairman drew attention to document WT/DS482/7/Add.2, which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on imports of certain carbon steel welded pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

1.20. The representative of Canada said that, as his country had reported to the DSB on 22 June 2017, Canada had enacted amendments to the Special Import Measures Act in respect of exporters found to have *de minimis* margins of dumping in order to achieve compliance with the DSB's recommendations and rulings. Regarding the DSB's recommendations and rulings relating to measures of the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal (CITT), on 28 July 2017, the CITT had initiated a review of its threat of injury finding, which would be completed by 8 December 2017. On 29 September 2017, the CBSA had amended the final determination of dumping of carbon steel welded pipe from Chinese Taipei in order to exclude two Chinese Taipei exporters that had had *de minimis* margins of dumping. The CBSA had

also revised the margins of dumping for "all other exporters" from Chinese Taipei. A statement of reasons for this decision had been published on the CBSA's website.

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

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

2 EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

A Statement by the European Union

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

2.2. The representative of the European Union said that his delegation wished to inform the DSB that it intended to fully comply with its WTO obligations, as had been clarified by the DSB's recommendations and rulings in this dispute.

2.3. The representative of Indonesia said that her country thanked the EU for its statement and took note of the EU's views. Indonesia considered it important for all DSB's recommendations and rulings to be adequately implemented. This was essential for the well-functioning of dispute settlement system. In this dispute, the Panel had found a violation of Article 6.7 of the Anti-Dumping Agreement, because the EU had failed to adequately disclose the results of the verification. The Appellate Body had rejected the EU's appeal against this finding and had recommended that the EU bring itself into compliance even though the dumping measure at issue had expired late during the Panel's proceedings. Nevertheless, the DSB had made the recommendations and rulings in this matter. Indonesia had a strong commercial and systemic interest in the EU's compliance with its obligations under Article 6.7 of the Anti-Dumping Agreement. Indonesia was confident that the EU would take a principled approach and would bring itself into compliance with the DSB's recommendations and rulings. Indonesia would be happy to discuss this matter bilaterally with the EU and to keep the DSB abreast of these discussions.

2.4. The DSB took note of the statements.

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

A Statement by the European Union

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

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

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

3.4. The representative of Brazil said that, once again, her country thanked the EU for keeping this item on the DSB's Agenda. As one of the parties to the Byrd Amendment disputes, Brazil wished to refer to its previous statements made on this matter. In particular, Brazil wished to refer

to its statements regarding the continuation of illegal disbursements, which should cease immediately. Brazil renewed its calls on the United States to fully comply with the DSB's recommendations and rulings in this dispute. Until then, the United States was under an obligation to submit status reports, pursuant to Article 21.6 of the DSU.

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

3.6. The representative of the European Union said that his delegation thanked the United States for its response. As it had previously stated, the EU disagreed with the last part of the statement made by the United States. The EU believed that it had provided status reports in all disputes that involved the EU. As the DSB had just heard, the EU had provided status reports in the DS291 and DS473 disputes, respectively.

3.7. The DSB took note of the statements.

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

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

4.1. The Chairman drew attention to the communication from Qatar contained in document WT/DS526/2 and invited the representative of Qatar to speak.

4.2. The representative of Qatar said that his country was requesting the DSB to establish a panel to resolve a dispute between Qatar and the United Arab Emirates in connection with violations of Qatar's rights under the GATT 1994 and the GATS Agreement, as well as to benefit from the protection of intellectual property rights under the TRIPS Agreement. The actions of the UAE constituted unilateral actions that grossly disregarded Qatar's WTO rights and the rights of other WTO Members. Qatar noted that it had attempted to seek opportunities for dialogue with a view to finding some reconciliation with its nearest trade partners, but the responding parties had failed to engage constructively. The rights of Qatar, as well as many WTO Members, were being violated by the coercive attempts of the UAE to economically isolate Qatar. For example, through the denial of WTO-consistent transit of goods to and from Qatar. In addition, third-country Members could no longer enjoy the harmonized import conditions resulting from the Gulf Cooperation Council ("GCC") customs union and single market.

4.3. Qatar regretted that the UAE had refused to even engage in consultations following a request by Qatar on 31 July 2017. In refusing consultations, the UAE had violated Article 3.10 of the DSU which provided that "all Members will engage in these procedures in good faith in an effort to resolve the dispute." The UAE had also violated Article 4 of the DSU, which required Members to engage in consultations when requested. The UAE's rejection of the agreed procedures for resolution of trade disputes between WTO Members should be a matter of concern to all Members. Qatar noted that the UAE had previously asserted an absolute unilateral right to be absolved of all of its substantive and procedural WTO obligations vis-à-vis Qatar, based purely on its bald assertion that its coercive attempts to isolate Qatar reflected a security concern. Qatar did not dispute the right of countries to take bona fide measures to protect their security. But this defence could not be self-regulating, for that would threaten the integrity of the entire rules-based system.

This meant that Members were not entitled to use security concerns to disguise trade measures that were taken in pursuit of other objectives. If Members' discretion in this regard were completely unregulated, then the balance of rights and obligations in the covered agreements could be fundamentally altered with impunity. Qatar was confident that the panel established to resolve this dispute, together with the DSB, would carefully protect the balance in the covered agreements. Therefore, Qatar had determined to exercise its rights under the DSU and the covered agreements and requested a panel to assist in resolving the dispute between Qatar and the UAE.

4.4. The representative of the United Arab Emirates said that his country regretted that Qatar had requested the establishment of a panel in the DS526 dispute. As Members were aware, the measures challenged by Qatar were measures that the UAE had been forced to take because of Qatar's continued support and funding of terrorist organizations. Qatar's support and funding of these organizations raised serious national security issues for the UAE. The UAE had not acted alone. Eight other countries – seven of which were WTO Members – had broken off relations with Qatar and had taken similar measures out of national security concerns. For several years the UAE and other countries had submitted their concerns to the attention of Qatar's Government and had asked it to desist from providing support and funding to terrorist organizations. In 2014, Qatar had acknowledged the concerns that had been raised by the UAE and other countries and had assumed specific commitments to cease its illegal conduct. While fully aware of its obligations and that non-compliance would have serious repercussions, Qatar had repeatedly violated the commitments it had assumed by continuing to support and fund these terrorist organizations. Qatar's continued funding and support for terrorism constituted a threat to the UAE's national security. Article XXI of the GATT 1994, Article XIVbis of the GATS, and Article 73 of the TRIPS Agreement expressly allowed a Member to take any action that it considered necessary for the protection of its essential security interests. This was precisely what the UAE had done. The UAE's actions were not trade measures and were clearly distinguishable from the kind of measures that were subject to WTO rules. They did not protect a given industry or sector. Rather, they were intended to persuade Qatar to cease and desist from behaviour that endangered the essential national security interests of the UAE. Accepting Qatar's request for a panel in DS526 would, in effect, transform the WTO from an institution intended to set rules for international trade into an institution that arbitrated national security issues. The WTO dispute settlement system already faced many serious challenges, including disagreements about economic measures and their consistency with WTO rules. The system was simply not equipped to adjudicate the national security issues raised in DS526, nor was there any support for the notion that it was intended to adjudicate such issues. In fact, there was clear language in the GATT 1994, GATS, and TRIPS Agreement that excluded such national security matters from the jurisdiction of the WTO. For these reasons, the UAE could not agree to the establishment of a panel. In addition, the UAE, in the strongest possible terms, urged every other Member of the WTO to condemn this attempt by Qatar to use the WTO for purposes it was not intended.

4.5. The representative of the Kingdom of Bahrain said that his country fully endorsed the statement made by the UAE and supported its objection to the establishment of a panel at the present meeting. Like the UAE, Bahrain and Saudi Arabia had adopted national security measures which were directed against Qatar. Bahrain's measures had also been the subject of the consultation request issued by Qatar on 31 July 2017. For reasons that were best known to Qatar, it had chosen to focus on the UAE alone, notwithstanding the fact that three GCC member States had adopted the same stance in respect of Qatar. Against that background, Bahrain wished to place on record that, like the UAE, it had only decided to take measures against Qatar after it was satisfied, on the basis of credible evidence, that Qatar's conduct posed a serious risk to security in the Gulf region. As Bahrain had made clear in WTO bodies where the measures had been raised, the measures were necessary to protect Bahrain's essential national security interests. These measures were well within the rights granted to WTO Members under GATT 1994 Article XXI, GATS Article XIVbis and TRIPS Article 73. Those provisions made it clear that each WTO Member was entitled to take any action that it considered necessary for the protection of its essential security interests. Bahrain stressed that it was the invoking WTO Member, and it was only the invoking WTO Member that had the responsibility to make judgements under the national security exceptions. For this fundamental reason, Qatar's claims were misconceived and could not be upheld. Bahrain was convinced that this matter should be resolved through the appropriate channel, elsewhere, and should not be considered under the WTO.

4.6. The representative of the Kingdom of Saudi Arabia said that his country regretted that the establishment of a panel had been requested by Qatar. Saudi Arabia assured Members that the measures referenced in Qatar's panel request were being maintained pursuant to the national security exceptions set out in Article XXI of the GATT 1994, Article XIVbis of the GATS and Article 73 of the TRIPS Agreement, as well as any other relevant provisions of the WTO Agreements. Furthermore, nothing in the WTO Agreements or security exceptions could be construed to compel a Member to furnish information which it considered to be contrary to its essential security interests, as was the case concerning the present matter. Saudi Arabia associated itself with the statement made by the UAE and supported its objection to the establishment of a panel in this dispute. Moreover, Saudi Arabia believed that the WTO was not the appropriate forum to discuss this matter. In conclusion, it emphasised that the solution to this matter was in Qatar's hands and this was not a matter to be dealt with by the WTO.

4.7. The representative of Egypt said that his country associated itself with the statements made by the UAE, Bahrain and Saudi Arabia. Egypt supported the position of the UAE to object to the establishment of a panel at the present meeting. It believed that these measures had been undertaken by the UAE in a manner that did not contradict the WTO Agreements. Egypt also believed that these measures had been taken in accordance with Article XXI of the GATT 1994, Article XIVbis GATS, and Article 73 of the TRIPS Agreement, which were important elements for safeguarding the rights of the UAE when it considered that issues of national security were involved in a dispute.

4.8. The representative of Qatar said that his country had noted the statements made by the UAE and the other parties involved. Qatar invited all WTO Members to contemplate the need to invoke the security exceptions to deny dairy products, fresh vegetables, and essential medicines to Qatari residents. In truth, the UAE's attempt to justify its actions was a disguise for measures that pursued a fundamentally different purpose. Furthermore, Qatar noted that certain of its neighbours, in particular the UAE, that were currently banning any goods from entering Qatar continued to willingly pay large sums to Qatar for its continuing exports of energy-related products essential to the economics of its neighbours. Qatar currently provided the UAE with 30% of their energy needs. Such profound contradictions belied any suggestion that the coercive measures were based on security concerns. Qatar further rejected the UAE's contention that these measures did not serve a commercial purpose. With regard to the various allegations brought up by the UAE in their statement, Qatar wished to state that these allegations were complete fabrications and that the DSB was not the right forum to deal with such matters. It was clear that the nature of any defence in WTO law was subject to multilateral oversight. The legal tests agreed to by Members were objective and were not left to the whim of individual decision makers in Member governments. The UAE was simply incorrect to the extent that it considered its measures to be immune from review.

4.9. The representative of the United States said that the United States noted that the UAE had indicated that its measures were justified on the basis of national security. Issues of national security were political and were not matters appropriate for adjudication in the WTO dispute settlement system. The United States therefore considered that the parties should resolve this issue outside the context of WTO dispute settlement. If the parties were unable to resolve the issue bilaterally, the United States encouraged the parties to request assistance from the Director-General through his good offices or from another person or WTO Member in which the parties had confidence.

4.10. The representative of the United Arab Emirates said that his country had listened to Qatar's statement carefully, however, the UAE reiterated that it objected to the establishment of a panel for the reasons it had mentioned previously.

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

5 CANADA – MEASURES CONCERNING TRADE IN COMMERCIAL AIRCRAFT

A Designation by the DSB of the representative referred to in paragraph 4 of Annex V of the SCM Agreement

5.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Brazil and he invited the representative of Brazil to speak.

5.2. The representative of Brazil said that his country was pleased to see that Mr. Hanspeter Tschaeni had been put forward for designation by the DSB as a facilitator, pursuant to paragraph 4 of Annex 5 of the SCM Agreement, in DS522. His designation as facilitator would contribute to the "timely development of information necessary to facilitate expeditious subsequent multilateral review of the dispute" as was required by paragraph 4 of the Annex V of the SCM Agreement.

5.3. The representative of Canada said that Mr. Hanspeter Tschaeni would be designated as the Annex V facilitator following an agreement between Brazil and Canada. However, as Canada had mentioned during 29 September 2017 DSB meeting, Canada had concerns with respect to Brazil's panel request in this dispute. Canada considered that Brazil's serious prejudice claims were not properly before the Panel and that, therefore, an Annex V process was not warranted. Moreover, Canada noted that certain measures mentioned in the panel request were also not properly before the Panel. Some measures had not been subject to consultations while the description of others was inadequate. Canada would file a preliminary request, in the coming days, asking the Panel in this dispute to rule on these matters.

5.4. The representative of the United States said that the United States welcomed the agreement of Brazil and Canada to the appointment of this qualified individual to serve as the facilitator in the Annex V process initiated by the decision of the DSB at its meeting on 29 September 2017. This agreement allowed the DSB at the present meeting to take a decision to appoint a facilitator that had the parties' confidence and support. The United States was confident that he would assist the parties and compile an appropriate record for the panel's work in this dispute.

5.5. The Chairman recalled that a fax had been sent to delegations on 18 October 2017 regarding Brazil's request to designate a DSB facilitator, pursuant to paragraph 4 of Annex V of the SCM Agreement. In that fax, the Chairman had informed Members that he had identified, and that the parties to the dispute had agreed to, a representative whom he had proposed that the DSB designate to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement. The Chairman invited any delegation that desired further information to contact him or the Secretariat. The Chairman proposed that the DSB designate Mr. Hanspeter Tschaeni as a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement.

5.6. The DSB so agreed.

5.7. The Chairman thanked Mr. Hanspeter Tschaeni, on behalf of the DSB, for his willingness to undertake this task.

5.8. The representative of Brazil said that since the Annex V procedures had been initiated and Mr. Hanspeter Tschaeni had been designated as the facilitator in DS522, Brazil wished to make a statement of its own position, for the record. Brazil saw the Annex V procedure as an important part of the multilateral dispute settlement system. This information-gathering process established in the SCM Agreement played an important function in contributing to the Panel's obligation to make informed and objective findings and recommendations regarding the measures at issue and, consequently, helped the DSB to discharge its function of achieving a prompt and satisfactory settlement of disputes between Members. Brazil understood that, although agreement was always preferable and advisable, the initiation of the Annex V procedure and the designation of its facilitator were simply procedural consequences of the DSB's decision to establish a panel.

5.9. The representative of the United States said that the United States did not share Brazil's view that the appointment of a facilitator was automatic, or that the DSB Chairman should serve as the facilitator in the absence of the parties' agreement. Annex V called for the DSB to take two steps to commence information-gathering: under paragraph 2, "the DSB shall, upon request, initiate the procedure" and then, under paragraph 4, "[t]he DSB shall designate a representative to serve the function of facilitating the information-gathering process". There could not be a procedure or a representative unless the DSB did something to "initiate" or "designate" that procedure or representative. The DSB did not play the passive role of merely witnessing or commenting on dispute settlement. The DSU envisaged an active role for the DSB in administering those rules and procedures. That role meant that a procedural step charged to the authority of the DSB could take place only if that body had actually taken ("executed") the relevant step. Interpreting an authority of the DSB as occurring without DSB action would be fundamentally inconsistent with the active role envisaged by the DSU. DSU Article 2.4 stated unambiguously that "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". Article IX:1 of the Marrakesh Agreement provided that "[d]ecisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding". In contrast, where a dispute settlement provision did not require positive consensus for action by the DSB – such as when the DSB established a panel under Article 6.1 – this was explicit in the text of the relevant provision. The absence of such language in Annex V confirmed that the positive consensus rules applied to the initiation of the Annex V procedures. The Annex envisaged a collaborative process related to, but separate from, the proceedings before the Panel. Thus, application of the positive consensus rule to initiation of the Annex V procedures and designation of a DSB representative reflected the collaborative approach embodied in Annex V itself. Brazil and Canada's agreement to initiate the Annex V process at the 29 September 2017 DSB meeting, as well as their subsequent agreement on the facilitator, was consistent with this collaborative process.

5.10. The representative of Canada said that while his country appreciated the value of setting out Members' positions on the procedural aspects related to the launch of the Annex V procedure and the designation of the facilitator, Canada considered that it was unnecessary to do so at this point in this dispute. Therefore, Canada reserved its right to express its position on these issues.

5.11. The representative of Brazil said that despite the interesting comments the DSB had just heard, and fortunately for the Membership, the Appellate Body had already given guidance on how to interpret this issue. In that guidance the Appellate Body had said that both the initiation of the procedures as well as the designation of the facilitator were procedural consequences of the DSB's decision to establish a panel. To consider it otherwise would essentially make the initiation and the designation of the facilitator dependent on the will of one of the parties, which could lead to difficulties in initiating the procedures. Thus the guidance given by the Appellate Body seemed to be solid and it helped give Annex V its meaning.

5.12. The representative of the United States noted that Brazil had referred to the Appellate Body's Report in "US – Large Civil Aircraft (Second Complaint)" (DS353). The DSB, like any other political body of the WTO – such as the General Council or Ministerial Conference – should resolve disagreements on procedural matters through their own, internal rules and processes. It was not for the dispute settlement system to tell the DSB or the Ministerial Conference or any other WTO Body how to operate under its own rules of procedure and whether and how a decision was to be taken. Therefore, any statements relating to the DSB's procedures in the "US – Large Civil Aircraft (Second Complaint)" (DS353) dispute were unwarranted, and a regrettable choice by the Appellate Body. To compound the concern, any such statement had not been necessary to resolve that appeal and would therefore be in the nature of *obiter dicta*. The Appellate Body's discussion of whether the initiation of Annex V was by positive consensus had clearly been unnecessary to resolve the dispute. The Appellate Body itself had declined to find that all of the conditions for the initiation of the Annex V procedure had been fulfilled.[4] And the panel considering the same issue had found that, in fact, the DSB had initiated no procedure and that no procedure had been undertaken. On that basis, the panel had declined to make findings on the legal issue, a judicious approach the Appellate Body had failed to emulate.

[4] "US – Large Civil Aircraft" (DS353) (AB), para. 549.

5.13. The representative of Brazil noted the statement made by the United States. Brazil understood that some Members considered the Appellate Body's guidance to be in the nature of *obiter dicta*. However, that term did not appear in the covered agreements. Members had been hearing that expression for many years even though it was not a legal concept known outside the common law. For all those Members from a civil law system, it was simply a matter of a judge writing a lot or writing less. So, for Brazil, the guidance given by the Appellate Body in that case was important.

5.14. The DSB took note of the statements.

6 ADOPTION OF THE 2017 DRAFT ANNUAL REPORT OF THE DSB (WT/DSB/W/603)

6.1. The Chairman said that, under this Agenda item, he was submitting for adoption the draft text of the 2017 Annual Report of the DSB contained in document WT/DSB/W/603. He was doing so pursuant to the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO, contained in document WT/L/105. The Report covered the work of the DSB since the previous Annual Report contained in document WT/DSB/71. In other words, it covered meetings of the DSB from 8 November 2016 through 29 September 2017. The Report contained a factual summary of DSB meetings during the period under review. As in the past, following the adoption of the Annual Report at the present meeting, the Secretariat would update the Report under its own responsibility in order to include actions taken by the DSB at the present meeting. Subsequently, the updated Annual Report would be submitted for consideration by the General Council at its meeting scheduled for 30 November 2017. Consequently, the Chairman proposed that the DSB adopt the draft Annual Report of the DSB contained in document WT/DSB/W/603 on the understanding that it would be further updated by the Secretariat.

6.2. The DSB took note of the statement and agreed to adopt the draft Annual Report contained in document WT/DSB/W/603 on the understanding that it would be further updated by the Secretariat.[5]

7 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/606)

7.1. The Chairman drew attention to document WT/DSB/W/606, which contained additional names proposed by Singapore for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/606.

7.2. The DSB so agreed.

8 APPELLATE BODY MATTERS

A. Statement by the Chairman

B. Appointment of Appellate Body members: proposal by the European Union (WT/DSB/W/597/Rev.5)

C. Proposal regarding the Appellate Body selection process (WT/DSB/W/596/Rev.5)

8.1. The Chairman proposed that the three sub-items under this Agenda item be taken up together. He said that he would first make a short statement to update delegations regarding the Appellate Body matters. Subsequently, he would invite the respective proponents to introduce their proposals and then he would open the floor for delegations to speak. The Chairman said that he would now make a short statement regarding the Appellate Body matters. As he had indicated at the 29 September 2017 DSB meeting, informal consultations continued on the AB matters in order to find a way forward regarding the current impasse. These consultations were being held at different levels, both political and technical. However, there had been no notable development so far. The Chairman urged all Members to show more flexibility and creativity so that the DSB could

[5] Subsequently, the Annual Report was circulated in document WT/DSB/74.

launch the three selection processes as soon as possible. Subsequently, the Chairman turned to the proposal submitted by the European Union contained in document WT/DSB/W/597/Rev.5.

8.2. The representative of the European Union said that his delegation thanked the Chairman for his statement. As the EU had repeatedly stated in previous meetings, the EU had fully supported the selection of new Appellate Body members without delay. The proposals on this issue were very pertinent and the EU encouraged all Members to support these proposals so that all three selection processes could be launched at the present meeting. In any event, the EU looked forward to the Chairman's continued consultations on this issue. Regarding the details of its proposal, the EU noted that it had strictly followed the models of similar DSB decisions in the past. The proposal provided for the selection processes to be conducted and concluded as soon as possible. The EU had also noted the other proposal on the table and thanked Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru for their revised proposal which corresponded, in substance, to the EU's proposal. There were very minor differences between the two proposals. Therefore, the EU was also ready to join a consensus on the Latin American proponents' proposal.

8.3. The Chairman invited the representative of Mexico to introduce the proposal submitted by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru contained in document WT/DSB/W/596/Rev.5.

8.4. The representative of Mexico, speaking on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, thanked the Chairman for his statement. Mexico regretted that the selection process to fill the Appellate Body vacancies had not been launched. Mexico said that it would be useful to hear more details from the Chairman and the Director-General regarding the steps taken to move away from the impasse. Similarly, Mexico encouraged other Members who had engaged in their own consultations to inform the DSB of any progress. Mexico believed that WTO Members had to safeguard and preserve the Appellate Body, and consequently, the multilateral trading system. Members could not remain passive under the present circumstances. It was not necessary to remind Members of the large number of disputes that continued to arrive at the Appellate Body, the subsequent delays or the concrete trade damages caused to the legitimate interests of the parties. It was for this reason that the Latin American proponents were presenting, for the sixth consecutive time, a draft proposal to launch the Appellate Body selection process.

8.5. As at the 29 September 2017 DSB meeting, Mexico's proposal sought to fill the two Appellate Body vacancies that were already open, as well as the vacancy that would become available in December 2017. This was necessary given the critical situation whereby, as of December, only four out of seven seats on the Appellate Body would be filled. The proposal contained four elements: (i) the initiation of the three selection processes: one to replace Mr. Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; another to fill the vacancy that had resulted after the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; and a third to replace Mr. Peter Van den Bossche, whose second term would expire on 11 December 2017; (ii) the establishment of a Selection Committee; (iii) setting 29 November 2017 as the deadline for the submission of candidacies; and (iv) requesting that the Selection Committee issue its recommendation no later than the regular DSB meeting in February 2018. Mexico was flexible regarding the deadlines for the selection process and could accept the deadlines proposed by the EU. Mexico again urged all Members to have similar flexibility on this issue.

8.6. The representative of the United States said that the United States thanked the Chairman for his continued work on these issues. With respect to the proposals at issue, as it had mentioned at the 29 September 2017 DSB meeting, the United States was not in a position to support either of the proposed decisions. The United States said that, in its view, it could not consider a decision launching a selection process when a person to be replaced continued to serve and decide appeals after the expiry of their term. As the United States had noted at past meetings, the DSB had a responsibility under the DSU to decide whether a person whose term of appointment had expired should continue serving. The United States considered that Members needed to discuss and resolve that issue first before moving on to the issue of replacing such a person. As had also been noted previously, the United States would welcome Mr. Ramírez's continued service on the appeals to which he had been assigned prior to 30 June 2017. In fact, it did not understand any Member to have objected to his service on these appeals. In that circumstance, the DSB should take up its responsibility to adopt an appropriate decision. The United States had been discussing this issue

informally with multiple delegations recently. Those meetings had been productive in that the United States believed that it had heard a general recognition that the DSB had the authority to set the term of an Appellate Body member under Article 17.2 of the DSU. It followed that the DSB had a responsibility to decide whether a person should continue serving beyond that term. The United States had also heard a willingness of several delegations to work together to find a way forward. It therefore would continue its efforts and its discussions with Members and with the Chairman to seek a solution on these important issues.

8.7. The representative of Australia said that her country remained concerned at the impasse the DSB had reached in relation to appointments to the Appellate Body. Delays in the commencement of the selection and appointment processes undermined the WTO's capacity to resolve disputes, and had the potential to undermine the WTO itself. Australia encouraged those Members that had raised particular interests and concerns to discuss those openly and constructively, and to show flexibility with a view to finding a mutually acceptable way forward. Ultimately, however, Members all shared responsibility for the proper administration and operation of the dispute settlement system through the DSB. Therefore all Members had to be prepared to work together to bridge differences and agree on a path forward. Australia stood ready to be a part of this conversation. Australia acknowledged the concerns which had been raised in the DSB regarding the current practices in the application of Rule 15 of the Working Procedures for Appellate Review. It remained open to constructive discussions about the issues raised with a view to identifying and clarifying issues of systemic and legal concern and working together to consider potential solutions.

8.8. The representative of Pakistan said that the current impasse being faced by the DSB regarding the appointment of Appellate Body members was now reaching alarming levels. Pakistan feared that unless this matter was resolved in earnest and at the earliest, it might eclipse other matters in the upcoming Ministerial at Buenos Aires. This would indeed be a travesty. The dispute settlement mechanism was facing a high level of activity which underscored the great measure of confidence that Members continued to place in it. At the same time, these elevated levels of activity placed great strain on the system. To make matters worse, WTO disputes had become complex and litigators had become increasingly sophisticated, thus making the job of the Appellate Body more challenging. This was exacerbated in situations where several appeals in different disputes were filed simultaneously or within a short period of time. In essence, the workload of the Appellate Body had increased significantly. While Pakistan agreed with the United States regarding the seriousness and importance of the systemic issues they had pointed out, and the needed to iron these out. Pakistan believed that these issues should not be linked to the appointment of the new Appellate Body members. Pakistan urged all WTO Members to work with the Appellate Body to maintain, nurture and preserve the trust and credibility that had been built up over the years in this dispute settlement system. A system which was uniquely effective, but fragile, and which could not be taken for granted. In that vein, Pakistan sincerely hoped that the differences between Members were bridged and would be overcome soon, and it urged Members to work towards that end, lest they create a lag whereby the sanctity of the system might be at stake. Pakistan could join a consensus on either of the two tabled proposals. However, it hoped that the process of appointment of the new Appellate Body members would be finalized by the end of 2017 and before MC11 to be held in Buenos Aires.

8.9. The representative of Singapore said that her country wished to reiterate its serious systemic concerns on the lengthy delays in the launching of the Appellate Body selection process. Singapore regretted that a link had been drawn between the launch of the selection process and certain systemic issues that had been raised. It remained of the view that the systemic issues could be dealt with on a separate and parallel track and should not prevent the launch of the Appellate Body selection process. Singapore urged Members to show flexibility and to work towards a consensus for a DSB decision to launch the Appellate Body selection process as soon as possible. Singapore noted that the proposal by the EU and the proposal by the group of Latin American countries were very similar in substance and Singapore could go along with either proposal. In this regard, it may be useful to work towards a single text so that the DSB could take a decision on the Appellate Body selection once the impasse had been resolved. Singapore stood ready to engage constructively and to work with the Membership and the Chairman to help to resolve this impasse.

8.10. The representative of Thailand said that dispute settlement was a key pillar of the WTO that provided predictability and security to the multilateral trading system. Thailand noted that, currently, there were two vacancies on the Appellate Body and another vacancy would arise at the

end of 2017. At the DSB meeting on 29 September 2017, Thailand had associated itself with the ASEAN statement expressing the regional group's serious concern regarding the present impasse. In fact, Thailand believed that most Members shared the same concern – the concern that vacancies had to be filled as they arose and that the selection process should have already been launched. Thailand also associated itself with the statements mentioned previously by other colleagues seeking more flexibility from the Membership. It was willing to engage constructively and to work with Members and the Chairman to resolve this impasse.

8.11. The representative of Canada said that his country again registered its profound disappointment and serious concern 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. Order required law, and law required enforcement. By providing an effective enforcement mechanism, the WTO's system of dispute settlement had underpinned the order that had prevailed in the world trading system since 1995. That system had delivered predictability and prosperity for businesses and individuals around the world. Neither these benefits nor the institutions that were responsible for them should be neglected. Canada urged the United States to reconsider its position and to allow the selection process to proceed immediately.

8.12. The representative of New Zealand said that her country thanked the proponents for their updated proposals, and the Chairman for his report on consultations. New Zealand noted the United States' intervention, and while New Zealand stood ready to discuss the concerns the United States had raised, these were distinct matters from the decision to launch the selection processes to find new Appellate Body members and needed to be resolved through a separate and parallel process. Regarding the substance of the concerns, New Zealand again took the opportunity to reiterate that any resolution of the issues raised could only be done on a prospective basis. It could not affect any decisions or proceedings involving divisions that had already been composed applying the well-established practice of Rule 15 of the Working Procedures for Appellate Review. It followed that New Zealand did not consider that a decision authorizing Mr. Ramírez's continued service was necessary, even though New Zealand had no objection to that continued service. It again called on Members to be flexible and pragmatic and to allow the launching of the selection processes for new Appellate Body members as soon as possible. New Zealand remained ready to work constructively with Members in this regard.

8.13. The representative of Switzerland said that her country thanked the Chairman for his ongoing efforts on this matter. As it had noted at previous DSB meetings, Switzerland was very preoccupied with the situation regarding the selection process to replace Appellate Body members. This situation could have growing, detrimental consequences for the well-functioning dispute settlement mechanism, as well as for the integrity and credibility of the multilateral trading system as a whole. Switzerland reiterated its readiness to engage in discussions on issues raised and to explore possible solutions. At the same time, it strongly believed that the selection processes for all three Appellate Body positions should be launched and completed without further delay, in line with the two very similar proposals on the table.

8.14. The representative of India said that his country appreciated the efforts being made by the Chairman to resolve the present crisis in initiating the selection process for Appellate Body members. India thanked the proponents for their revised proposals to resolve the present impasse in the selection process. The proposal submitted by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, and the proposal submitted by the EU had achieved common ground to launch selection processes to replace the two vacancies that had arisen and a third one which would arise in December 2017. India was flexible with regard to the process of launching the selection processes and completely supported the proponents' suggestions to commence the selection processes for all three vacancies as soon as possible. India believed in the rule based multilateral trading system of the WTO. One of the key pillars of the WTO was its dispute settlement system which was considered the central element in providing security and predictability to the multilateral trading system. The WTO dispute settlement system had been recognised as a reliable and effective system that delivered outcomes within strict time-frames. It had delivered crucial decisions in WTO disputes and Members had placed their faith in it. Its independence and autonomy were critical to the effectiveness of the dispute settlement system. India believed that certainty and predictability in trade rules could be ensured with the availability of adequate dispute resolution instruments and machinery. India expressed its serious systemic concerns regarding the significant delays in launching the Appellate Body selection process. This would paralyze the existing dispute settlement system and delay the resolution of disputes. It was vital for the

effective functioning of the dispute settlement system that the Appellate Body had a full complement of seven members to hear appeals. The continued impasse could have major consequences for the system. Any further delay in the selection of Appellate Body members would jeopardise Members' rights to the timely resolution of disputes. It would delay the Appellate Body from being able to make recommendations and rulings, which would impact the trade and industry affected by the measure at issue in each dispute.

8.15. India said that the Appellate Body was a critical element of the dispute settlement system. A large number of disputes ended up being appealed. There were presently two vacancies in the Appellate Body and another vacancy would arise shortly, in December 2017. There was an urgent need to fill the vacancies on the Appellate Body. This was not only on account of the legal obligation enshrined in Article 17.2 of the DSU which provided that vacancies had to be filled as they arose, but also on account of the number of appeals that had already been filed or were in the process of being filed. Although India appreciated Members raising their concerns on any systemic issues which they considered should be discussed and addressed, it regretted and disagreed with the linkage of any such alleged systemic issues with the launch of the selection process to fill the Appellate Body vacancies. India shared the view of many Members that these were two separate, independent issues. It strongly believed that any systemic issues raised by Members could be dealt with on a different track, and thus, should not become a stumbling block for the launching of the Appellate Body selection process. India was willing to participate in any such discussion on the systemic issues that had been raised as an independent process and it urged Members to show flexibility to launch the Appellate Body selection process as soon as possible.

8.16. The representative of Chile, speaking on behalf of the GRULAC countries, said that the WTO was in a delicate situation due to the impasse that had arisen regarding the launching of the Appellate Body selection process. First of all, Chile acknowledged the Chairman's efforts to seek a solution to this problem and to enable Members to express their views on this matter. In this regard, Chile stated its deep concern about the present situation which affected the well-functioning of a central body of the WTO. If the problem continued, it would, in the short term, practically imply the paralysis of the Appellate Body, putting the entire dispute settlement system at risk. Chile noted that the delay in launching the selection process, with two vacancies having already arisen, meant a failure of the DSB to comply with an existing mandate and involved a flagrant breach of legal obligations under the covered agreements. This had serious systemic consequences and was a bad precedent for the organization. It inflicted damage and affected the image and credibility of the WTO, particularly taking into account the complex international environment that was having a negative impact on multilateralism. Chile had heard the concerns regarding the functioning of the dispute settlement system, and specific issues regarding decision-making, which had been the cause of the impasse in launching the Appellate Body selection process. Chile could not accept that these concerns were linked to the launching of the selection process. It pointed out that the operation of the system could not be stopped because the concerns of some Members had not been resolved. Chile called on Members who were opposed to initiating the selection process to take into consideration the seriousness of a continued impasse, and, consequently, to not condition the initiation of the selection process on the resolution of different concerns. These issues had to be addressed on their own merits and procedures. Members should work towards a solution that allowed the DSB to meet its legal obligations as soon as possible. Finally, Chile requested the Chairman to continue to seek a solution to this matter.

8.17. The representative of Hong Kong, China said that her delegation thanked the Chairman for his on-going efforts on this matter. Hong Kong, China shared the systemic concerns that had been expressed by other Members on the prolonged impasse regarding the launching of the Appellate Body selection process. It welcomed the proposals from both the EU and the group of Latin American Members. Her delegation was flexible and ready to support either one of the proposals. Again, Hong Kong, China urged Members to exercise maximum flexibility in order to reach an agreement on the selection process as soon as possible. Regarding the systemic concerns that had been raised by the United States, her delegation was open to discussing any proposals to further improve the operation of the WTO, separately.

8.18. The representative of Norway said that, as her country had stated on previous occasions, it was Norway's primary interest to ensure that the Appellate Body functioned well. Norway reiterated its grave concern with the Membership's common failure to ensure that all vacancies on

the Appellate Body were filled. Norway continued to be flexible and would be in a position to support any of the proposals put forward in order to reach a solution on launching a selection process without further delay. With regard to the linkage made – proposing to hold off filling the vacancies on the Appellate Body until the systemic issues outlined had been resolved – Norway did not agree that there was such a link. Norway was open and willing to discuss systemic issues separately. It continued to urge all Members to show flexibility in order to ensure that the DSB surpassed this deadlock – for the benefit of the system.

8.19. The representative of Chinese Taipei said that his delegation referred to its statement on this issue made at the 29 September 2017 DSB meeting. Chinese Taipei could support either proposal. On the other hand, it was willing to work with Members to discuss and clarify the legal issue mentioned by the United States in a constructive manner.

8.20. The representative of Turkey said that his country thanked the respective proponents for their revised proposals. Turkey referred to its statements delivered at the informal DSB meeting held on 15 September 2017 and the regular DSB meeting held on 29 September 2017. Turkey reiterated its belief that the concerns raised by the United States about the working procedures of the Appellate Body should be dealt with separately and should not block the immediate start of the Appellate Body selection process. Turkey was ready to join a consensus on either of the two proposals. It thanked the United States for organizing some informal consultations with Members to exchange views on Rule 15 of the Working Procedures for Appellate Review. During those consultations Members had had the chance to better understand the United States' concerns and to express their opinions about the legal relationship between Rule 15 of the AB Working Procedures and the DSU. Turkey believed that the Members should continue such dialogue, nevertheless, this did not change the fact that the Members should also launch the Appellate Body selection process immediately.

8.21. The representative of Japan thanked the Chairman for his report. Japan also thanked the respective proponents for their revised proposals. The DSB was tasked with administering the DSU. Appointing a member of the Appellate Body was one of the most important functions of the DSB under the DSU. Thus it was unfortunate that the DSB was not in a position to launch the selection processes at the present meeting. All Members had to exercise flexibility and act in a constructive manner so that the DSB could perform its functions.

8.22. The representative of China said that her country was flexible as to the modality of launching the selection processes. However, China was deeply concerned and shared Members' profound disappointment at the current situation. Out of the seven positions on the Appellate Body two vacancies had arisen and one would soon arise in the coming months, yet Members were still not able to launch the selection processes due to the concerns expressed by the United States. While the United States had expressed and explained its concerns numerous times, it had failed to submit any proposals that would help resolve its concerns. China therefore queried the reasons behind such a blockage. As the end of Mr. Peter Van den Bossche's term was approaching, China urged Members to act constructively instead of jeopardizing the dispute settlement system – a central pillar of the multilateral trading system. China looked forward to working with other Members to ensure the dispute settlement system resumed its proper function without further delay.

8.23. The representative of Korea said that his country appreciated the Chairman's continued efforts to find a way out of the impasse in launching the Appellate Body selection process. Korea joined the previous speakers in expressing its serious concerns about the ongoing delay in the launch of the Appellate Body selection process. Regarding the reasons why the DSB should immediately launch the selection process, Korea referred to its previous statements on this matter. It also shared the views expressed by other Members at the present meeting. As always, Korea stood ready to discuss the systemic issues regarding the Appellate Body. A presentation by the United States of concrete ideas or proposals on how to address these systemic issues would facilitate the DSB's discussions. Korea emphasized, once again, that the selection process should be launched without being linked to deliberations on systemic issues relating to the Appellate Body. Finally, Korea expressed its flexibility on the modality of the selection process. In this regard, it was willing to join a consensus based on either of the two proposals put forward by the EU and a group of Latin American countries respectively.

8.24. The representative of Honduras said that her country supported the statement made by Chile speaking on behalf of the GRULAC countries. Honduras thanked the Chairman for his tireless efforts to seek a solution to this matter. It expressed its deep concern with the present situation. As an active Member of the DSB Honduras felt that the DSB needed a systemic solution. Problems existed with the Appellate Body and the entire DSB and these issues had an impact on the covered agreements. Honduras urged Members to show flexibility and the will to find a prompt solution to the current impasse. This was in the interest of the entire Membership.

8.25. The representative of the Russian Federation said that her country referred to its statements made on this matter at previous DSB meetings. Russia emphasised that it remained flexible and could join a consensus with regard to either of the proposals that had been put forward at the present meeting. It remained hopeful that the disagreements would be resolved soon so that the vacancies on the Appellate Body could be filled as they arose.

8.26. The representative of Guatemala said that his country was disappointed that the situation regarding the Appellate Body selection process remained the same. Guatemala was ready to engage constructively in the exercise of finding a solution to this impasse.

8.27. The representative of Israel said that his country had made its views regarding the Appellate Body selection process known at past regular DSB meetings and at the 14 September 2017 informal DSB meeting. The dispute settlement system, which included the Appellate Body, was a pillar of the WTO. By delaying the launch of the selection process for two existing vacancies, as well as an upcoming third, the DSB risked hindering one of the pillars upon which the organization stood. This would undoubtedly bring serious consequences reverberating across the rest of the WTO and the whole international trade environment. Israel agreed that there were some areas in the dispute settlement system where there was room for some improvement. It was committed to making such improvements. However, Israel did not see why this should come in the way of launching the selection process to fill the Appellate Body vacancies. It encouraged Members to reach an agreement to launch the selection processes.

8.28. The representative of Uruguay said that his country wished to reiterate what it had stated at past DSB meetings regarding the importance of filling the vacancies in the Appellate Body. This was essential for the continuation of the dispute settlement system. Uruguay also supported the statement made by Chile on behalf of the GRULAC countries.

8.29. The representative of the Bolivarian Republic of Venezuela said that, along the same lines as expressed by Chile on behalf of the GRULAC countries, her country wished to be associated with the previous speakers who had expressed concerns about the impasse in the launching of the Appellate Body selection processes.

8.30. The representative of the Dominican Republic said that her country supported the statement made by Chile on behalf of the GRULAC countries. As the Dominican Republic had stated at previous DSB meetings, it was concerned at the impasse in the launching of the Appellate Body selection process and hoped that a solution could soon be found.

8.31. The representative of El Salvador said that her country echoed the statement made by Chile on behalf of the GRULAC countries. As it had pointed out at prior DSB meetings, El Salvador echoed what had been stated by several delegations regarding the need for a prompt solution to the impasse in launching Appellate Body selection processes. This would enable Members to once again take up the work of one of the most important bodies in the WTO.

8.32. The representative of Peru said that his country supported the statement made by Chile on behalf of the GRULAC countries.

8.33. The representative of Mexico, speaking on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, said that the Latin American proponents regretted that, once again, Members had not achieved a consensus to start the Appellate Body selection processes. As Mexico had pointed out, Article 17.2 of the DSU placed an obligation on all Members by stating that "vacancies shall be filled as they arise". It was therefore the Membership's duty to fill the vacancies on the Appellate Body. Mexico reiterated that it was not acceptable to link the concerns and discussions on issues related to the dispute settlement system to the initiation of the selection

process. It noted, once again, that this seemed to be a quasi-unanimous position amongst the DSB Members. Any substantive discussion on appeal procedures or broader discussions on the Appellate Body's function should not prevent it from continuing to operate fully or complying with its obligations under the covered agreements. Members should not open the door to the danger that any Member with a particular concern, whether justified or not, could decide to block the functioning of the dispute settlement system until that Member's concerns were resolved. Otherwise, Members would keep the Appellate Body, the dispute settlement system, and hence the rules-based multilateral trading system, the hostage of particular positions. The dispute settlement system relied on common efforts among all Members and the multilateral trading system depended on the proper functioning of the dispute settlement system.

8.34. Mexico noted that for more than 20 years, the Appellate Body had provided the WTO with solid jurisprudence on a range of different WTO agreements. Over these years, important disputes had been settled, which had helped to strengthen the multilateral trading system. There would always be room to improve the functioning of the DSB and the Appellate Body. However, Members had the responsibility to preserve what they had accomplished thus far. In this context, it was important not to lose sight of the seriousness of the present situation, which only worsened as time passed. Currently, the DSB faced an unprecedented crisis with potential negative consequences. If Members failed to act now, the Appellate Body would soon become dysfunctional. It was Mexico's firm belief that nobody gained from the present situation. Members could violate the covered agreements by allowing the situation to exacerbate. Mexico called on Members to be flexible in order to launch the Appellate Body selection process. Finally, Mexico said that the November regular meeting would be the deadline for delegations to show their interest in the proper functioning of the Appellate Body before the matter was considered in Buenos Aires. In this regard, Mexico expressed its readiness to work with other delegations and with the Chairman in order to find a solution to the current situation.

8.35. The representative of Brazil said that his country thanked the Chairman for his report. Brazil wondered about the takeaway of the present and previews DSB meetings held in 2017. Almost one year had passed and the DSB had not been able to decide on this very important issue. Members should reflect on this matter in light of their obligations under the WTO Agreement. Brazil noted that Members had not moved closer to a common view or "met at the middle of the bridge". Members were losing perspective, they focused too much on the particulars and missed the bigger picture. It was a monument that had allowed the international trading system to stand firm despite the problems, imperfections, fiery legal skirmishes and procedural manoeuvrings. Over the past two decades, the Membership together – as parties and third parties, the Secretariat, panelists and members of the Appellate Body – had actively contributed to breathe life to a conceptual inspiration that had, without a shadow of a doubt, already made a significant contribution to international trade law and, in fact, to public international law. But Members seemed to have lost the perspective. Some successes of the Appellate Body included: around 150 appeals that had been filed in 20 years, similar to the number of cases in the ICJ in 70 years, important landmark findings that had settled disputes or had paved the way to mutually agree on solutions, the constant and cautious interpretation of provisions of the Agreements, living up to the obligations set out in Article 3.2 of the DSU. He then referred to the following past disputes: "Gasoline, Alcoholic Beverages, Bananas, Salmon, Apples, Dairy, Poultry, Autos, Auto parts, Asbestos, Hormones, Steel, D-RAMS, Sugar, Cotton, Audiovisuals, Tyres, Raw Materials, Aircraft, Renewable Energy and Solar Cells". Brazil asked the following questions: "Was that not the spectrum of global trade, of global trade rules in motion and sometimes in trouble? Did Members not all have their favourite cases and preferred reasoning insights? And did Members not also have those disputes that they believed went off the mark or they were still trying to understand?" This was the formidable forest: a myriad of intractable legal claims and arguments that had been stripped down to their core and exposed to the light of the agreed common rules, in an exercise of professional excellence that was testimony to the capacity of solving disputes peacefully. And all this had been done within the shortest time-frames of any arbitration body or tribunal in the world, with part-time AB members and limited resources. It had been done in an environment where two thirds of the disputes were appealed, which demonstrated the trust that Members had placed in the dispute settlement system and the Appellate Body. Now Members had the perspective. The sense of perplexity only expanded when Brazil saw that the DSB was letting the Appellate Body slowly shrivel. In less than two months, only four Appellate Body members would be left and the prospect loomed that, for several reasons, it would not be possible to form one AB division. Members had pointed to the rules of procedures and, although most had never thought the rules could represent a problem, all Members seemed to be ready to discuss and solve the problem collectively, as the

DSB had done in the past. These issues regained their proper dimension when confronted with the proper perspective. There was certainly room for improvement, but nothing that justified stalling the processes to fill the vacancies, which, as many had already stated, should be a routine process in the DSB. With regard to Rule 15 of the Working Procedures for Appellate Review, he said that although the DSB had not heard details about the issues or ideas on how to solve it, this was an issue that was intrinsically linked to the independence of the Appellate Body. Rule 15 was a practical solution that had been adopted in several similar adjudicatory bodies and had been a constant and peaceful feature in the Appellate Body since 1996. This was a consequence of the decision by WTO Members to give the Appellate Body the authority to draw up its rules of procedure. Did any Member entertain the "slippery-slope" idea that a Member, perhaps a party in a dispute, would have the right to block or to interfere with the selection of a new Member in any ongoing dispute. In contrast, and in perspective, the real and immediate problems facing the dispute settlement system were as follows. Article 17.1 of the DSU provided that the Appellate Body members had to serve in rotation. He questioned whether with fewer than seven Appellate Body members, such as three or four, the rotation principle would be observed and be meaningful. Article 17.3 of the DSU also stipulated that the Appellate Body had to be representative of the Membership of the WTO (both in terms of geographical representation and of legal traditions). Brazil wondered how this feature was going to be maintained in the present circumstances. Members also know that collegiality was a central feature of the Appellate Body's collective decision-making. The Working Procedures provided that the Appellate Body members had to convene on a regular basis to discuss matters of policy, practice and procedure. The DSU also required the Appellate Body members to stay abreast of dispute settlement activities and other relevant activities of the WTO. How would the Appellate Body comply with these obligations with fewer and fewer Appellate Body members? Important trade interests were being delayed and denied the opportunity for a decision and prompt settlement. It was not clear what type of consequences the Appellate Body would have to face.

8.36. Members collectively had to ask themselves: what was left of machinery, without its main features? What was left of an entity such as the Appellate Body, without its members, its essence? The answer was: a skeleton, a shadow of its former self, a truly sad figure. Members should consider whether they could be held accountable for that situation. In the past week, in advance of the present meeting, the representative of Brazil had looked at the book "A History of Law and Lawyers in the GATT/WTO", and had found it enlightening on the development of WTO institutions and of its legal substrate. He then pointed out to a quotation by Claus-Dieter Ehlerman regarding the dispute settlement system and the Appellate Body. The quote was so accurate that it had been referred in two articles in the book. It read: "The dispute settlement system that was negotiated in the Uruguay Round seems to me still today an extraordinary achievement that comes close to a miracle. It seems not wise not to take its existence for granted, and to be guaranteed forever, but to contribute to its consolidation and further development". Brazil said that this book was a work in progress. New chapters were being written all the time and Members were writing one right now. Brazil could only hope that it would be a good chapter – with a happy ending. Brazil again noted its perplexity with the present situation. The good thing – the silver lining – was that the cataclysm had not yet occurred. Members could still change things for the better. Members could talk, listen and fix the problem so that they could, once again, concentrate on the "formidable forest".

8.37. The Chairman thanked delegations for their statements. He regretted, once again, that it had not been possible to reach a consensus on the proposals before the DSB. On his part, he would continue to consult further and, at the same time, he called upon delegations to have more conversations amongst themselves. Certainly, a solution to these matters required more political consultations. However, the Chairman believed that conversations in Geneva amongst Members would help to build the necessary confidence and create concrete ideas in order to appropriately address these matters. The Chairman thanked Members for their cooperation.

8.38. The DSB took note of the statements.

9 UNITED STATES – LARGE RESIDENTIAL WASHERS FROM KOREA

A Statement by Korea

9.1. The representative of Korea, speaking under "Other Business", said that his country wished to express its disappointment that the DSB had failed to discuss the issue of implementation of the DSB's recommendations and rulings in the "US – Large Residential Washers from Korea" (DS464)

dispute as a regular Agenda item at the present meeting. Article 21.6 of the DSU stipulated that the issue of implementation "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 that "the Member concerned shall provide the DSB with a status report" at least 10 days prior to each such DSB meeting. The reasonable period of time for this dispute had been established on 13 April 2017. Therefore, the issue of implementation of this dispute should have been placed on the Agenda of the present meeting and the United States should have provided a status report to the DSB for its consideration. Korea was aware that the deadline for inscription of items on the DSB Agenda had been 12 October 2017, one day prior to the expiry of the six-month period stipulated in Article 21.6 of the DSU. However, Korea's interpretation of Article 21.6 was that the issue of implementation needed to be on the Agenda of the DSB meeting that took place six months after the establishment of the reasonable period of time. Consequently, Korea believed that a status report should have been provided for the present meeting. Regarding this dispute, Korea was yet to learn how the United States had taken necessary steps, including procedures under Section 123 and 129 of the Uruguay Round Agreements Act, to implement the DSB's recommendations and rulings. Given that the reasonable period of time would expire on 26 December 2017, Korea had concerns about the transparency of the United States' implementing measures. It was Korea's expectation that the United States was working in good faith to fulfil its obligation to implement the DSB's recommendations and rulings. In this regard, Korea asked the United States to present a status report before the next DSB meeting in November, in accordance with relevant DSU provisions.

9.2. The representative of the United States said that the United States thanked Korea for providing advance notice of its intention to make a statement under Other Business. This notice was called for under Rule 6 of the GC Rules of Procedure, which the DSB also applied. Under those Rules, in particular, Rule 25, "Discussions on substantive issues ... shall be avoided, and the [DSB] shall limit itself to taking note of the announcement by the sponsoring delegation" and any reaction by another delegation "directly concerned". The United States noted that the Agenda for the present meeting had closed prior to the date six months after establishment of the reasonable period of time in this dispute. Further, the reasonable period of time, as had been determined by an arbitrator under Article 21.3(c) of the DSU, would expire on 26 December 2017. The United States took note of Korea's statement and would convey it to capital.

9.3. The DSB took note of the statements.