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18 May 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 May 2010

Acting Chairman: Mr. John Gero (Canada)

Prior to the adoption of the Agenda, Amb. John Gero, the Chairman of the General Council, welcomed delegations and said that he had been asked to chair the present meeting in the absence of Amb. Yonov Frederick Agah, the Chairman of the DSB. He noted that this was in accordance with the Rules of Procedure for meetings of the Dispute Settlement Body which provided that if the DSB Chairperson was absent from any meeting or part thereof, the Chairperson of the General Council, or in the latter's absence the Chairperson of the Trade Policy Review Body shall perform the functions of the DSB Chairperson.

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[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.90)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.90)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.65)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.28)

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(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.5)

1. The Chairman recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the DSB's 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 was resolved.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.90)

2. The Chairman drew attention to document WT/DS176/11/Add.90, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 6 May 2010, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the First Session of the current (111th) Congress. The Second Session of the 111th Congress had begun in January 2010. The Committee on the Judiciary of the House of Representatives had held a hearing on certain of these proposals on 3 March 2010. In addition, the US administration was working with Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Union noted that the United States was presenting its ninety-first status report in this dispute. The EU hoped that the US authorities would take steps to finally implement the DSB's ruling and resolve this matter.

5. The representative of Cuba regretted that, as had happened on many previous occasions, there was nothing new in the US status report, despite the seriousness of this dispute, in which the fundamental principles of the TRIPS Agreement – the most comprehensive multilateral instrument on intellectual property issues – were not respected. Cuba noted that 17 DSB meetings had already been held since the new US administration had taken office, which had raised many expectations at that time. The United States continued with its succinct status reports. At the present meeting, before the DSB, was the ninety-first status report which contained nothing new, and the "sacrosanct rules" governing intellectual property rights continued to be violated without any action on the part of the EU or the United States.

6. Cuba noted that at a meeting of the WIPO Committee on Development, which had been held three weeks ago, a topic had been discussed that the parties to this dispute would have preferred to see remain outside the scope of multilateral discussions, and the United States had referred to intellectual property as a tool for promoting development. The question was, which countries' development did such rules serve to promote? In Cuba's case, the United States was not even capable of respecting the most basic rights, as was clearly the case with Section 211. That amoral and skilfully crafted legislation from the very outset had presumptuously made it possible for the BACARDI company to take over a Cuban rum trademark and, at a given point, in addition to using it, to succeed in having it registered. Cuba recalled that the HAVANA CLUB trademark had been duly registered with the United States Patent and Trademark Office by the Cuban company CUBAEXPORT since 1976. Cuba was astonished and concerned about one new case that had been settled in BACARDI's favour in April 2010 by a District of Delaware Court, which had found that the company's use of the term HAVANA CLUB was not misleading or geographically described in such a way as to deceive the public. If the term HAVANA CLUB meant nothing to the District's judges, it must be that it had been decided to promote freedom of use of geographical names, including US names, for all. Yet again, the rights over that trademark were being attacked, international law was being breached, and basic principles that dated back to the Paris Convention of 1883 were being ignored.

7. In accordance with international rules, Cuba prohibited the registration of trademarks that could mislead the public as to geographical origin. Applications were examined for all trademarks alike, including those filed by a large number of US companies. As Cuba had previously stated, the parties to this dispute, with regard to which the Appellate Body had ruled more than eight years ago, should take immediate action to repeal Section 211. One could not impose rules upon others and require due compliance with those rules while violating international treaties and promoting unfair

competition practices. The United States and the EU had made it possible for BACARDI to sell products under the Havana Club trademark with labels carrying the words "Puerto Rican rum". This situation was the most alarming and discouraging for those who had established what was or was not correct in the intellectual property area, and who sought to strengthen the rules through commitments that had gone beyond the TRIPS Agreement by negotiating no less than an "Anti-Counterfeiting Trade Agreement" (ACTA). This caused serious concern among nationals of the countries involved, and in particular European countries. Cuba, therefore, asked what anti-counterfeiting rules did those countries proclaim? Was BACARDI's use of the Havana Club brand not a clear-cut act of counterfeiting if only because of the small note on the label bearing the words "Puerto Rican rum"? Was that not a mockery of human intelligence?

8. On 30 April 2010, the Special 301 Report had been released by the USTR and 11 countries were placed on the Priority Watch List. There was also some form of alert on other countries for applying the so-called flexibilities provided for in the TRIPS Agreement, the purpose of which was to protect human health. While Section 211 remained in breach of a number of international rules, including the TRIPS Agreement, the fact that lists of non-complying countries were being drawn up and countries availing themselves of the Agreement's provisions were singled out as meriting attention was totally unprecedented. Cuba, once again, called on the parties to comply with the ruling and on the United States to repeal Section 211.

9. The representative of India said that his country thanked the United States for its status report and its statement. India again noted that there was no substantive change in the situation, as had been indicated on previous occasions. Unfortunately, the US status report only confirmed the continuation of non-compliance. India felt compelled, yet again, to stress that the principle of prompt compliance was missing in this dispute. India was concerned that this situation of non-compliance undermined the credibility and confidence that Members reposed in the WTO dispute settlement system. India, therefore, urged the United States to fully implement the DSB's recommendations in this dispute without further delay.

10. The representative of the Bolivarian Republic of Venezuela said that her country, once again, wished to make a statement regarding the surveillance of implementation of the recommendations adopted by the DSB with respect to the Section 211dispute. Venezuela noted that Section 211, which was inconsistent with the TRIPS Agreement, was still in force, and that the principles of national treatment and most-favoured-nation treatment were still being violated, in spite of the DSB's recommendations, which had been made more than eight years ago. This situation continued to cause injury to Cuba, and to undermine the credibility of the DSB. Venezuela, once again, noted that the US status report, submitted on 7 May 2010, was merely a copy of previous ones with a change of date and symbol. As on previous occasions, Venezuela considered this to be as an "empty gesture" of the United States who justified itself through a vastly excessive reasonable period of time for implementation. Since 2002, Cuba had been awaiting concrete signals and actions from both the United States and the EU in response to the Appellate Body's ruling. Cuba believed that other Members also wished to see some evidence of compliance by the United States with the DSB's recommendations, since this would have positive effects on the multilateral trading system and the DSB. In addition, decisions of the DSB, which represented stability, guarantee and security for Members and was one of the greatest achievements of the Uruguay Round, should be respected. Venezuela, therefore, called upon the United States to put an end to its policy of economic, commercial and financial blockade against Cuba. Venezuela vigorously rejected that policy and urged the United States to respect its commitment towards the DSB and to its obligation to implement the DSB's recommendations. Finally, she said that Venezuela fully supported Cuba regarding this matter.

11. The representative of China said that her country thanked the United States for its status report and its statement. However, the US status report did not provide any new information and simply confirmed the continuation of non-compliance after more than eight years since the adoption, by the DSB, of the Reports pertaining to this dispute. China believed that the situation of prolonged non-compliance was not in line with the principle of prompt implementation contained in the DSU provisions and undermined the authority and credibility of the WTO dispute settlement system. China supported Cuba and urged the United States to implement the DSB's decision as soon as possible.

12. The representative of Ecuador said that his country thanked the United States for its status report and supported the statement made by Cuba. Once again, Ecuador emphasized that Article 21 of the DSU referred expressly to prompt compliance with the DSB's recommendations and rulings, in particular with regard to the matters affecting the interests of developing-country Members. The United States closely monitored other Members' compliance with their WTO obligations and had, in various WTO Councils and Committees, expressed its trade and systemic concerns about certain commitments undertaken by other Members. The United States also drew up internal reports on countries' alleged non-compliance with their obligations regarding intellectual property rights. In fact, the United States had just recently published such a report. Ecuador, therefore, hoped that the United States would set a good example and, once again, urged the US administration and Congress to continue their efforts to ensure prompt compliance with the DSB's recommendations and rulings by repealing Section 211. Finally, he said that Ecuador wished to receive more detailed information from the EU on the steps being taken to resolve this dispute.

13. The representative of Bolivia said that her country regretted, once again, that there had been no progress in this case. Bolivia was concerned about the consequences for the WTO of non-compliance by Members with their WTO obligations. The United States must comply with the DSB's recommendations and rulings and lift the restrictions imposed under Section 211, which were contrary to the rules of international law, in order to ensure the integrity of the WTO system. Finally, she said that Bolivia supported Cuba's statement.

14. The representative of Brazil said that his country thanked the United States for its status report. Brazil wished to join previous speakers in expressing its concern about the lack of progress reported, once again, by the United States with regard to the implementation in this dispute. Brazil, therefore, urged the United States to bring its measures into conformity with the DSB's recommendations and rulings.

15. The representative of Argentina said that his country thanked the United States for its status report. The failure to implement the DSB's recommendations, in particular over a long period of time, had consequences not only for the parties to the dispute. The most worrying and the most serious systemic implication was the fact that the failure to comply cast doubts on the system's effectiveness in settling the disputes brought by Members. Argentina, therefore, reiterated its call on the parties, in particular the United States, to ensure that the recommendations in this dispute were fully implemented.

16. The representative of Mexico said that his country thanked the United States for its status report and wished to echo the concerns expressed by other delegations regarding the slow progress being made towards implementation in this dispute. Mexico called upon the parties to find a satisfactory resolution to this dispute through the legal remedies available under the DSU. Mexico noted that WTO-inconsistent measures could affect more than one Member. Therefore, any Member who might be affected by such WTO-inconsistent measures had the right, under the DSU provisions, to initiate its own dispute.

17. The representative of the United States said that, in response to the statements made by some Members that this dispute raised concerns for the dispute settlement system, as the United States had noted at previous DSB meetings, it did not believe that those concerns were well-founded. In this dispute, as in the other few instances where US efforts to come into compliance had not yet been entirely successful, the United States had been working actively towards compliance in furtherance of the purpose of the dispute settlement system. In addition, as had been noted in the first intervention by the United States, the Committee on the Judiciary of the US House of Representatives had held a hearing in March on certain proposals to implement the DSB's recommendations and rulings in this dispute.

18. The representative of Cuba said that, at each DSB meeting, following the statement made by Cuba under this Agenda sub-item, many other Members called on the United States to comply with its obligations in the Section 211 dispute. Members had heard the United States repeating the same arguments and stating that it had done everything it could in its power. However, Cuba wished to hear something new at the next DSB meeting and considered that Members should be provided with some information regarding steps being taken by the United States towards its compliance. Cuba, therefore, called on the United States to provide new information at the next DSB meeting regarding this dispute.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.90)

20. The Chairman drew attention to document WT/DS184/15/Add.90, 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.

21. The representative of the United States said that his country had provided a status report in this dispute on 6 May 2010, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities 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 in this dispute. Details were provided in document WT/DS184/15/Add.3. With respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

22. The representative of Japan said that his country thanked the United States for its statement and its latest status report. Japan noted the US report that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. With respect to the remaining part of the DSB's recommendations and rulings, Japan hoped that the United States would soon be in a position to report to the DSB more tangible progress, as appeared to be the case under the previous sub-item on the Agenda of the present meeting. Full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[2] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

[2] Article 3.3 of the DSU.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.65)

24. The Chairman drew attention to document WT/DS160/24/Add.65, 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.

25. The representative of the United States said that his country had provided a status report in this dispute on 6 May 2010, 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.

26. The representative of the European Union said that the United States had again reported non-compliance. The EU was, again, disappointed and remained ready to work with the US authorities towards the complete resolution of this case.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.28)

28. The Chairman drew attention to document WT/DS291/37/Add.28, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

29. The representative of the European Union said that, once more, her delegation noted that EU regulatory procedures on biotech products continued to work as foreseen in the legislation. The five authorizations decisions on GMOs issued on 2 March 2010, including one for cultivation, had raised the number of GMOs authorized since the date of establishment of the Panel to twenty-nine. Progress had also been made on other applications for authorization, including a recent vote in the relevant regulatory committee on two GM maize stacks (MON89034xNK603 and Bt11xGA21 maize). The EU, once again, thanked both Argentina and Canada for their constructive approach on this matter and reiterated its invitation to the United States to re-engage in dialogue.

30. The representative of the United States said that his country thanked the EU for its status report and its statement. As the United States had noted at the March DSB meeting, earlier in the year the new Commission had made some progress in the operation of the EU's biotech approval system by approving five long-pending applications. The recent approvals were encouraging, but the United States disagreed with the EU's statement at the April DSB meeting that "EU regulatory procedures on biotech products continue to work as foreseen in the legislation". Unfortunately, that was not the case. For example, one application filed 14 years ago, in 1996, and another application filed nearly nine years ago, in 2001, remained stalled in the EU approval system. The EU's own scientific authority had found that the products covered by these applications would not have an adverse effect on human and animal health or the environment. In addition, the DSB had found that applications for both of these products were subject to "undue delay", resulting in a breach of the EU's obligations under the SPS Agreement.[3] Yet, the applications remained pending. Furthermore, the EU Commission had announced that it was considering substantial modifications to its biotech approval procedures in order to address such long-standing delays. In those circumstances, it was more accurate to say that EU regulatory procedures on biotech products continued not to work as foreseen

[3] Panel Report: "EC – Measures Affecting the Approval and Marketing of Biotech Products"; WT/DS291/R, adopted on 21 November 2006, para 8.18(a)(vii) (BT-11 maize) and (xi) (Bt-1507 maize).

in the legislation, and, accordingly, that the EU was considering changes to those procedures. The United States, therefore, wished to reiterate what it had stated at the April DSB meeting, namely that it looked forward to further progress in the EU's operation of its biotech approval system.

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

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.8)

32. The Chairman drew attention to document WT/DS322/36/Add.8, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

33. The representative of the United States said that his country had provided a status report in this dispute on 6 May 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

34. The representative of Japan said that his country thanked the United States for its statement and its latest status report. The United States had stated in its status reports that it "will continue to consult with interested parties in order to address the findings contained in [the Appellate Body and the panel] reports" adopted by the DSB on 31 August 2009. Japan took this statement as an expression of commitment by the United States to fully implement the DSB's recommendations and rulings. On 23 April 2010, Japan had requested the Arbitrator under Article 22.6 of the DSU to resume its proceeding[4], which had been suspended since June 2008.[5] The Arbitrator would determine the level of the suspension of concessions or other obligations to be authorized to Japan vis-à-vis the United States in this dispute. Once again, Japan called on the United States to fulfil its commitment by taking immediate and concrete action so as to resolve this dispute.

35. The representative of the European Union said that her delegation wished to reiterate its disappointment over the lack of any real progress by the United States on compliance with adverse rulings on zeroing in this dispute. The EC recalled that immediate compliance with the DSB's recommendations and rulings was not an option, but an obligation under the DSU provisions.

36. The representative of the United States said that, in response to Japan's statement that it had requested the Article 22.6 arbitrator to resume work, his country regretted that Japan had taken that step. As the United States had explained in its first intervention, the United States was conducting consultations with all interested parties in order to address the findings in this dispute.

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

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.5)

38. The Chairman drew attention to document WT/DS350/18/Add.5, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

[4] WT/DS322/37.
[5] WT/DS322/30.

39. The representative of the United States said that his country had provided a status report in this dispute on 6 May 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

40. The representative of the European Union said that, at the April DSB meeting, her delegation had welcomed public statements by the USTR officials that the United States was finally trying to find a way to comply with the DSB's recommendations and rulings on zeroing. The EU could understand that implementation could sometimes take time, but reminded the United States that Article 21.3 of the DSU provided for such time. It was called the reasonable period of time, and in this dispute it had been agreed to last ten months, already generous, and had now been exceeded by five months. The United States had, therefore, already had 15 months to implement the DSB's recommendations and rulings, but was yet to take concrete and substantial steps to start its domestic compliance procedure. This was very disappointing, even more so when one considered all the zeroing disputes for which compliance was long overdue. The EU's concerns about the lack of implementation by the United States in this case were well-known and recorded in the minutes of past DSB meetings. Despite the aforementioned encouraging political statements, the recently published final determination in its Section 129 proceeding (12 March 2010) left the EU perplexed as to the US intentions on compliance with the ruling in this dispute. The EU, therefore, urged the United States to reconsider its Section 129 determination immediately and to implement. The EU also wished to note, once again, that the United States had not presented a status report on the progress in the implementation of the DSB's recommendations and rulings in the DS294 dispute, which it was required to do pursuant to Article 21.6 of the DSU.

41. The representative of Japan said that since the issue of implementation in the zeroing disputes brought by the EU (i.e. DS294 and DS350) were closely related to the one in Japan's own zeroing dispute with the United States[6], Japan was following the situations and developments in those disputes with great interest. Japan agreed with the EU that, in the DS294 dispute, the issue had not been resolved and the United States was obliged to provide the DSB with a status report pursuant to Article 21.6 of the DSU. Japan did not believe that on-going arbitration proceedings under Article 22.6 of the DSU would excuse implementing Members from their obligations under Article 21.6 of the DSU.

42. The representative of the United States said that, in response to the EU's statement, the EU had made reference to Section 129 proceedings. The United States had, at the March DSB meeting, explained the scope of these proceedings and would not repeat those points at the present meeting. With respect to the mention of status reports in the DS294 dispute, the United States noted that that dispute was now pending before an arbitrator under Article 22.6 of the DSU. For the benefit of Members, the United States noted that the hearing in that proceeding later that week would be open to observation by all WTO Members and the public.

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

[6] WT/DS322.

2. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB

(a) Statements by the European Union and Japan

44. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union and Japan. He then invited the respective representatives to speak.

45. The representative of Japan said that, according to the CDSOA 2009 Annual Reports issued on 10 December 2009, some US$248 million had been distributed for FY2009.[7] These latest annual distributions showed that the CDSOA remained operational. In fact, as US Customs and Border Protection had explained, "the distribution process will continue for an undetermined period".[8] Japan urged the United States to stop illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute.

46. The representative of the European Union said that, as announced at the previous DSB meeting on 20 April, the EU had, as of 1 May, brought up to US$95.38 million, the level of retaliatory measures applied in this dispute. This reflected the proportionate increase of the amount disbursed to US companies from anti-dumping and countervailing duties collected on EU products, as had been published in the latest distribution of October 2009. This showed that duties continued to be distributed to the US industry. Once again, the EU wished to ask the United States when it would effectively stop the transfer of those duties to the US industry and hence, put an end to the condemned measure. The EU also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports in this dispute.

47. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB Agenda. The United States was required to submit status reports in this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue be "resolved" within the meaning of Article 21.6 of the DSU and the United States would be released from its obligation to provide status reports in this dispute.

48. The representative of Canada said that his country agreed with the EU and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

49. The representative of India said that his country thanked the EU and Japan for bringing this issue before the DSB, once again, and shared their concerns. India remained disappointed at the US maintenance of the WTO-inconsistent disbursements. As had been mentioned by previous speakers, the CDSOA remained fully operational and allowed for disbursements by the US administration to its domestic industry. This fact continued to raise concerns to WTO Members. As reiterated in the past, India was concerned that non-compliance by Members would lead to the erosion of the credibility of the WTO dispute settlement system. India agreed with the EU and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

50. The representative of China said that her country thanked the EU and Japan for, once again, bringing this matter before the DSB. China shared the concerns expressed by previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings.

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[7] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/fy09_annual_report.xml.

[8] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml.

51. The representative Thailand said that his country thanked Japan and the EU for continuing to bring this item before the DSB and supported the statements made by previous speakers. Thailand continued to urge the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume providing status reports until such actions were taken and this matter was fully resolved.

52. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Furthermore, the United States recalled that Members, including the EU and Japan, had previously acknowledged during past DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, some two-and-a-half years ago. With respect to comments regarding further DSB surveillance in this matter, as it had already been explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

53. The DSB took note of the statements.

3. European Communities – Export subsidies on sugar

(a) Statements by Australia, Brazil and Thailand

54. The Chairman said that the item was on the Agenda of the present meeting at the request of Australia, Brazil and Thailand.

55. The representative of Australia, speaking also on behalf of Brazil and Thailand, said that Australia, Brazil and Thailand wished to recall their statements made at the meetings of the DSB of 18 February 2010, 19 March 2010 and 20 April 2010, and in the Committee on Agriculture on 10 March 2010, expressing their concern at the recent decision of the EU to export out-of-quota sugar in excess of its annual scheduled quantity commitment level of 1.2735 million tonnes. The EU had justified its decision on the basis of high world sugar prices at the time. However, as had been mentioned at the 20 April DSB meeting, these additional exports had negatively affected market sentiment and had driven world prices down. Australia, Brazil and Thailand continued to be concerned by the EU's action. Furthermore, by signalling to EU sugar producers that excess out-of-quota sugar could be exported, the EU risked a continuous cycle of overproduction and artificially depressed global prices, unwinding the important reforms undertaken by the EU following the "EC -Sugar" dispute findings. As Members would recall, the EU had offered to provide the necessary technical information underpinning its decision to export additional sugar. It had subsequently withdrawn that offer. Australia, Brazil and Thailand urged the EU to provide the necessary technical information, and to justify the WTO-consistency of its decision to export additional sugar.

56. The representative of the European Union said that, at previous DSB meetings, the EU had already highlighted that its decision to export 0.5 million tonnes of sugar was a temporary measure, adopted in view of the exceptional market conditions at both the EU and world level, world prices being at a record high level creating a shortage of sugar which affected importing developing countries. The EU did not expect those market conditions to last beyond the season 2009-2010. The exports of 0.5 million tonnes had now been exhausted and the EU had not renewed that temporary decision. The decision fully respected the EU's international obligations as the quantities on sale were not subsidized and happened at a time when world sugar prices were higher than EU production costs and EU producers had become much more competitive following the drastic overhaul of the EU

Common Market Organisation for sugar. The EU continued to respect its WTO commitments and reiterated its insistence on its right to engage in international trade, even if competing exporters of other WTO Members would have, for rather obvious reasons of commercial interest, preferred otherwise. The EU continued to offer its readiness to continue a dialogue regarding the background underpinning its temporary decision to export sugar.

57. The representative of the United States said that his country had been a third party in this dispute and had followed it with interest. The United States had also taken note of the statements made at the present meeting and at the three previous DSB meetings on this Agenda item. The United States, therefore, was puzzled at the situation that the EU had offered to provide the technical information supporting its decision to export out-of-quota sugar in excess of its scheduled quantity commitment and had not followed through on that offer. The United States had heard a lot from the EU, including at the present meeting, about the importance of providing information to Members relating to implementation of the DSB's recommendations and rulings. This situation would appear to the United States to be a particularly good opportunity for the EU to live up to those standards and provide Members with information to address their concerns about the EU's implementation of its WTO commitments.

58. The DSB took note of the statements.

4. Korea – Anti-dumping duties on imports of certain paper from Indonesia

(a) Statement by Indonesia

59. The Chairman said that the item was on the Agenda of the present meeting at the request of Indonesia.

60. The representative of Indonesia said that his country thanked the DSB for the opportunity to make a statement at the present meeting regarding Korea's continued imposition of WTO-inconsistent anti-dumping measures on certain paper products from Indonesia. Korea had initially imposed anti-dumping measures on imports of paper from Indonesia in September 2003, six years ago. Those measures had twice been challenged in dispute settlement proceedings and had been found twice to be inconsistent with Korea's obligations under the Anti-Dumping Agreement. Indonesia was disappointed that despite two adverse Panel's rulings, Korea had not taken more positive steps to treat Indonesia's exporters in a manner consistent with Korea's obligations under the Anti-Dumping Agreement. Following the ruling of the Article 21.5 Panel in September 2007 that Korea's measure remained WTO-inconsistent, Indonesia could have requested the right to retaliate against Korea, but in a spirit of good will and cooperation it had decided not to do so. As a matter of law, Indonesia retained the right to request authorization from the DSB to retaliate in light of the Article 21.5 Panel's finding. Indonesia noted that, notwithstanding the fact that it had maintained a WTO-inconsistent measure for six years, Korea had recently initiated a sunset review of this measure, the second such review since the measure was imposed. Given that the measure had been found twice to be WTO-inconsistent, Indonesia expected Korea to allow the measure to expire without conducting a further sunset review. Indonesia, therefore, considered it appropriate that Korea terminate the current sunset review and allow the WTO-inconsistent measure to expire. In the event that Korea would not allow the WTO-inconsistent measure to expire, Indonesia would have no choice, but to assert its rights under the Anti-Dumping Agreement and the DSU.

61. The representative of Korea said that his country wished to express its disappointment with Indonesia's statement asserting that Korea had somehow failed to implement the DSB's decision of 22 October 2007 concerning this dispute. In fact, as Indonesia was well aware, Korea had taken additional steps following the October 2007 DSB decision to fully correct the problems identified in the Compliance Panel Report that had been adopted by the DSB. Those steps had been completed in

August 2008. Korea reminded Members that the Compliance Panel ruling adopted by the DSB in October 2007 had found only two procedural faults with Korea's original implementation. The Compliance Panel had not found any substantive violation of the Anti-Dumping Agreement in Korea's original implementation. Following the adoption of the Compliance Panel's Report by the DSB, Korea had corrected the procedural faults the Compliance Panel had identified, and had duly delivered the results to Indonesia in August 2008. In that regard, Korea would welcome any opportunity to discuss Korea's implementation with Indonesia at any time. In the meantime, Korea, once again, confirmed that all of the DSB's recommendations had been implemented, and it, therefore, respectfully rejected Indonesia's claim, which was without merit. With respect to the sunset review referred to by Indonesia at the present meeting, he said that, in January 2010, Korea's authorities had decided to start the sunset review on the Indonesian paper upon application by the relevant industry. Korea would take into consideration the possible implication for the sunset review on the past WTO dispute with Indonesia and was paying attention to the review process, so that the results would comply with both the WTO Agreements and Korean laws.

62. The DSB took note of the statements.

5. United States – Use of zeroing in anti-dumping measures involving products from Korea

(a) Request for the establishment of a panel by Korea (WT/DS402/3)

63. The Chairman recalled that the DSB had considered this matter at its meeting on 20 April 2010 and had agreed to revert to it. He drew attention to the communication from Korea contained in document WT/DS402/3, and invited the representative of Korea to speak.

64. The representative of Korea said that the US practice of "zeroing" in anti-dumping investigations was a long-standing issue that had been discussed on numerous occasions at previous DSB meetings. Korea had joined other Members in bringing this practice before the WTO dispute settlement system in November 2009. Since that time, Korea had tried sincerely and repeatedly to find a mutually convenient way to resolve the dispute but could not find a solution. Therefore, on 8 April 2010, Korea had requested that a panel be established with respect to the use of zeroing by the United States in anti-dumping investigations on stainless steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades. The request had been discussed at the previous DSB meeting held on 20 April 2010, but the United States had opposed the establishment of a panel at that time. Korea considered the US measures to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Zeroing in anti-dumping investigations had been found inconsistent with the Anti-Dumping Agreement by numerous panels whose decisions had not been appealed by the United States. Korea noted that the United States had announced that it would no longer utilize zeroing in investigations that were pending as of 22 February 2007. But this change in US practice had not remedied the problem with the above-mentioned measures on products from Korea. Korea, therefore, requested that the DSB establish a panel pursuant to Article 6 of the DSU, with standard terms of reference, to examine the matters described in Korea's panel request.

65. The representative of the United States said that his country was disappointed that Korea had chosen to pursue its request for a panel in this matter. Of course, the United States understood that a panel would be established at the present meeting. The United States, nonetheless, hoped that it would be able to continue its dialogue with Korea about this matter.

66. 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.

67. The representatives of China, the European Union, Japan, Mexico, Thailand and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

6. United States – Anti-dumping measures on certain shrimp from Viet Nam

(a) Request for the establishment of a panel by Viet Nam (WT/DS404/5)

68. The Chairman recalled that the DSB had considered this matter at its meeting on 20 April 2010 and had agreed to revert to it. He drew attention to the communication from Viet Nam contained in document WT/DS404/5, and invited the representative of Viet Nam to speak.

69. The representative of Viet Nam said that, upon the instruction of his authorities, his country had timely submitted a second request for the establishment of a panel in the DS404 dispute, which related to the application of zeroing of a country-wide rate, and the refusal of the United States to provide individual company rates for parties requesting such rates in periodic reviews in connection with the anti-dumping measures imposed on frozen warm water shrimp from Viet Nam. Viet Nam's request for the establishment of a panel had been circulated in document WT/DS404/5, dated 9 April 2010. Viet Nam believed that one purpose of the DSU was to promote resolution of disputes through discussions between the parties. Therefore, Viet Nam welcomed the opportunity to resolve this dispute at any time during this process. Viet Nam believed that it was fully justified in proceeding with this second request and pursuing the relevant issues through the panel and the Appellate Body process.

70. The representative of the United States said that his country was disappointed that Viet Nam had chosen to pursue its request for a panel in this matter. As it had observed at the previous DSB meeting, the United States had serious concerns about this panel request. For example, the panel request included: (i) items that had not been identified in Viet Nam's request for consultations, and thus had not been the subject of consultations; (ii) proceedings that had been initiated pursuant to applications received prior to Viet Nam's Accession to the WTO, which were not subject to the Anti-Dumping Agreement and were not properly a subject of review by a WTO dispute settlement panel; (iii) proceedings that had not yet been completed, and thus were not measures that a panel could review; and (iv) a measure described by Viet Nam as the "initiation" of the sunset review, though without a summary of the legal basis of Viet Nam's complaint sufficient to present clearly the alleged problem with the initiation of the sunset review. Viet Nam had not addressed these concerns, which the United States had also identified at the previous DSB meeting on 20 April. Hence, the United States continued to strongly urge Viet Nam to reconsider its decision to pursue a panel in this dispute. Nevertheless, the United States understood that a panel would be established at the present meeting, and looked forward to the opportunity to present its views to that panel.

71. 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.

72. The representatives of the European Union, Japan, Korea, Mexico and Thailand reserved their third-party rights to participate in the Panel's proceedings.

7. European Union – Anti-dumping measures on certain footwear from China

(a) Request for the establishment of a panel by China (WT/DS405/2)

73. The Chairman recalled that the DSB had considered this matter at its meeting on 20 April 2010 and had agreed to revert to it. He drew attention to the communication from China contained in document WT/DS405/2, and invited the representative of China to speak.

74. The representative of China said that, at the 20 April 2010 DSB meeting, her country had stated its concerns and had provided the legal basis regarding the measures identified in its panel request, which had been circulated in document WT/DS405/2. In the interest of time, China would

not repeat them at the present meeting. China wished to further emphasize that the EU anti-dumping measures had a very serious impairment on the interests of Chinese industries. To give but one example, the measures had negatively affected the jobs and livelihood of around 150,000 workers employed in the production of leather footwear. Unfortunately, although China had repeatedly expressed its serious concerns to the EU on several occasions, both bilaterally and multilaterally, thus far it had not been possible to resolve this matter. As a result, in the absence of any other option and given the immediate and systematic consequences of the EU's anti-dumping measure, China had to renew its request to the DSB for the establishment of a panel in order to resolve this dispute.

75. The representative of the European Union said that her delegation had noted the second request by China for the establishment of a panel. The EU regretted the step taken by China and considered it to be premature, in particular as China had decided not to complete the consultations. The EU recalled that the anti-dumping measures for which China was seeking a panel were not about protectionism, but about fighting unfair trade. The EU strictly followed the applicable WTO rules in all its anti-dumping cases and was strongly convinced of the strength of its case. The EU stood ready to defend its measures, which it considered to be fully consistent with WTO law.

76. 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.

77. The representatives of Australia, Brazil, Japan, Turkey, Viet Nam and the United States reserved their third-party rights to participate in the Panel's proceedings.

8. Proposed amendments to the Working Procedures for Appellate Review (WT/AB/WP/W/10)

78. The Chairman said that, as announced at the 19 March 2010 regular DSB meeting and reconfirmed at the informal DSB meeting on 20 April 2010, this matter had been placed on the Agenda of the present meeting pursuant to the "Additional Procedures for Consultations between the Chairperson of the DSB and the WTO Members in relation to Amendments to the Working Procedures for Appellate Review" contained in document WT/DSB/31. The purpose of this Agenda item was to provide delegations with a formal opportunity to comment for the record on the amendments proposed by the Appellate Body, as set out in document WT/AB/WP/W/10. Delegations had already had an informal exchange of views on the proposed amendments at the informal meeting on 20 April 2010. Moreover, pursuant to the 2002 DSB Decision, delegations would also be given an opportunity to provide written comments. In that regard, at the request of some delegations it had been agreed to extend the original deadline for submission of written comments until close-of-business on 26 May 2010. In accordance with paragraph 4 of the 2002 DSB Decision, delegations' views presented at the present meeting, as well as all written comments received by 26 May 2010[9], would be promptly conveyed to the Appellate Body along with the request that the Appellate Body take them into account. As some delegations might be aware, following the 20 April informal DSB meeting, the Chairman had received a letter from Ecuador concerning its proposal to hold an informal interactive meeting with members of the Appellate Body concerning the proposed amendments. It was the Chairman's understanding that Ecuador intended to make a formal proposal to this effect at the present meeting and would seek the views of other Members on its proposal. With that by way of introduction, he invited delegations to provide their views on the proposed amendments for the record, beginning with the delegation of Ecuador.

[9] Written comments on the proposed amendments are contained in the Annex to these Minutes.

79. The representative of Ecuador said that his country's statement on the proposed amendments to the Working Procedures for Appellate Review would consist of two parts. The first part related to procedure and the second one to the three Appellate Body's proposals. With regard to procedure, Ecuador reiterated that it had always supported the work done by the Appellate Body; i.e. Appellate Body members and the Secretariat. He recalled that in its statements to various WTO Councils and Committees, Ecuador had expressed its view that the Appellate Body's recommendations and rulings were invaluable to consistent and correct interpretations of WTO Agreements. Accordingly, as Ecuador had done at the informal DSB meeting on 20 April 2010, and in its letter addressed to the Chairman of the DSB on 28 April 2010, at the present meting, Ecuador again wished to ask the Chairman of the DSB to convey its request to the Chairman of the Appellate Body or his representative to hold an interactive informal meeting with WTO Members to enable them to obtain more information and make further comments on the Appellate Body's proposals, in order to understand better the proposals so as to be able to submit more precise written comments. He noted that on 4 May 2010, Ecuador had received the Chairman's response to its letter of 28 April, and at the present meeting Ecuador wished to express its disagreement with the Chairman's response to this letter. Ecuador did not consider that, at the 20 April informal DSB meeting, there was a lack of consensus with regard to its proposal. The proposal, in no way, sought to modify the 2002 DSB Decision as that Decision contained no reference to informal meetings. He noted that, at the 20 April informal DSB meeting, no delegation had spoken against Ecuador's proposal to hold an interactive meeting with the Appellate Body on the proposed amendments or the US proposal to extend the deadline for submission of written comments until 26 May 2010. Furthermore, some delegations had supported Ecuador's proposal. Ecuador hoped that, at the present meeting, Members would again express their views on its proposal. He underlined that, by making its proposal, Ecuador did not seek to delay the submission of written comments by the agreed deadline of 26 May.

80. Turning to the comments on the Appellate Body proposals, he said that with regard to the time-lines for written submissions, Ecuador had two concerns. While sympathetic to the Appellate Body's intention to make this proposal, namely to allow it more time to prepare its work, and hence to maintain its high standard of work, within the time-limit set out in Article 17.5 of the DSU, Ecuador had two concerns regarding this proposal. The first one was whether or not there was a need to maintain the Notice of Appeal if it were to be filed on the same day as the appellant's written submission. Ecuador wondered what would happen in the hypothetical case that not all the information required for the Notice of Appeal or the appellant's submission was supplied. Which information would prevail? Ecuador also wondered whether it would serve any purpose to maintain the possibility to amend Notices of Appeal under Rule 23*bis*. Ecuador understood that the Appellate Body's intention to make this proposal was to gain time for the preparation of its work. However, to maintain Rule 23*bis* or different requirements for the Notice of Appeal and the appellant's submission could delay the dispute even further or allow for preliminary issues to be raised so as to delay the consideration of the case.

81. Ecuador's second concern related to the proposal to modify the timetable for appeals, which implied taking away three days from the submission of the appellee so as to benefit submissions by third participants. In Ecuador's view, that proposal created an imbalance between the parties and had to be redressed. A possible solution would be to try to maintain the due dates for appellee(s)' submissions as they currently stood, and bring forward the due date for third participants' submissions to one day after. This would give the Appellate Body a few more days to prepare for hearings, but would not cause an imbalance in the parties' timetable.

82. With regard to the electronic filing and service of documents, he said that the proposal appeared to pursue an orderly submission of documents, but introduced inflexible deadlines since it modified the rights of parties from different time-zones. It introduced a number of conditions such as certification of the authenticity of the paper copies as compared to the electronic copy. Ecuador wondered what would happen in the event of failure to comply with some part of this provision. For

example, could Rule 29 be invoked, under which the Appellate Body division may even dismiss the appeal? Furthermore, who would compare the texts to check for any discrepancies? The Appellate Body was unlikely to do this since it had already indicated that its staff was too small to make copies. Ecuador also pointed out that no deadline was set in the event that one of the parties decided to submit its documents in the form of paper copies. Ecuador was also concerned about the vast number of copies that the Appellate Body requested for each dispute, at least 20. Ecuador failed to see the need for so many copies since the Appellate Body had electronic versions of documents, which could be photocopied by the Secretariat. Maybe the same number of copies would be required if the proposal was adopted and a party decided to send its documents by e-mail.

83. Ecuador had the most concerns with regard to the proposal for consolidation of appellate proceedings. In Ecuador's view, it was not appropriate for the Appellate Body to have the authority and on its own initiative to consolidate proceedings or decide on the form in which the final report was to be issued. Although the Appellate Body had always acted in good faith and with good will, it was, unlike the parties, unable to see the full picture of the dispute in terms of its implications for retaliation, negotiations, the search for a mutually agreed solution, or even political consequences. Ecuador had doubts about certain subjective criteria or concepts regarding the Appellate Body's decision as to whether or not to consolidate proceedings or issue a single report or separate reports, or reports in the form of a single document or in multiple documents. Ecuador was concerned about two concepts, namely, "substantial overlap in the content"; and the proposal that the Appellate Body would issue a single report "unless, following a request of a participant, it considers that there are good reasons to issue separate reports". According to the first concept, the Appellate Body would be free to decide what was meant by "substantial overlap in the content". The second concept placed the burden of proof on one of the parties as to the need to issue separate reports, and the Appellate Body would always have the final decision over the proof offered. Ecuador was also concerned about the reference in the proposal to Article 17.5 of the DSU, since this could give rise to some misunderstandings. In particular, it could prompt the Appellate Body to decide in haste to consolidate proceedings or issue a single report if it was under pressure to meet the time-limit set out in Article 17.5 of the DSU. Like other Members, Ecuador failed to see how consolidation of proceedings could be initiated prior to the constitution of the Appellate Body division which would hear the case.

84. Finally, with regard to the process, Ecuador, which consistently spoke in favour of transparency and inclusion in the WTO, failed to understand why a Member would not wish to share its written comments on the proposed amendments with other Members. Ecuador would certainly share its written comments on this matter with other Members.

85. The representative of Costa Rica said that his country thanked the Chairman for the opportunity to provide comments on the amendments to the Working Procedures for Appellate Review proposed by the Appellate Body. He said that Costa Rica had no major problem with the proposal that an appellant's written submission be filed on the same day as a Notice of Appeal. However, as his delegation had previously stated, the relationship between the Notice of Appeal and the first written submission should be clarified. Furthermore, Costa Rica noted that the Appellate Body had proposed to reduce by three days the time-period for the appellee to file its submission. In Costa Rica's view, this could affect the participation of an appellee who would not be familiar with all the arguments or substance until the appellant had filed its first submission. Costa Rica, therefore, had problems with this element of the proposal.

86. With regard to the electronic filing and service of documents, he said that, although Costa Rica recognized that e-filing was currently extensively used, it had doubts with regard to the need to file a signed certification stating that the paper copies were identical to the electronic copy since, in any event, according to the proposal, only the electronic copy would be taken into account in case of any discrepancy. In addition, if only the electronic copy were to be taken into account,

Costa Rica was concerned about the integrity of information filed by electronic means and the mechanism to ascertain the reliability of the sender, since it might take the form of an electronic signature, a procedure which was currently not used in the WTO. It was also necessary to clarify who would verify that the paper copy was identical to the electronic copy and what would be the consequences in the event of any discrepancy.

87. Finally, Costa Rica was concerned about various aspects of the proposal on consolidation of appellate proceedings. Costa Rica failed to understand why the Appellate Body had proposed a different way of proceeding than that set out under Article 9 of the DSU with regard to procedures for multiple complainants at the panel stage. Article 9 of the DSU provided for consolidation of proceedings and specified that if one of the parties to the dispute so requested, the panel would circulate separate reports without the need to justify such a request. The conditions proposed by the Appellate Body were not the same since the Appellate Body would decide to consolidate the appellate proceedings and would assess whether there were good reasons to issue separate reports, thereby placing the burden of proof on the parties to the dispute. Costa Rica considered that the change proposed by the Appellate Body had gone beyond mere amendment of its working procedures, because, by reserving for itself the final decision as to whether there was a substantial overlap in the content of the reports, it was addressing a substantive, not a procedural, matter. In concluding, he recalled that, as Costa Rica had stated at the informal DSB meeting on 20 April, a number of concepts in the proposal were not clear. For example, what was meant by "substantial overlap" or "around the same time", and what would constitute the "good reasons" for which it would be necessary to issue separate reports instead of a single report?

88. The representative of Chile said that his country thanked the Appellate Body for its proposals to amend the Working Procedures for Appellate Review and the explanation in support of the amendments. Chile believed that both the informal meeting held on 20 April 2010 and the present meeting were valuable opportunities for Members to express their views on the proposals under consideration. Turning to the substance of the proposal, he said that with regard to the proposal on time-lines for written submissions, Chile was in favour of the appellant's written submission being filed on the same day as the Notice of Appeal. Chile agreed with the Appellate Body's reasoning that such a change would contribute to a more efficient use of the time available. However, Chile had some concerns with regard to two aspects of that amendment. The first concern related to adjustments of subsequent time-lines in the appellate proceedings. In particular, Chile was concerned about the shortening of the time-period for the appellee to file its written submission. Chile considered that it was necessary to maintain the balance between the parties and, accordingly, requested that the Appellate Body reconsider that aspect of its proposal in order to give the appellee more time before filing its written submission. Chile's second concern was related to the fact that the Notice of Appeal would be maintained. Chile was not convinced that this was necessary if the deadline for filing the appellant's written submission were to be brought forward. In Chile's view, the purpose of the Notice of Appeal would be achieved by means of the appellant's written submission (to set out the scope of appellate review).

89. With regard to the electronic filing and service of documents, Chile believed that it was appropriate to encourage the use of electronic means in panel and the Appellate Body proceedings. However, Chile had serious doubts regarding this proposal. Why was it necessary to require the paper copies if a party had decided to file documents by electronic means? What was the purpose of requiring certification that the electronic copy was identical to the paper copy if, in case of discrepancy, only the electronic copy would be taken into account? It seemed that, although the overall objectives of the proposal were positive, the wording of the amendments proposed would not help to achieve those objectives.

90. Finally, Chile was most concerned about the proposal on consolidation of appellate proceedings since that proposal seriously reduced the participation of the parties to the dispute regarding the consolidation of proceedings. In Chile's view, it was critical that the parties to the dispute agree to proceed towards consolidations. Chile disagreed with the reasons provided by the Appellate Body regarding this proposal. There was no need to codify the practice. It was preferable to continue with *ad hoc* decisions on a case-by-case basis, which would take into account the specificities of the case and the positions of the parties to dispute. Accordingly, Chile requested that the Appellate Body reconsider this proposal in order to preserve the parties' right to decide on and to control the course of the proceedings. Chile hoped that its comments would be useful and would help the Appellate Body to reach the best decision from the systemic point of view.

91. The representative of Brazil said that his country thanked the Chairman for the opportunity to provide views on the Appellate Body's proposed amendments to its Working Procedures. In Brazil's view, proposals that sought to improve the operation of the WTO dispute settlement procedures should always be welcomed. As a matter of principle, however, Brazil also believed that Members were the ultimate users and beneficiaries of the system. In that regard, Brazil accordingly believed that Members' views and concerns regarding any proposed changes to the dispute settlement procedures should be a central element leading to the decisions that, in this case, would eventually be taken by the Appellate Body with respect to its Working Procedures. With regard to the specific proposals, he said that Brazil wished to take them up in an order slightly different from the one presented by the Appellate Body, starting with the proposal on electronic filing and service of documents. Brazil was in principle sympathetic to this idea. Although it was not clear what would be the immediate procedural gain to the Appellate Body, the proposal could serve to facilitate the orderly and timely filing of documents, sparing Members the hectic moments of last-minute reproduction of paper copies, not rarely subject to technical glitches. However, Brazil would expect that paper copies by the parties on the following day would continue to be provided. Brazil could also accept the filing of a certification to the effect that electronic and paper submissions were identical and that, in case of discrepancy, the electronic version would prevail, as long as nothing more than that was said. As a word of caution, however, Brazil noted that there might still be many potential technical problems related to security, authenticity, software compatibility and reliability that should be properly dealt with before migrating to a system of electronic filing.

92. With regard to the proposal on consolidation of appellate proceedings, although Brazil understood that consolidation could certainly contribute to a more efficient use of resources, it was not clear to Brazil in the first place why the Appellate Body would wish to codify it in the Working Procedures instead of simply keeping the practice which, to Brazil's knowledge, was functioning well. The Appellate Body had explained that "consolidation refers to cases in which merged appellate proceedings were conducted regarding separate disputes that were not consolidated before a single panel" and that "consolidation of appellate proceedings has occurred where separate disputes were reviewed by separate panels composed of the same individuals". However, the proposed amendment did not actually reflect those situations, if they were in fact intended to be the target of the proposal. The language suggested by the Appellate Body contained at least three elements that deserved careful reflection: (i) an apparently significant margin of discretion implied by the condition "if [the Appellate Body] considers that a substantial overlap in the content of appeals is likely"; (ii) the role accorded to consultations with Members – from the content of the proposal, it would appear that the Appellate Body could make a decision on consolidation that might be contrary to the position expressed by a participant or even by all participants for that matter; and (iii) the issue of single or separate reports. With respect to the third issue, Brazil recalled that, pursuant to Article 9.2 of the DSU, even where a single panel reviewed separate disputes, Members had the right to request the panel to issue separate reports. Under the proposed amendment, the Appellate Body would appear to have the discretion to deny a similar request even in cases reviewed by separate panels. Although the two proposals might have their problems and possibly unintended implications, it appeared to Brazil

that the principles behind them were legitimate and in line with the objective of making a more efficient use of resources.

93. However, the proposed amendment that caused Brazil the gravest concern was the one regarding the time-line for written submissions. Brazil could not have been more emphatic on how disturbed it was by the proposal and its practical effects, which could be envisaged looking ahead. First, there was the proposal to file the Notice of Appeal and the appellant's submission on the same date. The Appellate Body had justified that proposal at considerable length. Although the set of changes proposed by the Appellate Body did not seem to tackle the gist of the time-line problem as outlined in the DSU, the simultaneous filing of both documents was arguably a burden many Members could live with. It was a burden, because in Brazil's experience, and possibly that of many other Members, every day counted and time was never enough to finalize submissions. However, the other adjustments further down the time-line were not similarly accompanied by justification. In this regard, Brazil wished to repeat some of the points made at the informal DSB meeting held on 20 April 2010. The Appellate Body had given reasons for three changes in relative terms only and without reference to specific deadlines: (i) that the Notice of Other Appeal and the other appellant's submission be filed on the same date; (ii) that the time-period between submissions in appeals and other appeals be approximated; and (iii) that third parties file their submissions after the appellee's submission was received. However, there was no justification for the proposal that, for example, the appellee's submission be due 15 days after the filing of a Notice of Appeal; or that an other appellant's submission be due five days after the filing of a Notice of Appeal.

94. One could argue that those changes would be of lesser consequence for Members if one were to accept two assumptions: (i) that, in an appeal, the appellee's work only began after it received the appellant's submission (and nothing was done before that date after it received the Notice of Appeal); and (ii) that, when the appellee received the other party's Notice of Appeal, the decision to file an other appeal had already been made and the other appellant's submission had to a large extent already been drafted. In Brazil's experience none of these assumptions was true. For an appellee, the current 7-day period between the original Notice of Appeal and the appellant's submission was not a "waiting period". Work was already being done during those seven days, both organizational and substantive, in reaction to the specific points raised by the other party in its Notice of Appeal. The amount of time involved in preparation of the appellee's arguments and submission, therefore, was currently not just 18 days counted as of receipt of the appellant's submission, but 25 days counted as of receipt of the Notice of Appeal. According to the proposal, this time-period would be reduced to 15 days. It was thus not about a 3-day reduction, but about the suppression of ten days that Members currently had to work as appellees after the beginning of an appeal. Moreover, in Brazil's experience, the decision to file an other appeal was considerably a reflection of the first appeal. Some of those other appeals, for instance, were conditional on the Appellate Body's rulings with respect to the first appeal. The Appellate Body, however, was proposing not only that the deadline for such a decision be cut by almost two thirds from 12 to five days. It was also proposing that the other appellant's submission be also filed only five days after receipt of the original Notice of Appeal, a full two-thirds cut in relation to the current time-frame. All those proposed reductions seemed to be too drastic. The resulting deadlines might give the Appellate Body more time to discharge its duties, but this would happen at the expense of the already compressed time-table of Members. Brazil believed that the proposed adjustments would have a negative impact on the ability of developing countries to participate effectively in the Appellate Body's proceedings. One should not assume that every Member had the capacity to spend resources in guessing what the other party might appeal or how an other appeal could accordingly be framed before the appellate proceedings effectively began.

95. Brazil reiterated that it would be prepared to work with Members, the DSB Chairman, the Appellate Body and the Secretariat to identify means to address any logistical or procedural difficulties faced by the Appellate Body in carrying out its work. Brazil considered the work of the Appellate Body to be of the highest quality, and of the greatest value to the WTO. The real motive of

this time-line quandary seemed to rest, it was not difficult to find out, on the increasing complexity of disputes, on the one hand, and on the disproportionately tight time-frames faced by the Appellate Body and Members in order to meet the deadlines set out in the DSU provisions. The real solution, then, would seem to lie in a change to the DSU provisions, allowing for adequate additional time for the Appellate Body to discharge its task. Brazil would be ready to discuss this course of action with other Members. The current proposal, however, did not seem to be an adequate response to those difficulties. If it was true, that given the growing size of panel records and the increased complexity of disputes, the Appellate Body may find itself working under tight time-frames to meet the deadline foreseen in the DSU provisions, it was no less true that Members were also affected by the growing size of the records and the complexity of disputes. It was also true that the time-frames provided for Members in the current Working Procedures were already tight. From Brazil's perspective, there was no reason to assume that Members currently enjoyed a margin that could be cut into so as to further reduce those time-frames. Some Members might have such a margin. Others did not. Brazil believed that the Appellate Body's proposal, if adopted, could have a negative impact on the ability of developing countries to participate effectively in appellate proceedings. In conclusion, Brazil once again thanked the Chairman for the opportunity to express its views on this issue, which Brazil considered to be of great importance.

96. The representative of Guatemala said that his country thanked the Chairman for convening the meeting and the opportunity to formally comment on the Appellate Body's proposed amendments to its Working Procedures for Appellate Review. Guatemala wished to share its observations about those proposed amendments and would refer to the three issues under discussion in the following order: (i) the filing of the appellant's submission on the same day as the Notice of Appeal; (ii) the authorization to file and to serve documents electronically; and (iii) the consolidation of appellate proceedings. On the first issue, Guatemala supported the idea of making a more efficient use of time and resources, including the possibility of giving third participants the opportunity to review all documents before filing their respective submissions. Guatemala believed that any amendment to the Working Procedures should take into consideration both the needs and interests of the Appellate Body as well as those of all participants in a given dispute. While the Appellate Body's proposal moved in that direction, Guatemala considered that there were still some elements that needed to be addressed. Particularly, the legal effects of the Notice of Appeal and the imbalance between the deadlines provided for each of the appellees in cases of cross appeals.

97. Concerning the first issue (i.e. the legal effects of the Notice of Appeal), Guatemala no longer saw the need to give certain legal effects to the Notice of Appeal: namely, the effect of commencement of an appeal and the demarcation of the scope of appellate review. First, by filing the appellant's written submission on the same day as the Notice of Appeal, such notice would not necessarily "trigger" the appeal. In other words, the appeal could also be initiated by only filing the appellant's submission. Second, the appellant's submission set out detailed arguments in support of its position and spelled out the recommendations and rulings requested. It was more complete and elaborate than the Notice of Appeal, which only included a brief statement of the nature of the appeal. By submitting both documents on the same day, Guatemala did not see the utility of "demarcating" the scope of appellate review through the Notice of Appeal when the appellant's submission explained in detail the scope of such appellate review. Therefore, Guatemala suggested that the Appellate Body consider maintaining the Notice of Appeal only for transparency purposes. In Guatemala's view, the function of demarcating the scope of the appellate review, as well as triggering the appeal, would be fulfilled by the appellant's submission. Further, a way to clearly differentiate the legal effects of these documents could be the institution of the obligation to submit such Notice of Appeal "x" number of days after the filing of the appellant's submission.

98. Regarding the second issue (i.e. the imbalance between the deadlines provided for each of the appellees in cases where there were cross appeals), Guatemala observed that the Appellate Body proposed a reduction of three days from the deadline previously provided for appellees submissions

after the filing of the appellant's submission. However, there still remained a difference of five days between the deadline for the appellee to file its submission after the filing of the appellant's submission and the deadline for the appellee to file its submission after the filing of the other appellant's submission. In Guatemala's view, this could be solved if the Appellate Body had addressed the issue of the legal effects of the Notice of Appeal and had provided for the filing of the appellant's submission and the other appellant's submission on the same day. Therefore, Guatemala proposed that the appeal be triggered by the notification under Article 16.4 of the DSU. Pursuant to this provision, a panel report "shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal.....". In this regard, the appellant would only need to formally notify the DSB of its decision to appeal (and not necessarily to describe the scope and content of the appeal). Guatemala proposed that the appellant file its submission five days after the presentation of a formal notification of a decision to appeal under Article 16.4 of the DSU. In cases where there were cross appeals, it was also proposed that the other appellant file its submission on the same day as that provided for the filing of the appellant's submission. The reason was that both the appellant and the other appellant would have the same period of time to read and analyze the final panel report and commence their preparation for the appeal. Consequently, the proposed period of five days between the formal notification under Article 16.4 of the DSU and the filing of those submissions was only intended to give the other appellant the necessary time to finalize and file its submission. This period of time was as long as the period of time proposed by the Appellate Body between the filing of the appellant's submission and the filing of the Notice of other Appeal and the other appellant's submission. It was proposed that both participants submit their respective Notices of Appeal two days after the filing of the appellant's and other appellant's submissions. The idea of submitting such Notices of Appeal after the filing of the submissions was to make clear that the content of the Notices no longer had the effect of triggering the appeal or demarcating its scope. The Notices of Appeal would simply be the public documents notifying WTO Members of the commencement of an appeal and informing them of its nature. It was also proposed that both appellees file their respective submissions on day 20. This would eliminate the time difference that currently existed (and was maintained in the Appellate Body's proposal) between the deadlines for both appellees. Put another way, it would redress the existing imbalances between the appellees. Finally, after having had access to all submissions, third participants would have to file their submissions on day 23. In Guatemala's view the adjustments described above may contribute to improving the Appellate Body's proposal on this issue.

99. With regard to the second proposal (i.e. the authorization to file and serve documents electronically), as expressed by the Appellate Body, it had been the practice of participants to send a version of their documents by electronic mail to the Appellate Body registry on the day the documents were due, followed by the same-day delivery of paper copies to the Appellate Body Secretariat. For this reason, the Appellate Body had considered it "appropriate, and practical, to explicitly allow electronic filing of documents in appellate proceedings". In addition, the Appellate Body had anticipated that authorizing the submission of documents electronically "would assist participants and third participants in the filing process and better accord with their actual working practices". In light of the above, the Appellate Body had proposed a new Rule 18(1)*bis* in the Working Procedures. In general terms, this proposed rule would give the participants the "option" to file documents through electronic mail. Should the participants decide to submit a document through electronic mail, such a document would have to be sent by 5 p.m. on the day such document was due, with the obligation to deliver paper copies to the Appellate Body no later than 11 a.m. the following day. In addition, the paper copies would have to be accompanied by a signed certification stating that they were identical to the electronic copy. Furthermore, the Appellate Body had proposed that in case of any discrepancy between the electronic copy and the paper copies, only the electronic copy would be taken into account. In Guatemala's view, the only advantage of the proposed amendments was to give the participants a couple of extra hours to edit and correct their documents before submitting them electronically. In effect, participants deciding to file electronically would have until 11 a.m. of the following day to print, staple and deliver the paper copies to the Appellate Body Secretariat. While

this could be very convenient for the participants, especially those that must consult with their respective capitals in different time zones, the proposal contained however, some elements of concern to Guatemala. One of the elements was the fact that current technology did not guarantee on-time delivery of electronic communications. It was a common problem that electronic mails, especially those including big amounts of information, reached the servers of the recipients some minutes, hours or maybe days after the moment they had actually been sent. Even though the Appellate Body provided for a confirmation of receipt by its Secretariat, there was no clear indication about the consequences of late arrival of electronic communications. Electronic communications registered the date and time of reception. According to Rule 29, it could be the case that any communication arriving after 5 p.m. may be considered as a failure to submit a document "within the required time-periods". In Guatemala's view, this uncertainty could be resolved if the Appellate Body avoided including the expression "by 5 p.m." in its proposal. Another element of concern to Guatemala was the "signed certification" stating that the paper copies were identical to the electronic copy. There was no indication as to who had to issue such certification. Neither was there an indication of the merit of such certification if, in case of any discrepancy between the electronic copy and paper copies, only the electronic copy would be taken into account by the Appellate Body. This, in Guatemala's view, would require that both the electronic version and the paper copies be reviewed, thereby creating an unnecessary burden on the Appellate Body Secretariat and the participants. Therefore, Guatemala suggested that the Appellate Body also consider the possibility of eliminating the requirement of certification as well. Finally, In Guatemala's view, the Appellate Body should allow either the submission of electronic files or paper copies, but not both.

100. With regard to the last proposal, the consolidation of appellate proceedings, according to the Appellate Body, where two or more disputes shared a high degree of commonality, consolidation of appellate proceedings had proven to be a pragmatic way of conducting appeals, as it maximized the efficient use of resources available to the parties, third parties and the Appellate Body. In addition, the Appellate Body had stated that consolidation of appellate proceedings fostered consistency in decision-making as well. For those reasons, on certain occasions, the Appellate Body had deemed it appropriate to consolidate appeals of separate panel reports into single appellate proceedings by establishing a single division and conducting a single oral hearing. The Appellate Body had found a legal basis for the consolidated appellate proceedings in Rule 16(1) of the Working Procedures. That rule provided that the Appellate Body may "adopt an appropriate procedure for purposes of [a given] appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and [the Working Procedures]". Furthermore, the Appellate Body had clarified that decisions to consolidate appellate proceedings had been made on an ad hoc basis in consultation with the parties. In its view, the frequent resort to consolidated proceedings made it appropriate "to codify this practice" by adding a rule on consolidation to the Working Procedures. Guatemala supported the idea of having clear rules regarding consolidation of appellate proceedings. It may enhance legal certainty and increase predictability. Nevertheless, Guatemala had doubts about the manner in which the Appellate Body had interpreted current practice. In Guatemala's view, current practice existed because the parties had understood the advantages of consolidation and had given their consent to it. Furthermore, to the best of Guatemala's knowledge, there was no precedent of any party opposing consolidation. This, probably, was due to the fact that both the Appellate Body and the parties had carefully analyzed all necessary elements to guarantee that due process was respected for each single appellate proceedings that was consolidated. However, looking at the proposal, it seemed that the Appellate Body could take a decision to consolidate, even if any or all the parties opposed such consolidation. Guatemala did not believe that this would be a reflection of current practice.

101. In addition, Guatemala noted that the Appellate Body had made an important effort in defining the parameters for consolidation. Nevertheless, by doing so, the Appellate Body had also introduced some phrases that may eventually be problematic and subject to different interpretations, such as "around the same time", "and/or" and "substantial overlap" in the first sentence; or "good reasons" in the penultimate sentence, to mention some examples. Moreover, there was no clear

indication as to why the Appellate Body had decided to use the expression "substantial overlap in the content of [the panel reports]" in the first sentence and "substantial overlap in the content of the appeals" in the second sentence. Without more information than that provided in the Appellate Body's proposal, Guatemala assumed that the second sentence would authorize the Appellate Body to take a decision to consolidate appellate proceedings, without consultations with the parties, if it considered that the overlap in the content of the appeals was likely.

102. With respect to the issuance of the reports, the Appellate Body had basically stated that, by default, it would issue a single report. If there was a request of a participant and "there are good reasons", the Appellate Body may issue separate reports, in a "single document" or in "multiple documents". While there appeared to be a nuance (although not necessarily a clear one) between a "single report" and "separate reports in a single document", Guatemala would have preferred to see reflected in the Appellate Body's proposal only two options: either a single report (logically in a single document) or separate reports (in separate documents). Furthermore, in Guatemala's view, in single reports the Appellate Body should include separate pages containing the rulings and recommendations resulting from each appeal. Since not necessarily all appeals may refer to the same issues of law, this practice would be helpful in determining the specific results for each of them. Guatemala suggested the elimination of "separate reports in a single document" since this would avoid confusion with a "single report".

103. Finally he said that Guatemala would submit its written comments, which would reflect what it stated at the present meeting and would ask for those comments to be circulated to the rest of the Membership. With regard to Ecuador's proposal, Guatemala supported any initiative that was intended to spark informal discussion with the Members and with the Appellate Body.

104. The Chairman said that since delegations would also have the opportunity to submit written comments on the proposed amendments by 26 May 2010, they might wish to consider this in the context of how they would wish to intervene at the present meeting.

105. The representative of Egypt said that her country thanked the Chairman and the Appellate Body for providing the opportunity to comment on the proposed amendments to the Working Procedures for Appellate Review. Concerning the time-line for written submissions, despite having no practical experience with the Working Procedures for Appellate Review and understanding the reasons for the proposed changes, Egypt considered that requiring appellants to file their written submission on the day of the filing of appeal would impose an additional constraint on those Members who had little dispute settlement experience and expertise. While Egypt recognized that Members normally had time after the circulation of the interim and final panel reports, a one-week shortening of the period available to file an appellant submission should not be deemed insignificant. Egypt reiterated that Members with limited experience and expertise already faced difficulties, similar to those faced by the Appellate Body, with the existing deadlines. In Egypt's view, a shortening of the time available to appellants to file their written submission to the benefit of the Appellate Body was not the most appropriate solution to the problem identified by the Appellate Body.

106. Regarding the electronic filing and service of documents, Egypt agreed with the Appellate Body that it was appropriate and practical to explicitly allow electronic filing of documents in appellate proceedings. Egypt also welcomed the possibility offered to Members to continue to use the existing rules for the filing of documents.

107. Finally, in connection with consolidation of appellate proceedings, Egypt considered that the consolidation of appellate proceedings was appropriate in some cases and that, given the multiplication of consolidated proceedings in recent years, the Appellate Body was justified in proposing that specific rules be adopted in this respect. However, Egypt considered that, under the proposed rules, the Appellate Body would enjoy too great a discretion. Even though consultations

with the parties were provided for in the proposal, Egypt would prefer a greater involvement of the parties, as they were directly affected by the decision of the Appellate Body to consolidate or not, and in the form of the consolidation.

108. The representative of China said that first her country wished to say a few words on the issue of the means of communication between WTO Members and the Appellate Body. China believed that the previous practice carried out in accordance with the 2002 Decision was agreeable. China believed that the views and the positions of the WTO Members could be conveyed to both the Chairman and the members of the Appellate Body authentically and completely through the DSB Chairman. China did not see a need to change this practice at this stage. China thanked the Appellate Body and its Secretariat for their great efforts regarding the proposed amendments to the Working Procedures for Appellate Review. China considered that the practices to date had proven that the Working Procedures worked quite well, contributing significantly to the efficient settlement of disputes among Members. Thus China shared the view of the Appellate Body that the Working Procedures had operated smoothly and effectively. China recognized that there might be room for further improvements and clarifications of the DSU and practical experiences. With regard to the proposed amendments to the Working Procedures under consideration, China believed that a number of principles should be observed and in the interest of time it would not intend to repeat them as they would be included in China's written comments and had already been outlined by China at the informal DSB meeting on 20 April 2010.

109. With respect to the details of the proposed amendments, China wished to make the following comments. First, with regard to the time-line for written submissions, China understood and was able to accommodate the proposal to request the appellant to submit its written submission when an appeal was commenced, on the same day as the filing of a Notice of Appeal. As to the effect of the Notice of Appeal, China believed that the current practice had its value in terms of its jurisdictional meaning and hoped that this could be maintained. China had serious concerns on the proposal to shorten the period of time allocated to the appellee from 18 days to 15 days. China did not wish to repeat the reason for this as this would be included in its written comments. With respect to the timing of submissions by third participants, China considered that, because third participants still had an opportunity to make comments on the submissions of the appellee and other third participants during the oral hearing, whether or not a third participant was given an extra three days to prepare its submission would not impair its substantive rights.

110. With regard to the electronic filing and service of documents, China acknowledged that electronic files were widely used nowadays as the result of the evolution of technology. In proposing Rule 18(1)*bis*, the Appellate Body had also stated that in proposing to authorize expressly electronic filing, it did not intend to eliminate the need to file paper copies with the Appellate Body Secretariat and indeed anticipated having hard copies of submissions following Members' emails. Members who did not wish to file documents through electronic means could file paper copies as contemplated in Rule 18(1). Based on this understanding, China had the following comments. The content of electronic filing should include an electronic cover letter (a scanned one) signed by officials of Members so that the authenticity and legality of the filed documents could be assessed. According to the proposed amendment, after the document had been submitted through e-mail, Members would receive confirmation from the Secretariat. In practice, this would require both the Secretariat and the submitting Member to allocate a special person to monitor e-mails on a specific day. Furthermore, if Members sent e-mails on time but had not received confirmation from the Secretariat by 5 p.m., or if non-attributable technical problems occurred and resulted in e-mails not being correctly or properly received, it was not clear from the proposed Rule 18(1)*bis* whether Members who submitted the documents would be regarded as having done so within the required time-frame. According to the proposed Rule 18(1)*bis*, hard copies of electronic documents shall be delivered to the Appellate Body no later than 11 a.m. the following day. Otherwise a document sent by e-mail would not be considered duly filed. It was not very clear to China what purpose this requirement (submission of

hard copies) would serve if an electronic document was submitted on time and the Secretariat confirmed its receipt. Indeed, it would simply add to the logistical burden of Members who chose to use e-mail transmission and reduce the convenience and advantages of electronic filing compared with filing of hard copies. Furthermore, because the proposed Rule 18(1)*bis* stipulated that the electronic copy would prevail in case of discrepancy, it seemed unnecessary to further require a signed certification from Members stating that the paper copies are identical to the electronic copy.

111. With regard to consolidation of appellate proceedings, China understood the intention of the Appellate Body to make good use of available resources. China also understood that consolidation of appellate proceedings had been handled properly on a case-by-case basis in the past. China also appreciated prior efforts of the Appellate Body to keep decision-making consistent and consolidate certain particular disputes after full consultations with the parties, and getting agreement from them. China considered prior practices as evidence that the previous approach adopted by the Appellate Body, namely consulting with the parties and obtaining consensus from them, operated smoothly and effectively and had the full support and cooperation from Members. There seemed to have been no big practical problems and the Appellate Body in its proposal did not inform Members of any problems that would make a change imperative. Thus, China did not think it was necessary to make changes as proposed in Rule 16(1)*bis*. Having said that, with respect to the detail of the proposed Rule 16(1)*bis*, China observed that the definition of "substantial overlap" was not clear from the text of Rule 16(1)*bis*. The proposed Rule 16(1)*bis* stated that the Appellate Body may consolidate appellate proceedings "upon request by a party or on its own initiative" and "after consultations with the parties". It seemed from the text that the Appellate Body could consolidate proceedings even if the parties to the dispute disagreed. Under such a scenario, it was difficult to understand how the appellate proceedings could operate efficiently and smoothly without the voluntary cooperation from the parties to the disputes. It seemed a great challenge to fully ensure that Members' rights, bestowed by the DSU, would not be impaired or prejudiced. The consolidation of appellate proceedings in different disputes would necessarily lead to a number of procedural questions. For instance: how to guarantee that the confidentiality requirements in the DSU would be fully observed in consolidated appellate proceedings of different disputes to which the parties and third parities were not the same? What was the legal basis in the DSU for a non-third party participant to observe the Appellate Body hearing? The text of Rule 16(1)*bis* seemingly did not provide a clear answer. Finally, China thanked the DSB Chairman for the opportunity to express its views on this matter.

112. The representative of Turkey said that his country thanked the Appellate Body and its Secretariat for their work towards improving the Working Procedures with a view to reflecting several years of practical experience. Turkey also thanked the Chairman for giving Members the opportunity to comment on those proposals and believed that any proposal to facilitate the appeal process would be useful for all Members and would be a very positive exercise. In general terms, in Turkey's view amendments should not nullify or impair the rights and obligations of WTO Members. They should not impose disproportionate burden on the parties. The amendments should alleviate the unnecessary burden and time pressure on the Appellate Body. In addition to this, the needs and the views of the developing-country Members, which had significant difficulties in participating in the dispute settlement system should be taken into account. At the present meeting, Turkey wished to make specific comments regarding the proposed amendments to the Working Procedures of the Appellate Body.

113. With respect to the time-lines for written submissions, Turkey supported the proposal to eliminate the 7-day period between filing of the Notice of Appeal and filing of the appellant's submission, and similarly where there was an other appeal. However, this proposal was based on two assumptions. The first assumption was that the appellant did not work on its submission after filing the Notice of Appeal. The second assumption was that the appellee did not work after receiving the Notice of Appeal. Turkey believed that both of the assumptions were invalid and unfounded. The Notice of Appeal was an "early warning mechanism" not only for the appellee, but also for the third

parties. It contained information including a brief statement of the nature of the appeal as stated in Rule 20(2)(d). This information was significant for the appellee to be informed. The information gave the appellee and third parties an opportunity to prepare themselves and be ready for the appellant's claims. In that respect, taking into account the elimination of the benefit of the Notice of Appeal for the appellee, shortening the seven day period for the appellant to file its submission did not have the same effect for the appellee. Therefore, Turkey strongly believed that the proposed 15 days for the appellee should be at least 18 days. In addition, taking into account that the Notice of Appeal was the only publicly available document, Turkey considered that it should be retained for the sake of transparency.

114. Turkey welcomed the time-line changes for third parties. It was an important improvement to enhance third-party rights in the appellate process. Turkey supported giving an opportunity to the third participants, after having seen the arguments of the appellant and the responses of the appellee, to submit their arguments in this respect. Turkey considered that this change also provided a sequencing process for the appellate stage parallel to that which existed at the panel stage. However, Turkey also believed that three days were not really sufficient time for third participants to consider and reflect upon the appellee submissions and take them into account when drafting their third participant submissions. In Turkey's view, increasing this time period to five days would provide a more realistic time-frame for third participants to respond properly to the issues raised by the interested parties. This would allow third participants sufficient time to prepare a fully considered submission that addressed issues raised not only by the appellant, but also by the appellee. Turkey considered that any additional time allowed for third participants to prepare their submissions should not be allocated at the expense of the time allocated for the appellee to prepare its submission.

115. With respect to electronic filing, Turkey supported any amendment that would encourage electronic filing. Turkey believed that submission of documents electronically would assist interested parties and third parties in the filing process and better accord with the Appellate Body's Working Procedures. However, in Turkey's view, the proposed amendment did not encourage electronic filing, because it did not eliminate the need to file paper copies. The amendment proposed two alternatives. One was to submit both an electronic copy and paper copies; the other was to submit only paper copies. Turkey considered that there should be no requirement to submit additional paper copies for those Members who submitted electronic filing in due time. In addition to this, Turkey had some technical questions regarding the proposal. What would happen if there was a last minute technical problem in sending an electronic file or receiving a confirmation message? If that was the case, would the deadline of 11 a.m. the following day for the paper copies also be valid? Why would paper copies have prevalence over electronic filing? Who would be the authorized person to sign the certification stating that the paper copies were identical with the electronic copy? If the electronic copy had prevalence over the paper copies why was there a need for such a certification?

116. With respect to consolidation of appeals, Turkey supported the consolidation of appellate proceedings in certain circumstances as was the general practice of the Appellate Body in certain appellate proceedings. One of the main aspects of this proposal was to give discretion to the Appellate Body to consolidate the appeals even disregarding the view of the parties. The proposal stated that: "The Appellate Body may take such a decision if it considers that a substantial overlap in the content of the appeals is likely". In Turkey's view, this created problems because the proposal allowed the Appellate Body to consolidate with or without the parties' consent. The question of how the process would move forward without the parties' cooperation should be addressed. Turkey believed that the parties' consent or at least no objection was probably a necessary precondition to this consolidation. Turkey believed that the terms "a substantial overlap" and "likely" were vague and ambiguous in the language of the proposed amendment. With respect to the single report, the proposed amendment assumed that the Appellate Body would always issue a single report unless a reasonable request was received from the participants. As it had been drafted, the proposal imposed

the burden of proving the need for separate reports on the participants. Turkey considered that this burden of proof should be addressed.

117. With regard to Ecuador's proposal, he said that Turkey supported the proposal and welcomed the suggestion for the Appellate Body to address some of the questions that Members had so as to have a better understanding of the purpose of the amendments. Finally, Turkey wished to highlight its support for the Appellate Body for its on-going efforts to improve the Working Procedures. Turkey also thanked the Appellate Body and its Secretariat for tabling the proposed amendments and for the opportunity to comment on them.

118. The representative of Peru said that her country thanked the Chairman for convening the present meeting as well as the informal meeting DSB held on 20 April to enable Members to exchange views on the three amendments proposed by the Appellate Body. Peru appreciated and supported the idea of working towards the improvements of the Working Procedures to help the Appellate Body to make better-quality decisions. Peru agreed with Brazil and Turkey that the interests of Members, as users of the system, were at stake regarding those procedures. Peru hoped that the views of Members, and in particular developing-country Members, would be taken into account by the Appellate Body. With regard to Ecuador's proposal for a meeting with the Appellate Body, she said that Peru had no objection to holding such a meeting since this would enable Members to have a better understanding of the proposals and would help the Appellate Body to understand Members' comments.

119. With regard to the proposal that the appellant's written submission be filed on the same day as the Notice of Appeal and for all of the other deadlines for written submissions, the Notice of Other Appeal and third-party notifications to be advanced, Peru considered that, although the proposal contained positive elements, the time available to the appellant to file its written submission, including substantive arguments, would be reduced by seven days. Likewise, the new time-line would imply a significant reduction in the time available to the appellee to file its submission. This would have a particular impact for developing countries in the preparation of their defence, given budgetary and institutional limitations of developing countries. If this proposal was approved, it would also affect certain rules of procedure for Appellate Review, such as Rule 23*bis* concerning the amendment of Notices of Appeal, which, in Peru's view, would have to be eliminated. Similarly, in operative terms, the implementation of this proposal would require simplification of certain inherent processes given the reduction in the time available to the parties. Peru considered that the proposal would worsen the situation of the parties involved in the appellate proceedings and would have a significant impact on developing countries due to their limitations in preparing their defence.

120. With regard to the proposal concerning the explicit authorization, subject to certain conditions, of electronic filing and service of documents, Peru believed that this was positive to the extent that the electronic filing of documents was an option, and that if the parties opted for that possibility, the electronic copy should prevail. This was logical since the version submitted by the deadline should prevail. Otherwise, the procedure could be abused and, for example, an electronic version could be submitted in order to meet the deadline, followed by a "finished" version.

121. The proposal on consolidation of procedures appeared reasonable, provided that, in addition to a substantial overlap in the content of panel reports, the cases were the same, and that the parties were not only consulted, but their approval had to be sought. Thus, Peru considered that if the parties, or one of the parties, disagreed and had grounds for disagreeing, the Appellate Body should not consolidate the proceedings. With regard to the proposed consultations with the parties, the new procedures should clarify the scope of such consultations.

122. The representative of Australia said that, in principle, her country was sympathetic to the Appellate Body's intention to amend the Working Procedures to address: (i) the time-lines for written submissions; (ii) electronic filing; and (iii) consolidation of appeals. However, Australia was concerned that the underlying rationale and objectives for certain aspects of the proposed amendments were unclear, with a resulting lack of clarity in some aspects of the drafting of each of the proposed amendments. Australia was also concerned that the amendments should balance the needs of the Appellate Body with those of the parties to an appeal. Accordingly, Australia had specific comments on the proposed amendments.

123. With regard to time-tines for written submissions, the Appellate Body had suggested a number of adjustments to the time-lines for appellate proceedings. In Australia's view, any adjustments needed to maintain a balance between the needs of the Appellate Body, parties to the appeal and third participants. Like others, Australia supported the proposal to eliminate the seven-day period between filing the Notice of Appeal and lodgement of the appellant submission, and for a corresponding adjustment to the times for lodgement of a Notice of Other Appeal and other appellant submission. Australia noted comments from some Members questioning the continued need for a Notice of Appeal and a Notice of Other Appeal. These had been provided for in Rules 20(1) and 23(1) of the Working Procedures respectively. In Australia's view, the Notices were important transparency tools in the appeal process, and may provide the only public document on the record that would inform Members not party to the appeal and the public generally of the existence, nature and scope of the appeal. Australia, therefore, supported their retention. That said, Australia could support the scope of the appeal being delineated either by the Notices of Appeal or by the appellant submissions themselves. Given that under the proposal, both documents would be filed at the same time, Australia would assume that the contents of those documents would be consistent. Australia was sympathetic to the time pressures faced by the Appellate Body in the appeals process. However, Australia was conscious that the current time-table already placed severe pressure on the appellee and was concerned that a reduction in the time available to the appellee following receipt of the principal appellant submission would disturb the current equilibrium of the parties' rights, disadvantaging the appellee. To maintain the current equilibrium, Australia suggested that appellee submissions should be filed on the 18th day following commencement of the appeal, rather than on the 15th day as proposed by the Appellate Body.

124. Australia supported the Appellate Body's proposal that additional time be allocated to third participants to prepare their submissions following lodgement of appellee submissions. Such additional time would allow third participants time to reflect on arguments raised in appellee submissions in addition to those raised in appellant submissions, and to offer a view in their written submissions, as was the case in panel proceedings. Parties to the dispute and the Appellate Body would then have adequate time to consider third participants' perspectives on the totality of the issues under review ahead of the oral hearing. Questioning of third participants at the oral hearing could, as a result, be focused on those aspects of third participant submissions of most interest to the Appellate Body. However, Australia questioned whether three days was sufficient time for third participants to prepare submissions that commented meaningfully on arguments that may be raised in appellee submissions. Australia thought that a more realistic time frame would be for third participants to be required to lodge their submissions on the fifth day following lodgement of appellee submissions. That said, Australia wanted to emphasize that any additional time allowed for third participants to prepare their submissions should not be allocated at the expense of the time allocated to the parties to the dispute to prepare their submissions. Australia noted that the time-table for prohibited subsidies appeals would largely be determined by the final time-table decided for general appeals. As in the case of general appeals, Australia supported the Appellate Body's proposal that third participants be allocated some additional time to prepare their submissions. As with general appeals, however, Australia thought that the additional time should be such as to allow third participants to comment meaningfully on arguments in appellee submissions. For that reason, Australia thought that third participant submissions should be lodged on the third day after appellee submissions.

125. With regard to electronic filing, Australia supported the proposal to authorize electronic filing and service of documents, and noted that the Australian court systems had implemented effective electronic filing systems. That said, Australia noted the valid technical and procedural issues raised by some Members would require clarification if the proposed amendment were to be taken forward. Australia also wondered about the requirement to file submissions in hard copy as well as electronically.

126. With regard to the consolidation of appeals, Australia supported the consolidation of appeal proceedings in certain circumstances, and noted that consolidation had occurred in certain proceedings in the past. However, Australia was unclear as to the rationale for the proposed amendment, given the relative infrequency of consolidated appeal proceedings and the availability of Rule 16(1). Australia would appreciate clarification of the problem that was being sought to be remedied. In any case, Australia noted that the proposed amendments raised a number of questions, the answers to which were not clear on the face of the current draft. Would proceedings be consolidated only where the proceedings concerned the same measures of the same respondent? Would proceedings be consolidated only where there were similar claims in respect of the same measures of the same respondent? Would proceedings be consolidated where there were similar claims in respect of similar measures of different respondents? Could a party to the dispute object to the consolidation of proceedings and, if so, on what basis? Could the Appellate Body reject a party to the dispute's request for separate reports to be issued and, if so, on what basis? At what point would consolidation of appeal proceedings have to be requested by a party to the dispute or decided upon by the Appellate Body on its own initiative? For example, would such a request or decision have to be made before an appeal was formally initiated for one, or both, of the relevant proceedings?

127. On procedural issues, with regard to Ecuador's request for an informal interactive exchange with the Appellate Body members on the proposed revisions, Australia noted that there was no impediment in principle to such a meeting being held, and recalled that in the past the Appellate Body members had met with the Membership off-campus, in the context of the DSU review negotiations. However, Australia was concerned that the time for implementing such a proposal was constrained by the 26 May 2010 deadline for written comments and would not wish to see any delay in the consideration of the proposals. Australia also noted that as a full supporter of transparency, it would request that its written comments on the proposals be circulated to the Appellate Body members and to the Membership. In conclusion, Australia thanked the Appellate Body for the circulation of its draft proposed amendments. Australia thought it was important that the Working Procedures were periodically reviewed to ensure their continued effectiveness. Australia commended the Appellate Body for its ongoing efforts to streamline and improve the procedures.

128. The representative of Singapore said that her country thanked the Appellate Body for the proposed amendments to its Working Procedures and the Chairman for making the discussion on them possible. Singapore viewed the present meeting as an inclusive and transparent way of discussing the amendments and how best to refine them. Singapore was presenting its comments in order to provide feedback to the Appellate Body so that the proposals could be further refined. The Working Procedures for Appellate Review and their amendments were not only important for the appeal proceedings, they could have important implications on procedures for panel proceedings and, even possibly, set precedents for procedures in other fora which may look to the WTO as a model for international dispute settlement. In principle, Singapore supported the Appellate Body's efforts to clarify its Working Procedures, facilitate proceedings and make its work more efficient, so long as they did not undermine the parties' rights. Singapore wished to highlight some of its concerns with the proposals.

129. With regard to the proposed amendments relating to time-lines, Singapore welcomed the proposal to give third parties the opportunity to consider both the appellee's and appellant's submissions, before their own submissions were due. This would enable third parties to provide more

considered and balanced submissions. In fact, like Turkey and Australia, Singapore questioned whether three days were sufficient and preferred that more time be given to third parties to consider the appellee's submission. However, this improvement should not be at the expense of the appellee. Singapore, therefore, urged that together with the improvement for third parties, the existing timeline of 18 days after the appellant's submission be maintained for the appellee to file its submission.

130. With regard to the amendments relating to electronic filing, Singapore recognized that electronic filing was the trend. In fact, in its domestic courts, documents for civil litigation were electronically filed. In principle, Singapore supported the initiative for documents to be filed electronically. Singapore recognized that electronic filing could substantially reduce many paper copies of submissions that had to be currently submitted. However, Singapore was concerned that there was no information on the system supporting electronic filing. For electronic filing to be relied on as a mode of submission envisaged by the proposal, the system must address: (i) security of confidential information that may be contained in the submission; (ii) format of the documents submitted; and (iii) veracity of the identity of the sender, and accuracy and certainty of time. Singapore found the information on these matters missing. They needed to be addressed before parties could rely on electronic filing with confidence in the integrity of the system.

131. With regard to the amendments relating to consolidation, Singapore supported the efforts to consolidate proceedings and reports. Singapore was aware that consolidation took place in practice and noted that the proposal took a very different approach from Article 9 of the DSU. Singapore was concerned about this difference and that the proposal seemed to go beyond what Singapore understood was the current practice and may prejudice the parties. In particular, Singapore was concerned that: (i) the proposal seemed to allow consolidation of proceedings to take place even if parties did not agree to it; (ii) there needed to be "good reasons" before there could be separate reports (even separate reports in a single document), and the proposal provided for a single report as the default even though it may be difficult for parties to adopt and implement the rulings applicable to each of them separately from a single report; and (iii) the tests for consolidation of proceedings and when a report would be separated were not clearly defined. Singapore urged the Appellate Body to take into consideration the constructive views of Members which, in the end, had the same objective, namely, how best to make the appellate proceedings work.

132. The representative of Switzerland said that his country wished to take the opportunity to comment on the Appellate Body's proposals to amend the Working Procedures for Appellate Review. Switzerland thanked the Appellate Body for its detailed communication containing not only the proposed changes, but also the reasons for proposing those changes. Since many delegations had asked for the floor, Switzerland's statement would be very short. Switzerland particularly welcomed the proposed amendment to Rule 24 giving third parties the opportunity to take a written position on the arguments and reasoning of the parties. This would enable third participants to take a position prior to the date of the hearing. In addition, like Australia, Switzerland would propose that the deadline in this respect be extended by two days.

133. The representative of Korea said that his country believed that the three issues included in the proposed amendments to the Working Procedures provided a platform for productive discussions among Members in order to facilitate and improve the Appellate Body's proceedings. Korea also recognized the logistical burden the Appellate Body was currently facing in the course of discharging its duty under the DSU provisions within a relatively short time-frame. The pursuit of time-saving and efficiency, however, could sometimes lead to an unintended abridgement of Members' legitimate rights under the DSU in Appellate Body proceedings. Thus, Korea believed that discussions on the three proposed amendments should allow a proper balance to be struck between the two competing themes.

134. First, Korea recognized the underlying rationale for the proposal for simultaneous submission of the appellant's submission and its Notice of Appeal. However, like previous speakers, Korea noted that the initial 7-day period offered crucial opportunities to prepare overall strategies and develop legal arguments. Consequently, the simultaneous submission may undermine an appellant Member's ability to present its factual and legal claims effectively. In Korea's view, the merits and demerits of eliminating the 7-day preparation period for the appellant deserved careful consideration by Members.

135. Second, the proposed amendment suggested that Members consider wider application of recent IT technologies in Appellate Body proceedings. As a general matter, Korea regarded this proposal as appropriate and timely. Application of recent IT technologies, however, also posed new challenges such as confirming authenticity, preserving confidentiality and maintaining a reliable electronic submission system. The experience of other tribunals may shed some helpful light on how to deal with and overcome such new challenges.

136. Finally, with regard to the proposal for consolidation of multiple appellate proceedings, Korea shared the concern expressed by some Members that the proposal was somewhat vague and did not necessarily reflect current practice. In particular, as other speakers had already pointed out, it was not entirely clear from the proposed text whether or not the Appellate Body would retain the authority to consolidate multiple cases even in the absence of clear consent from the parties to the disputes. Such consolidation without the parties' consent might run the risk of undermining Members' legitimate right to appellate review, as guaranteed under Article 17 of the DSU. Korea looked forward to working closely with the Appellate Body and other Members to address the concerns the Appellate Body had raised in the proposed amendments.

137. The representative of Norway said that his country thanked the Chairman for providing Members with the opportunity to present their views on the proposed amendments to the Working Procedures for Appellate Review, contained in document WT/AB/WP/W/10. Norway was generally supportive of the proposed amendments. Even if the Working Procedures, in Norway's experience, operated well, it was possible to make further improvements, in light of how practice had evolved over time. The proposal by the Appellate Body consisted of three elements and Norway wished to comment on all of them.

138. Starting with the proposal to amend deadlines for written submissions, Norway was sympathetic to the wish of the Appellate Body to allocate, more efficiently, the limited time available for appellate proceedings. Norway understood that the 7-day period between a Notice of Appeal and the appellant's written submission seemed like an unnecessary waiting period, particularly in light of the increasingly complex appeals and lengthy written submission. As a Member that mostly participated as a third party in the proceedings, Norway also saw the benefit in moving the deadline for the third participants' submission to a separate day after the filing date for the appellee's submissions to afford the third participants a better opportunity to address all relevant arguments. However, Norway did understand the concerns raised by other Members with regard to the fact that other deadlines would have to be shorter than at present.

139. With regard to the proposal to expressly authorize electronic filing of submissions, Norway noted that this proposal would accord better with the actual practice of Members than what was currently in the Working Procedures. Furthermore, Norway understood that allowing electronic filing of submissions would be in line with trends in other international tribunals. Norway had, however, a comment regarding the proposed deadline for the service of paper copies. To accommodate Members that had limitations in their IT facilities, Norway wondered whether there should not in fact be an obligation to deliver paper copies of the submission on the same day as the electronic version. Time was a factor in appellate proceedings, and it, therefore, seemed to be of essence that all participants had access to submissions as soon as possible after the deadline for filing.

140. Finally, with regard to the proposal regarding consolidation of appellate proceedings, it was Norway's understanding that there had been several instances where the Appellate Body had consolidated appeals of separate panel reports into single appellate proceedings. In the absence of an express provision in the Working Procedures on such consolidation, this had been done pursuant to Rule 16 (1), which provided that the Appellate Body may adopt an appropriate procedure for a given appeal only. Norway believed that it would be a positive addition to the procedure to codify the practice of the Appellate Body in this regard. A codification would make the system more predictable for Members. Norway understood the concerns raised by some Members regarding the possibility that the Appellate Body would consolidate proceedings where the parties did not agree to this. In Norway's view, the obligation to consult with parties before making a decision on consolidation should be adequate.

141. The representative of the United States said that his country thanked the Chairman for the opportunity to provide views, in accordance with the December 2002 Decision of the DSB, on the proposed amendments to the Appellate Body Working Procedures. The process set out by the Chair had afforded delegations time to study the proposed amendments and exchange views on them, which had led to a deeper understanding of the proposals. On the basis of those exchanges, the explanations given by the Appellate Body, and, most importantly, the text of those proposed amendments, the United States wished to offer its views.

142. With regard to the time-line for written submissions, the United States first wished to address the proposal regarding filing of the appellant's submission on the same day as the Notice of Appeal and consequential changes to the deadlines. The United States joined other delegations in desiring to optimize the use of the time allotted to appeals. In particular, it had become increasingly apparent that the 90 days allotted for Appellate Body reports placed significant time pressure on the Appellate Body. Of course, the time-period was effectively less than 90 days once account was made for translation. Accordingly, it was important that the time be used productively. An appellant typically had a significant amount of time before filing an appeal to develop its appeal, including its appellant submission. As a result, the time currently provided between commencing an appeal and filing the appellant submission did not appear to be time that was being used as productively as it could be. Those seven days could better serve the system if they were used for the Appellate Body's work. An appellant should be able to prepare its appellant submission in advance such that it could be filed at the beginning of an appeal. Therefore, the United States was sympathetic to making the appellant submission due on the first day of an appeal.

143. However, this did raise questions about the continued role of a Notice of Appeal. The United States noted that the proposed amendments would retain the Notice of Appeal as a separate document. That Notice would continue to retain some role in expressing the scope of the appeal. This raised questions about whether there would be jurisdictional arguments in an appeal based on the Notice of Appeal. With the full appellant submission in hand, it was hard to understand why the Notice of Appeal should serve to limit or constrain the scope of appeal. Presumably the appellant intended its submission to be a full expression of its appeal. It would seem that there should be ways to provide the transparency currently afforded by a Notice of Appeal while avoiding the procedural issues that accompanied giving the Notice of Appeal some sort of jurisdictional status. Furthermore, it would seem contrary to the desire to use the time for an appeal as productively as possible to invite jurisdictional arguments based solely on the Notice of Appeal. The United States noted that Article 16.4 of the DSU required a Notice of Appeal, but that notice was to the DSB only, and it did not call for one to be filed with the Appellate Body. Therefore, it would appear that one option could be for the Appellate Body's Working Procedures to omit specifying any requirement for a Notice of Appeal to the Appellate Body and rely simply on the DSU.

144. With regard to the consequential changes to the deadlines, the United States said that the proposed amendments altered the subsequent deadlines after the filing of the appellant submission. While the United States understood the symmetry in also requiring the other appellant submission to be filed on the same day as the Notice of Appeal, the United States would have the same concerns regarding a Notice of Other Appeal as just expressed with respect to a Notice of Appeal. In other words, it would seem that there should be ways to provide the transparency currently afforded by a Notice of Other Appeal while avoiding the procedural issues that accompany giving the Notice some sort of jurisdictional status. Nor, the United States said, did there appear to be value in shortening the time for appellee submissions from 18 days to 15 days. As the Appellate Body had noted in the proposed amendments, "Appellants' submissions are typically the longest written submissions in an appeal". Accordingly, reducing the time for appellee submissions could prove particularly disadvantageous for an appellee. Nor did there appear to be value in changing the existing practice of the past 15 years so as to provide for third participant submissions to be filed after the appellee submissions. In the first place, it appeared odd that third participants should be provided an opportunity to respond in writing to the appellee submission(s) while the appellant did not have that opportunity. Second, the explanation for the proposal was to allow third participants time to respond to the appellee submission(s). However, in reality the additional three days proposed would not be sufficient time to prepare a written response to that appellee submission. That had been reflected in comments at the present meeting proposing to give third participants even more time to prepare their submissions. Moreover, the proposed change could undermine the objective of using the time for an appeal more productively. The United States assumed that the oral hearing was set for the earliest date possible after the appellee and third participant submissions, taking into account the need to review those submissions and prepare for the hearing. Providing for a later date for third participant submissions would imply delaying the hearing, thus reducing the time for the Appellate Body's deliberations and work during the 90-day period.

145. Turning to the second element of the proposed amendments – authorization, subject to certain conditions, to file and serve documents electronically – as an initial matter the United States noted that it appreciated the fact that filing electronic versions of documents had become much more prevalent since the Working Procedures were first developed. However, since it had become typical for Members to file an electronic version in addition to the paper copy, it was not clear why this amendment was needed or what was its value added, and it raised some concerns. The proposed amendment would appear to mean that a Member must either file only paper copies, or be subject to the new rules, including that the electronic version would prevail. The United States was concerned that this may discourage rather than encourage electronic filing. The United States had had previous instances in which differences in software or hardware, or merely transmitting via email, had meant that the electronic version appeared differently on one system than on another system. There was a concern about what it meant to say that the electronic version would prevail over the paper copy since in those circumstances there could be more than one electronic version. The United States also shared the concerns expressed by a number of delegations about the proposed requirement for a signed certification. It was not clear what the purpose of such a certification was other than to highlight the fact that allowing paper copies to be filed the following day could increase the chance that the paper copy would diverge from the electronic copy.

146. Finally, the United States wished to turn to the third element of the proposed amendments – consolidation of appellate proceedings. The proposed amendments raised a number of questions and concerns that had already been well-expressed by a number of other delegations at the present meeting. For example, consolidation of appeals to this point had been handled on a case-by-case basis and with the consent of the parties. The United States echoed one Member's comment that dealing with consolidation on a flexible basis was not a flaw in the system but a strength. The United States was not aware of any appeal in which parties had not consented to consolidation nor was it aware of any instance of consolidation over the objection of a party. The United States was concerned by the possibility raised by the proposal that the Appellate Body could consolidate two

appeals when at least one party said that it should not. Also troubling was the idea that the Appellate Body would decide to consolidate two appeals based on the Appellate Body's view that a substantial overlap in two appeals was "likely". This raised the question on what basis the Appellate Body would determine that a substantial overlap was "likely", perhaps even at a time when no appeal had yet been filed. Concerning issuing single or separate reports, the proposal also raised a number of questions. The United States was troubled by the possibility raised by the proposal that the Appellate Body could issue a single report covering appeals of separate panel reports when at least one party to the dispute said that it should not, and perhaps even where a party believed that its rights could or would be impaired by a single report.

147. With respect to the written comments that Members would provide, the United States intended to submit written comments and would welcome circulation of those comments. Circulation of written comments was appropriate for a number of reasons. First, the oral statements made at the present meeting would be contained in the DSB minutes, and the United States believed the written comments should be treated similarly. Second, the 2002 DSB Decision stated that the Chairperson of the DSB would request the Appellate Body to take the views of Members, including their written comments, into account. Circulation would make clear to Members and the Appellate Body what were the views to be taken into account. Third, circulation would assist Members in retrieving and viewing these written comments in the future. The United States, once again, thanked the Chairman for the opportunity to make its statement and for the opportunity to provide written comments. At the present meeting, delegations had made a number of very interesting comments which the United States would reflect on further.

148. The representative of Chinese Taipei said that her country appreciated the efforts made by the Appellate Body and its Secretariat towards putting forward the proposed amendments to the Working Procedures for Appellate Review. Noting the significant impacts that these proposed amendments might have on appellate proceedings and the WTO dispute settlement mechanism, Chinese Taipei wished to provide some observations on the proposed amendments. With respect to the first proposal, Chinese Taipei noted that, compared with the current 18-day period, appellees would have three days less to work on their submissions since such submissions would be due only 15 days after the filing of the Notice of Appeal and the appellant's submission. Chinese Taipei thought that this would constitute a drastic change that would put the appellees, especially developing-country Members, at a great disadvantage in the litigation process. Chinese Taipei, therefore, believed that it would be more reasonable to maintain the current rule of the filing of the appellees' submissions within 18 days.

149. With regard to the proposed amendment on the filing of third participants' submissions, which would be due three days after the filing deadline for appellees' submissions, Chinese Taipei viewed this adjustment as a positive development in the appellate review proceedings on the following grounds. First, the proceedings would be carried out pursuant to rules that were parallel to those at the panel stage, as provided in the DSU, where third parties get a chance to comment in writing after receiving both parties' written submissions. It would still allow the Appellate Body and all participants sufficient time to consider the arguments advanced by third participants before the oral hearing. Second, this would make the entire appellate proceeding more balanced between the interests of stakeholders of the dispute and the dispute settlement system, i.e. the appellant(s), appellee(s) and third participant(s). Therefore, Chinese Taipei supported the idea of providing third participants with an opportunity to respond to both the appellants' and the appellees' submissions in writing before the oral hearing. Chinese Taipei noticed that some of the previous speakers had suggested that the third participants' submissions be due five days after the filing deadline for appellees' submissions. Chinese Taipei welcomed this initiative and would have no problem with it.

150. With regard to the second and third proposals, Chinese Taipei noted that many Members had expressed their concerns and had requested further clarifications regarding the amendments. Chinese Taipei also found that it would need more careful reflection on those proposals at this stage. In

conclusion, Chinese Taipei appreciated the Appellate Body's hard work and looked forward to more balanced and agreeable amendments that accommodated not merely the efficiency of the appellate proceedings but also the expectations of most Members in structuring a fair and predictable dispute settlement system that properly balanced the rights and obligations of Members.

151. The representative of the Bolivarian Republic of Venezuela said that her country thanked the Appellate Body for the proposals to amend its Working Procedures, as set out in document WT/AB/WP/W/10, and for the informal meeting held by the DSB Chairman on 20 April 2010. Venezuela considered that it was important for Members, and in particular developing-country Members, to learn more about any advantages of such amendments as well as whom they benefited and why. Clarity in that regard was vital, as stated by Ecuador at the informal DSB meeting on 20 April 2010 when it had requested that an informal meeting be held with the Appellate Body regarding the proposed amendments. Since at the 20 April meeting no objection had been raised regarding Ecuador's proposal, Venezuela understood that there was a consensus on the proposal. She recalled that, at that meeting, another proposal put forward by one delegation regarding the deadline for filing written comments by 26 May 2010 had also been accepted without any objection. Venezuela supported Ecuador's request for an informal meeting with the Appellate Body Chairman. It was in the interest of Members to achieve an outcome from which they would not only derive greater benefits in the appeal proceedings, but would also see improvements to the Working Procedures for Appellate Review and ultimately a stronger multilateral trading system. This could be achieved through an exchange of views among Members and explanations provided by the Chairman of the Appellate Body, proposing new aspects to the proposals under consideration.

152. Venezuela was concerned about the proposal to file a written appellant's submission at the same time as the Notice of Appeal. The proposal made sense from a practical point of view, but did not appear feasible from a legal point of view due to the lack of balance and equality of opportunities among the parties, as underlined by some delegations. Combining the Notice of Appeal and the written appellate submission in a single document implied setting up different deadlines for the other appellants and an imbalance in the treatment of the parties to the proceedings, thereby worsening the existing asymmetry among WTO Members.

153. With regard to the proposal to file submissions by electronic means, she said that this set an official status requirement for electronic submissions as well. Venezuela considered, however, that the proposed amendment did not necessarily constitute an advantage for the parties from the legal point of view as compared to the current procedures, given that authenticity would continue to be contingent upon submission of paper copies to the Appellate Body. In addition, if inclusion of the amendment did not entail any legal consequences, it did not make sense to introduce the change as currently drafted. That did not mean that Venezuela disagreed with technological developments, but that in order to accommodate electronic notification of documents, language different to that set forth in the proposal had to be used for incorporating this change.

154. With regard to consolidation of appellate proceedings, Venezuela would not, in principle, have any objection to substantially similar appeals being consolidated in a single proceeding, provided that it was clearly established what the "substantial overlap" involved so as to avoid discretionary criteria and the decision falling solely within the Appellate Body's purview, because such a decision should be taken in consultation with the parties to the disputes.

155. Venezuela was ready to pursue the discussion aimed at improving the Appellate Body's Working Procedures, bearing in mind that the development dimension must be taken into account in any possible improvements to the WTO procedures, as had repeatedly been stated by Ministers at meetings of the Ministerial Conference, which was the highest WTO body.

156. The representative of Colombia said that with regard to the proposed amendment to file the appellant's written submission when the appeal was commenced, his country appreciated the reasons provided by the Appellate Body to have a more efficient time-line for appeals. This might increase the prospect of enhancing the quality of the Appellate Body reports. Colombia believed that the objective must be sought by trying to maintain the ability of the parties and third participants to respond to the arguments made both by the appellant/other appellant and the appellee(s). For that reason, Colombia was concerned about the proposed adjustments to the deadlines for the appellee's(s') submission(s) and the third participant's(s') submission(s). In Colombia's view, both the appellee(s) and the third participant(s) should have the chance to give a considered response both to the appellant(s) and the appellee(s). Such a response comprised two elements, written submission and the oral statement during the hearing. If the written submission was comprehensive enough, there would be less need to make new points in the oral statement, hence less chance that the Appellate Body would need to work after the hearing on issues additional to those already presented in the submission. Consequently, Colombia would rather keep the current 18-day period between the deadline for the appellant's submission and the appellee's(s') submission and supported the proposed 3-day period between the deadline for the appellee's(s') submission and the third participant's(s') submission. The additional time being requested for the appellee could be taken away from the other appellant's(s') deadline to give notice of the other appeal and present the submission. At the end, the other appellant(s) would have already had a period of time similar to the appellant to prepare the submission, and would only be waiting for the appellant's decision to appeal in order to take its (their) own decision.

157. With regard to the Notice of Appeal, Colombia noted that the Appellate Body's view was that it remained necessary because it triggered an appeal and served the function of demarcating the scope of appellate review in a specific dispute. However, Colombia noted that Articles 16.4 and 17.5 of the DSU made reference to the "formal notification to the DSB of the decision to appeal", which in essence was the very first step of an appeal, and could serve the transparency functions of the current Notice of Appeal. Thus, an additional feature that would increase efficiency would be to eliminate the Notice of Appeal and transfer its transparency functions to the formal notification of the decision to appeal. The function of demarcating the scope of appellate review would be fulfilled by the appellant's(s') submission(s). In the same fashion, the functions of the Notice of Other Appeal would be fulfilled by the notification of appeal provided by Rule 23(1) and by the other appellant's(s') submission. In any case, whether or not there would be changes to the rules regarding the existence and content of the Notice of Appeal, Colombia was of the view that there must be full clarity and precision about its nature, legal effects and format. If the Notice of Appeal and the Notice of Other Appeal were kept, it was Colombia's view that the scope of Rule 23*bis* should be clarified or amended, as necessary, to keep consistency between the Notice of Appeal and the submission.

158. With regard to the proposed amendment to consider duly filed documents and notifications sent by e-mail, Colombia appreciated the reasons provided by the Appellate Body to enhance the efficiency of the procedures by means of the use of technological tools. Colombia further appreciated that the proposal was presented as a non-mandatory alternative with enough time to process printed copies. Colombia had concerns related to the absence of any rule that regulated cases of insufficient or faulty electronic transmission of the documents and the nature, scope and format of the certification stating that the paper copies were identical to the electronic copy. Should an institutional electronic docket system guarantee the accuracy, timeliness, and confidentiality of documents, Colombia thought that the proposed modifications could serve as an appropriate basis for a possible regulatory framework. Meanwhile, Colombia thought that the rules could include the current practice to distribute documents in electronic form, including by e-mail, as a supplement to paper copies. The latter would continue to have their current value and deadlines.

159. With regard to the proposed new rule about consolidation of appellate proceedings, Colombia appreciated the Appellate Body's objectives to maximize the efficient use of resources available to itself, the parties and third participants and to promote the uniformity of Appellate Body decisions. Colombia was concerned about the role that parties would play in the implementation of the decision to consolidate and meeting the deadline for the appellate proceedings provided for by Article 17.5 of the DSU. Even if the parties did not affirmatively reject that the criteria and requirements to proceed with consolidation were fulfilled, nothing in the proposal guaranteed that the parties would have their own findings. Should consolidation be added to the Working Procedures, Colombia was of the view that the Appellate Body should issue separate reports in multiple documents upon request by a participant. In any case, Colombia wished to have more clarity regarding the requirements and procedure to adopt the decision to consolidate.

160. As it had indicated at the 20 April 2010 informal DSB meeting, Colombia would appreciate having more information from the Appellate Body regarding some aspects of the proposed amendments provided on a multilateral and transparent basis. Colombia supported Ecuador's proposal regarding this matter and hoped that the Chairman would find the most practical way to address it.

161. The representative of Japan said that his country thanked the Chairman for providing Members with the opportunity to formally present their views on the amendments to the Working Procedures for Appellate Review proposed by the Appellate Body.[10] Japan had carefully examined the proposed amendments and had benefited from the useful informal exchanges of views with other Members. The three proposed amendments were mutually independent and each one was a stand-alone proposal. Accordingly, each proposal should be considered on its own merit. That being said, Japan understood that the objective common to the proposed amendments was to "maximize[] the efficient use of" time and resources for those involved in appellate reviews.[11] Japan did not disagree with this underlying objective. However, any amendments that purported to embody this objective must be consistent with the DSU and should not introduce a new rule that may potentially cause any procedural complication at the appellate review stage. Japan's general approach in examining the proposed amendments was that: (i) any new or amended rules should be simple and easy to understand and operate without causing unnecessary procedural complications; (ii) any new or amended rules should be well balanced, taking due account of the interests of all participants in the appellate review proceeding; and (iii) anything to be regulated under the Working Procedures must be within the authority of the Appellate Body conferred under the DSU. Bearing this general approach in mind, Japan wished to turn to the specific proposals.

162. With regard to the time-line for written submissions, Japan attached utmost importance to the high quality of the Appellate Body reports, because such high quality reports had served and would continue to serve the very objective of the dispute settlement system. Under the DSU, the time period allowed for appellate proceedings was limited to 90 days. This had proved to be extremely challenging. Thus, even one working day may have a great marginal utility and could make a big difference. Under those circumstances, a reallocation of the timeline that would allow a better use of the limited time available for the Appellate Body may serve to maintain its high quality reports and should be considered positively. Given the preparatory time generally available for parties to disputes Japan was sympathetic to the proposal that an appellant's submission be filed on the day that a Notice of Appeal was filed. However, the time-constraint in appellate proceedings under the DSU also applied to the parties to the dispute. Thus, any change in the time-lines or an allocation of time in appellate proceedings must strike a proper balance amongst the interests of all participants in the

[10] Proposed Amendments to the Working Procedures for Appellate Review ("proposed amendments"), WT/AB/WP/W/10.

[11] Proposed amendments, p. 9, second paragraph from the top; see also proposed amendments, p. 5, first paragraph from the top.

proceedings. For example, under the proposed amendment, the time-period between an appellant submission and an appellee submission would be reduced from present 18 days to 15 days. Given the limited time available for appellate review, this could mean that the proposed amendment would change the allocation of the working time to the disadvantage of an appellee who would lose three working days. On balance Japan considered it to be reasonable to maintain the current 18 day period between the filing of an appellant submission and an appellee submission, as other delegations had argued. The Appellate Body also proposed that the date for filing of an other appellant submission be moved forward from day 15 to day 5. Since, like an appellant, the other appellant/appellee also had several months (from the issuance of interim report, for instance) to prepare for its other appeal, the Appellate Body might wish to consider the possibility of moving forward the date for filing the other appellant submission further (say, to day 3). In that way, the other appellant/appellee may be relieved of its burden somewhat by gaining extra days for the period between filing its other appellant submission and appellee submission, which was currently, and under the proposal as well, 10 days.

163. Under the proposed amendment, third parties would have three extra days from the filing of an appellee submission for preparing their submissions, which would presumably enable third participants to respond in their submission to the appellee's arguments. Japan understood that this proposed change purported to afford an opportunity for all participants and the Appellate Body to review and analyze all possible arguments to be presented in the proceeding prior to the oral hearing. However, Japan was not sure that, as a practical matter, three extra working days could make much difference in terms of thoroughness and the extent of coverage of the arguments in third participants' submissions. This was especially so from the perspective of a non-WTO official language speaking Member.

164. As the Appellate Body had noted, there was an emerging practice that electronic media and means were used for the filing of documents in the dispute settlement proceedings. Japan had no quarrel with the general proposition that the dispute settlement system was to be updated to, and keeping in line with, the evolution of technology that may allow the system to better and efficiently use such means and media. However, this must be done in full accord with the principle of procedural fairness and with due regard to the security and certainty of such delivery method and media. Under the proposed amendments, a party had an option as to the means of delivery. Assuming that one party decided not to file by electronic means for legitimate reasons (i.e. security or certainty concerns) but the other party decided otherwise, given the time needed for printing and other clerical works in the case of paper filing, the former must complete its substantive work on its submission much earlier than the latter. This would create a discrepancy in terms of the practical deadline for the works associated with the filings. In "a rules-based system of adjudication, such as that established under the DSU"[12], where a strict adherence to the principle of procedural fairness was required, Japan was not sure why having legitimate concerns about the security or certainty of filing methods would justify being treated differently. Further, the proposed Rule 18(4) appeared to assume that the means of serving a document (and the deadline) could or did differ depending on the recipients; i.e. between the Appellate Body and other parties to a dispute. Japan was not sure how such a different treatment could be justified in "a rules-based system of adjudication". Finally, Japan was not convinced that e-mail was a secure means of delivery in the dispute settlement proceeding because of the possibility of failure of mail servers of the Secretariat or Geneva missions of parties, mistyping of e-mail addresses, or e-mail spoofing. In addition, there would be discrepancies between the electronic version and what the party intended to submit due to the difference of the version or language setting of operational and/or word processing software. Japan considered that such concerns on the technical issues and security of delivery methods must be addressed.

[12] Appellate Body Report, "US - Continued Suspension", para. 433.

165. With regard to consolidation, Japan did not disagree with the Appellate Body's general observation that consolidation of appellate proceedings would "maximize[] the efficient use of resources available to" the participants in the proceedings and "foster[] consistency in decision-making".[13] However, it was Japan's understanding that consolidation of appellate proceedings had been made possible through the practical and pragmatic cooperation and agreement among the parties to the dispute. Given the voluntary nature of arrangements and practices to consolidate appellate proceedings that had worked well thus far, Japan was not quite sure that consolidation or practice thereof could be susceptible to a formal and hard regulation by the Appellate Body. Although the Appellate Body explained that the proposed rule was a codification of the existing practice, it appeared to Japan that the rule went beyond a simple codification of the existing practices and added new elements or rules to the process.

166. Japan had a number of questions conceptually, legally, and practically, to the proposed rule for consolidating appellate proceedings. For example, the proposed text indicated that the rule was designed to regulate not only the act of consolidation after the Notice of Appeal was filed, it appeared to be designed also to regulate at the pre-appeal stage. For instance, the proposed text contained such language as "When more than one panel report is circulated … at or around the same time", and "the Appellate Body may take such a decision if it considers that a substantive overlap in the content of the appeals is likely". Japan understood that the consolidation process contemplated under the proposal ordinarily involved such steps as consultations with the parties and a decision by the Appellate Body to consolidate, and it may also foresee a specific order by the Appellate Body on the parties to act in a particular manner in accordance with such decision. For example, to file simultaneously their Notices of Appeal on a specific (or the same) date. Under the proposal, all those procedural steps could be taken before the initiation of appellate proceedings. However, Japan was not quite sure whether, except for certain institutional matters, the Appellate Body was authorized under the DSU to regulate or act on individual appeals that had yet to be initiated. Japan recalled that Article 17.1 of the DSU provided that "The Appellate Body shall hear appeals from panel cases". Rule 3(1) of the current Working Procedures further elaborated, "In accordance with paragraph 1 of Article 17 of the DSU, decisions relating to an appeal shall be taken solely by the division assigned to that appeal". How could the division take any decisions regarding an appeal including to consolidate before the appeal was even initiated, let alone, be established and assigned to a non-existing appeal? The language in the proposed text "The Appellate Body may take such a decision if it considers that a substantive overlap in the content of the appeals is likely" also indicated that the Appellate Body, in deciding the issue of consolidation, could prejudge the scope of the possible appeals at the pre-appeal stage. The parties might be forced to expose their possible scope of appeal to other parties during the required consultations on the issue of consolidation with the Appellate Body before they actually filed their Notices of Appeal. Under the proposal, the Appellate Body could decide to consolidate appeals over the objection(s) of the parties. This was a clear deviation from the current practice as Japan understood it. The proposed text did not set forth any rule for a remedy that could be applied to prejudice (or a claim of prejudice) that might be suffered by the parties as a result of consolidation. The proposed rule appeared to intend to cover a wide variety of scenarios, as explained on pages 7 to 9 of the proposed amendments. However, Japan was not sure that one of the conditions for consolidation (i.e. "substantial overlap") would properly capture, or could be applied consistently to, such diverging situations.

167. Under the proposal, issuing a single report was a norm and parties must show "good reasons" to depart from this norm. However, because of the concern about a possible complication as to the rights and obligations of the parties at the implementation stage of a dispute in a multiple complainants' situation, the practice had been developed in which separate reports were issued, should the parties so request. This current practice made perfect sense and Japan found little reason to justify a departure from this well-established practice. In that respect, Japan noted that Article 9.2 of the

[13] WT/AB/WP/W/10, p. 9.

DSU provided that, upon request by the parties, the panel shall submit separate reports, as other delegations had also mentioned. Under the proposal on "the Time-line for Written Submissions", an appellant submission shall be filed on the same date as the Notice of Appeal. If, in a multiple complainants' situation, the Notices of Appeal were filed and the appeals were initiated by different parties on different dates, how practical would it be to consolidate those staggered proceedings without prejudice to any of the parties to the dispute and within the prescribed 90-day time period? These were comments on and concerns that Japan had about the proposed amendments to the Working Procedures for Appellate Review. Japan would further elaborate on these points in its written comments.

168. Finally, Japan wished to touch upon the procedural issues. In this regard, Japan said that the idea of circulating written comments by Members would serve the purpose of better records and transparency of the DSB Chairman's communication to the Appellate Body in conveying the views expressed by Members on the proposed amendments. Thus, Japan would support that idea. With respect to the idea of having an interactive session between Members and the Appellate Body members, having listened to the comprehensive and detailed comments presented by delegations at the present meeting and at the informal DSB meeting, it appeared that Members fully understood the proposals and the rationale behind them. Thus, Japan was not sure what value would be added to hold such an interactive session at this stage.

169. The representative of Hong Kong, China said that her delegation appreciated the Appellate Body's efforts to improve the Working Procedures for Appellate Review and was grateful for the opportunity to provide its comments. With regard to the time-line for written submissions, she said that considering that the final version of a panel report was sent to the parties to a dispute before circulation to all WTO Members and the parties to a dispute had 60 days to appeal after such circulation, the proposed changes would not increase the burden on the appellant, as it already had ample time to analyze the final panel report and prepare the submission prior to the filing of a Notice of Appeal. Therefore, Hong Kong, China did not have a principled objection to the proposal that an appellant's written submission be filed on the same day as the filing of the Notice of Appeal. The Notice of Appeal remained necessary as a public document notifying Members of the commencement of an appeal and informing Members of its nature. In addition, it was proposed to request the other appellant to submit its Notice of Other Appeal and submission simultaneously. The submission deadline for the other appellant was proposed to be advanced to day 5. Given that the interval between the appellant's submission and the filing of the Notice of Other Appeal remained unchanged, Hong Kong, China also did not have a principled objection to the proposal.

170. However, on the other hand, it was proposed to cut short the interval between the appellant's and appellee's submissions by three days, from 18 to 15 days. Third participants' submissions and notifications would be due on a day separate from, and three days after the filing date for appellee's submission. Furthermore, extra days were re-allocated for the preparation of the oral hearing and the Appellate Body report. Hong Kong, China believed that a balanced approach should be taken in the allocation of time. Hong Kong, China noted that the appellee played a responsive role in the appeal process and it needed to take the appellant's submission into account in order to formulate its own. Therefore, the proposed cut may undermine the appellee's rights and as such, Hong Kong, China did not support cutting the time for the preparation of the appellee's submission. Therefore, the appellee's submission should be filed by day 18 instead of day 15.

171. Like Guatemala, Turkey, Australia, Switzerland, Chinese Taipei, Singapore, Norway and Colombia, Hong Kong, China welcomed the opportunity to afford third participants the chance to respond to the arguments made by the appellee in its written submissions, bearing in mind that the time accorded to third participants to respond in the oral hearing was very limited. While waiting for the third participants' submissions, the Appellate Body could already start to consider the appellant and appellee's submissions. After receiving third participants' written submission, the Appellate Body

would have an overview of all the issues and thus be able to focus on its questioning at the oral hearing. This would facilitate a more efficient use of time in the oral hearing. Thus, Hong Kong, China supported the Appellate Body's suggestion of allocating three days for third participants' submissions following that of the appellee. The proposed changes of the timetable for general appeals would automatically have an impact on the timetable for prohibited subsidies appeals under Article 4.12 of the SCM Agreement. Hence, Hong Kong, China's comments also applied to the proposed consequential adjustments to the timetable for prohibited subsidies appeals.

172. With regard to electronic filing and service of documents, Hong Kong, China appreciated the initiative of the Appellate Body to authorize electronic filing. The proposal intended to clarify the status of the electronic copy and paper copy. However, Hong Kong, China would appreciate further clarification on how the date of submission would be counted if the hard copy was not received by 11 a.m. of the following day.

173. With regard to the consolidation of appellate proceedings, Hong Kong, China supported consolidation of appellate proceedings before a single division, unless the parties to a dispute agreed otherwise. It would be helpful if clear definitions could be provided for the terms "around the same time" and "substantial overlap".

174. The representative of Canada said that his country appreciated the Appellate Body consulting with Members on its proposed amendments to the Working Procedures for Appellate Review. Canada was pleased to submit its comments on the proposed amendments circulated in WT/AB/WP/W/10 on 12 January 2010. The Appellate Body had proposed to alter certain aspects of the timetable for appeals. With regard to the timetable proposal, Canada recognized that the timetable of an appeal was extremely tight for all involved, including the Appellate Body. However, Canada could not support altering the timetable as had been proposed. Such a reduction in time risked diminishing the quality of the submissions, which would ultimately make the Appellate Body's job more difficult. In particular, it would be prejudicial to the appellee to reduce the time allotted to prepare its submission. The appellee already had the shortest amount of time, and, under the proposal, it would lose three days of preparation time following the appellant's submission. This reduction of time was not justifiable, even if it resulted in staggering the third party submissions from the appellee's submission. Moreover, in a dispute involving two parties, the proposal would allot the same party, the appellee, a mere five days to produce an other appellant submission. In other words, it would lose seven days to file the Notice of Other Appeal and would lose ten days to file the other appellant submission. Admittedly, some of this party's preparatory work could take place prior to the launch of the appeal, but important decisions would necessarily await receipt of the Notice of Appeal. Five days simply did not allow for the necessary consultations to take place. In sum, Canada did not support altering the current timetable through an amendment of the Working Procedures. However, Canada was willing to consider adding to the time provided to the Appellate Body through a negotiated amendment to the DSU.

175. With regard to electronic filing, Canada appreciated the Appellate Body's desire to promote and encourage electronic filing. Canada recalled that the proposal authorized, but did not oblige Members to e-file. If a party opted for e-filing, it must file and certify the requisite paper copies too, by the next day. The proposal made clear that where there was an electronically filed submission, it was that version and not the paper copy that would be treated as the authentic version. The exchange of electronic documents was useful and should be encouraged. Yet the proposal risked discouraging Members from filing electronically by requiring the e-version to be treated as the authentic version. The proposal, if implemented, may cause Members who had a preference for authentic paper versions or technical concerns about filing electronically to avoid e-filing altogether. This would stunt a growing trend and result in fewer documents being exchanged electronically. Therefore, Canada did not support this proposal as written. In Canada's view, a better approach would be to require parties to file both electronic and paper copies at the same time, but to allow a party to declare upon filing

which version was authentic. Doing so would re-assure those Members who remained uncomfortable with e-filing that their paper version could be the authentic one. It also would avoid disagreements about whether a submission was filed on time, and it would ensure that the practice of e-filing continued to grow and evolve. If e-filing were made mandatory, but with adequate flexibility, all parties would necessarily influence the evolution of the practice.

176. With regard to consolidation, Canada agreed with the Appellate Body that consolidation of appellate proceedings could maximize the efficient use of resources and foster consistency in decision-making. To date, the Appellate Body had consolidated appeals on an ad hoc basis with the agreement of the parties, and Canada supported the codification of this practice. However, insofar as the proposed rule did not embody a codification of current practice, Canada could not support it. The proposal departed from current practice in at least three respects. First, the proposal stipulated that consolidation could occur "when a report is circulated and/or appealed". Therefore, it would allow the Appellate Body to consolidate appeals before they were launched. Given that the mandate of the Appellate Body was to address the issues raised by the appeal, it must lack the authority to take action prior to the launch of an appeal. Second, the proposal departed from practice by implying that the Appellate Body may consolidate "when it considers that a substantial overlap is likely". In Canada's view, it would be improper for the Appellate Body to decide on its own whether two appeals should be consolidated, particularly before their scope became clear. Currently, where consolidation was a possibility, parties discussed the potential scope of the appeal with the Appellate Body. For consolidation to work, the Appellate Body needed the cooperation of the parties. It might be more advisable simply to reflect this fact in the proposal, by specifying that the agreement of the parties was necessary. Third, the proposal created uncertainty around the question of whether the parties would be able to obtain separate reports in a consolidated case. The proposal stipulated that a single report was the norm and that a party would have to demonstrate good reasons why separate reports were necessary. Currently, under consolidated panel proceedings, parties had the right to separate reports. It seemed incongruous that this right should be lost upon appeal. In some cases, a Member would benefit from the clarity that separate reports could provide in leaving no doubt as to which recommendations and rulings applied to it. To conclude, Canada could support the codification of current practice regarding consolidation, but not the proposal as written. Canada appreciated the efforts made by the Appellate Body to examine and improve their Working Procedures and appreciated even more the consultation exercise and trusted that its views would be fully considered.

177. The representative of New Zealand said that her country welcomed the opportunity to comment on the Appellate Body's proposed amendments to its Working Procedures. New Zealand joined other Members in expressing its support and appreciation for the work of the Appellate Body. New Zealand was sympathetic to the Appellate Body's wish to make more efficient use of time during the 90-day appeal period and supported changes that would give the Appellate Body more time to engage in its careful and thorough analysis. However, New Zealand wished to ensure that, at the same time this goal was balanced with the needs of all the parties involved in the appeals process. With regard to the time-line for the Notice of Appeal and written submissions, and the removal of 7-day period between the Notice of Appeal and the appellant submission, New Zealand shared other Members' support for requiring the appellant to file its submission on the same day as the Notice of Appeal. By the time the appellant filed its Notice of Appeal, it would already have had sufficient time to prepare for the appeal and to draft its submission. The appellee, however, had much to gain from seeing the appellant's full submission as soon as possible in order to give it adequate time to prepare its own submissions in response. New Zealand noted that several Members had questioned the utility of retaining the Notice of Appeal, if it was submitted at the same time as the appellant's submission. New Zealand considered that there was benefit to be had for the parties, and the public, in filing a Notice of Appeal. The Notice served important functions, in terms of transparency and delineating the scope of the appeal. New Zealand shared the concerns of Members over the proposal to bring forward the appellee's submission date. Currently the appellee had 25 days from the date of the Notice of Appeal (and 18 days from receipt of the appellant's submission) in which to file its

submission. The Appellate Body's proposal would see the Notice of Appeal and the appellant's submission due on the same day, with the appellee's submission due 15 days later. This reduction in time for the appellee risked upsetting the balance of rights between the principal parties, particularly in the case of resource-constrained appellees. Not only would the appellee lose time in which to prepare its submission after having seen the appellant's submissions, but it would also lose the seven days otherwise available to organize resources and to prepare based on the information provided in the Notice of Appeal. As noted above, the extra seven days gained by requiring the Notice of Appeal and appellant's submission to be filed on the same day should be allocated to the appellee. New Zealand considered that 25 days from the Notice of Appeal to tabling of the appellee's submission would represent an appropriate balance of rights between the principal parties. In principle New Zealand supported third parties having an opportunity to review the appellees' submission before submitting their own. However, the extra three days proposed for third parties to prepare their submissions should not come at the expense of the preparation time for the principal parties.

178. With regard to electronic filing, New Zealand noted that the Appellate Body's proposal contemplated that filing would not be complete until both electronic and paper copies were received by the Appellate Body. New Zealand was sympathetic to concerns expressed informally by other Members regarding the potential for corruption of electronic documents and would, therefore, prefer that paper copies continued to be regarded as the officially filed documents. The obligation also to supply electronic copies to the parties to the dispute and to the Secretariat should be formalized, but not be a requirement of successful filing.

179. With regard to consolidation, New Zealand was sympathetic to the idea of formalizing current practice concerning consolidation of proceedings in appeals, particularly to the extent that it would make it easier for third parties with limited resources to participate. However, real and meaningful consultation with the parties before determining whether or not to consolidate would be vital. New Zealand agreed with other Members that in reality consolidation would only work if the parties to the dispute agreed to it.

180. New Zealand thanked the Secretariat and the Appellate Body for providing it with the opportunity to make formal comments and to submit written comments by 26 May 2010. New Zealand requested that any written comments that it might submit be circulated to DSB Members, and to the Appellate Body.

181. The representative of Mexico said that his country thanked the DSB Chairman for the opportunity to comment on the proposed amendments to the Working Procedures for Appellate Review. Pursuant to Article 17.9 of the DSU, the Appellate Body was authorized to draw up its working procedures in consultation with the Chairman of the DSB and the Director-General. Even though Members had had an indirect role in establishing the Appellate Body's Working Procedures, any amendment in that regard had an immediate impact on their dispute-related work. Therefore, Mexico believed that it was important to participate in this exercise and to exchange views in the DSB on the proposed amendments to the Appellate Body's Working Procedures. Mexico supported Ecuador's request that the DSB Chairman convey a request to the Appellate Body Chairman for an informal meeting with the members of the Appellate Body or the Appellate Body Secretariat in order to have an interactive dialogue with them on the proposals to amend the Working Procedures for Appellate Review.

182. With regard to the first proposal regarding simultaneous filing of the Notice of Appeal and the appellant's written submissions, and in particular new time-lines, Mexico was pleased to note that all the time-lines, except one, at different stages of an appeal, remained the same in terms of the number of days or the number of days was increased under the proposal. This was a very positive development. The only instance in which the number of days was reduced was the deadline for the

appellee's submission. This was negative because the appellee needed sufficient time to prepare its submission. In this regard, Mexico proposed to extend the time-period for appellees' submissions in the proposal to 18 days instead of 15. This would give appellees three more days to present their written submissions. Mexico noted that this would leave no time for third participants to include appellees' submissions in their written submissions. However, it seemed more important to give sufficient time to appellees, even if this would shorten the deadline for third parties by three days. In any event, three days was very little time for incorporating appellees' arguments efficiently into third-party written submissions.

183. With this proposal, the Notice of Appeal would lose much of its legal utility. Although it would continue to serve as a document for transparency purposes, its legal utility would appear to be considerably diminished. Mexico noted that Article 16.4 of the DSU provided that a panel report shall be adopted "unless a party to the dispute formally notifies the DSB of its decision to appeal". Article 16.4 of the DSU, in principle, gave the Appellate Body the opportunity to amend, abolish or regulate the Notice of Appeal in some other way under its Working Procedures. In other words, the DSU did not require a Notice of Appeal for the party commencing the appeal to notify the DSB of its wish to appeal. Therefore, the status of a Notice of Appeal to be delivered simultaneously with the appellant's or other appellant's submission should be clarified.

184. With regard to the authorization to file documents by electronic means, Mexico noted that the use of electronic means to file appellate submissions could render the process far more efficient. However, the efficiency of electronic filing would be contingent on the number of copies required to be filed by a party using electronic facilities. It was not specified in Rule 18(1)*bis*, how many paper copies a party using the electronic option would be required to file. If it was the same number of paper copies as that required under the traditional filing system, the benefits of this amendment would be practically nil.

185. With regard to consolidation of appellate proceedings, Mexico said that the criteria for consolidation appeared to give the Appellate Body discretion in terms of whether or not to consolidate, which was not necessarily a bad thing. However, according to Mexico's understanding, the Appellate Body did not have jurisdiction over panel reports at the stage of circulation. The Appellate Body's jurisdiction began only once the appeal commenced. This should be reflected in Rule 16(1)*bis*. One fundamental issue regarding consolidation of proceedings was the format of an Appellate Body report. The Appellate Body's proposal did not specify what the format would be in the event that reports were issued as a single document. In some cases one would have more than one complainant or more than one respondent would be involved in a series of bilateral legal relationships. Therefore, each of those legal relationships needed to be clearly specified in the conclusions and recommendations of the Appellate Body report. It would be very useful if such a format were provided for in the Appellate Body's Working Procedures. That would avoid many implementation-related problems.

186. The representative of Malaysia said that his country thanked the Appellate Body for coming up with proposals on improvements to the Working Procedures for Appellate Review. Turning to the proposals on timetables, Malaysia was supportive of the proposal for the Notice of Appeal and the written submission to be filed on the same day. However, it wished to express its concern that the time-period for the appellees to respond to the written submission was cut short by three days.

187. Second, with regard to electronic filing, Malaysia sought clarification as to the intention of the proposals. If the intention was to simply allow Members to submit soft copies of documents to the Appellate Body, Malaysia wondered whether this could continue to be done without amendments to the Working Procedures. If, however, the intention of the proposal was to establish an electronic filing system, Malaysia sought clarification on the value that would be added by this proposal, since hard copies of documents would have to be filed anyway. In fact, it seemed that Members choosing

to make electronic filings would have an additional burden, in that they were required to submit electronic copies on top of written copies. Furthermore, if the intention was to establish an electronic filing system, more issues would need to be clarified in the text. Taking into consideration the use of electronic communication in commercial transactions, issues such as time of sending, time of receipt, acknowledgment of receipt, effect of absence of acknowledgement and whether what was received was the same as what was sent would have to be provided for in the text.

188. Third, on the proposal regarding consolidation, Malaysia sought clarification on the phrase "on its own initiative", which implied that the Appellate Body may decide to consolidate the disputes without the consent of the parties. Furthermore, Malaysia was concerned with the practical application of vague and subjective criteria such as "substantial overlap", and "good reason" which were contained in the proposal.

189. The representative of Argentina said that his country thanked the DSB Chairman for the opportunity to make comments on the proposed amendments and the Appellate Body for its proposals. Argentina agreed with the Appellate Body that the Working Procedures "have operated smoothly and effectively"[14], but it was also of the view that, as a matter of principle, there was always room for improvement no matter how effectively the Working Procedures operated. In that spirit, Argentina had assessed, and continued to assess, the amendments proposed by the Appellate Body contained in document WT/AB/WP/W/10. On the basis of its analysis, Argentina wished to offer comments, which were very much the same as its comments made at the 20 April 2010 informal DSB meeting.

190. With regard to the time-line for written submissions, and in particular the merger of the deadline for the Notice of Appeal and the appellant's submission, Argentina saw the advantage of making use of a "waiting period" between the Notice of Appeal and the appellant's submission, on the understanding that the time would be used more efficiently by the Appellate Body. Argentina did not yet have a final position as to whether, following the merger, the Notice of Appeal should maintain the same legal effect as it currently had. Argentina understood the rationale behind the arguments put forward by delegations that had spoken in favour of this proposal. However, the same could not be said with regard to the other proposed changes, which would restrict the capacity of delegations, in particular developing countries, to meet their requirements as appellees and other appellants. Argentina was concerned that those deadlines, which were already difficult to meet, could be even tighter, but there was no obvious reason or justification for making them so. The Appellate Body's effectiveness depended ultimately on Members' ability to make effective use of the system and this would be compromised if deadlines were shortened, as proposed. Argentina proposed that the "net" working periods available both to the appellee and to any other appellant be no shorter than the current ones, namely, 18 and 8 days respectively as from the filing of the appellant's submission.

191. With regard to the electronic filing and service of documents, in general, Argentina was in favour of any changes that would make handling of documents easier and better. However, Argentina was concerned that this proposal, which was based on current practice, suggested no real improvement, but implied that the parties involved in an appeal would have more responsibilities. The proposal allowed submissions to be filed by e-mail, but did not dispense with the requirement to submit paper copies. The difference with current practice was the requirement to provide supporting certification that electronic copies and paper copies were identical. Apart from adding to the workload of delegations, such certification raised more question and risks rather than providing solutions. By making the electronic copy the authentic one in the event of discrepancy between the two versions, the proposal did not take into account the fact that disputes might arise due to the use by delegations of different systems, programmes and versions. This could give rise to differences between the versions sent and received. Accordingly, and unless a provision was introduced for a

[14] WT/AB/WP/W/10, second paragraph of the introduction.

system affording equal access/use to all delegations, which would resolve the matter adequately, Argentina would support the possibility, as envisaged in the proposal, of submitting electronic and paper versions, but maintaining the paper copy as the original version in the event of any discrepancy, without the proposed requirements for certification.

192. With regard to the consolidation of appellate proceedings, Argentina wished to reiterate its views expressed at the 20 April informal DSB meeting, which were similar to the views expressed by other delegations at the informal meeting and at the present meeting. He said that the language, form and circumstances of the proposal for new Rule 16(1)*bis* introduced amendments that had gone beyond mere procedural changes. The proposal would alter the balance between Members' rights and obligations by subjecting a Member's wish, if it opposed the consolidation of proceedings or reports, to considerations which would be only procedural. The Appellate Body was not better placed than the parties to evaluate considerations, which were not purely legal but which Members brought to any decision to resort to the dispute settlement mechanism. Furthermore, even if supremacy of the Appellate Body's opinion were to be accepted over the wish of one or more parties to the proceedings, there was no clarity as to what criteria the Appellate Body would apply, since the grounds on which the Appellate Body would decide whether or not proceedings should be consolidated appeared to be vague concepts. For example, more than one panel report was to be "circulated and/or appealed", although this did not appear to be a necessary or exclusionary requirement; such circulation and/or appeal took place "around the same time", with no mention of why the mere coincidence in time of a report to be circulated with one already appealed could and should be sufficient reason to decide *a priori* on their consolidation, even in the event of "substantial overlap" between them, a concept with no inherent indication of how exactly it would apply.

193. With regard to the process, he said that Argentina had no particular position regarding Ecuador's request, but as a matter of principle it supported any initiative that would contribute to enhancing understanding on the part of delegations and facilitate an exchange of views and comments on the proposed amendments.

194. The representative of the European Union said that her delegation appreciated that the Appellate Body kept its Working Procedures constantly under review in the light of past experience and with a view to cope with new developments. With regard to the timing of appellate review procedures, the EU fully appreciated that the strict-time limit of 90 days put a severe strain on the Appellate Body and was supportive of the Appellate Body's efforts to try to make the best use of those days for the benefit of all stakeholders concerned. That said, the timing of the appellate procedure must be respectful of the interests of all stakeholders in an appeal. The EU agreed that the present seven days between the Notice of Appeal and appellant submission may be put to better use. However, the EU had some hesitations in completely collapsing the due date for both events and would prefer to maintain a short delay between the Notice of Appeal and the appellant's submission, for example of two days. This would allow the preservation of some flexibility to the process both inside the parties (the lawyers of the appellant had a couple more days; the lawyers of the appellee get a warning of what was coming), as well as in Geneva (i.e. to withdraw and re-file a Notice of Appeal, as had happened in a few cases in the past). However, it seemed from comments made at the present meeting that other Members saw no problem in collapsing the two deadlines, and the EU could work under that scenario. If the date of the Notice of Appeal and Appellant's submissions were to be merged, the EU believed that the rules should still foresee the use of a Notice of Appeal, to ensure transparency vis-à-vis the Membership. Its "jurisdictional" status, however, may become less evident, since considerations of due process would seem less relevant once a comprehensive appellant submission was submitted at the same time as the Notice of Appeal. Ultimately, however, it would be for the Appellate Body to decide what value to give to the Notice of Appeal. The major concern of the EU as far as the proposed modifications to the timetable were concerned related to the timing of the appellee submission. The appellee had concrete notice as to what it was up to upon receipt of the appellant submission, and under present rules it already had less time than the appellant. The

proposed rules further reduced the time available to the appellee; presently the appellee disposed of 17 days from the receipt of the appellant submission, with an additional advance warning of seven days from the Notice of Appeal. Under the proposed modifications this would be reduced to 15 days and without any advance warning. The EU would be concerned about this deterioration of the appellee's position. The EU would therefore suggest fixing the due date for the appellee submission on day 20 (under the assumption that the appellant submission would be due on day 2). In the same vein, the EU would suggest fixing the due date for the Notice of Other Appeal and the other appellant submission respectively on days 7 and 9. Finally, the EU supported the Appellate Body's proposal to give third participants the benefit of having all submissions of the main parties before the due date of their submissions. To this end, the EU believed that an appropriate time would be day 22 (instead of day 18).

195. With regard to the procedures for filing and service of submissions, the EU welcomed the Appellate Body's initiative to take technological developments in the field of document processing into account and move in the direction of electronic filing and service of submissions. The EU noted that the electronic alternative proposed by the Appellate Body was in reality a mixed electronic-paper procedure, but making the electronic version the dominant element (it reversed in a sense the present situation where the paper format was the dominant element). Incidentally, the EU noted that the proposal formalized the exact time of electronic submissions. To the extent it did so, it should also formalize the exact time for the other option, namely filing of a paper-only version. While the EU considered this to be a step in the right direction, it wondered if it were not preferable to go all the way to electronic-only filing and service of submission, if a party/participant so wished, courtesy paper copies could always be provided on request. This would do away with all potential conflicts flowing from the co-existence of documents in several formats and different time lines for filing and service. It went without saying that an electronic-only or electronic-dominant alternative would require secured and highly reliable electronic communications systems for WTO Members and the Appellate Body Secretariat, for example, so as to guarantee that a submission had indeed been filed, and had been filed on time. It was the EU's understanding that more general discussions on this topic were presently under way in the WTO. In this situation it might be preferable to let things be as they stand for the time being and reconsider an electronic-dominant or electronic-only option once the necessary infrastructure was in place.

196. With regard to the consolidation of appellate proceedings, the EU was aware that while Article 9 of the DSU contained a specific rule for multiple complainants at panel stage, no such rule existed for appellate review. The EU was in principle sympathetic to the consolidation of appellate proceedings whenever possible and had indeed taken part in several consolidated proceedings. That said, any consolidation of appellate proceedings was essentially in the hands of the parties, who could freely decide on the timing of their appeals (within the 60 days period, pursuant to Article 16.4 of the DSU), given that for each appellate procedure the Appellate Body had to respect the 90 day deadline. That meant in practical terms that a consolidation would effectively become impossible in cases where the different Notices of Appeal would be more than a few days apart. Thus each party could to a large extent allow or disallow consolidation of appellate proceedings. In that situation, in the EU's view, it may not be effective or practicable to give to the Appellate Body discretion for consolidation (in extremis against the will of one or even all the parties). Furthermore the EU did not fully understand why the Appellate Body limited the consolidation possibility to situations where more than one panel report was appealed, because the issue of consolidation also existed in situations where several co-complaints appealed an Article 9.1 of the DSU panel report at different points in time during the 60-day period pursuant to Article 16.4 of the DSU, thus allowing or prohibiting a consolidation of appeals. Finally the EU wondered about the use of the term "likely" in the second sentence of the proposed Rule 16(1)*bis* of the Working Procedures. When the Appellate Body took a decision about "a substantial overlap in the content of the appeals" it would presumably do so on the basis of the Notices of Appeal and possibly the appellant submissions which should allow the Appellate Body to form a definitive view on the "substantial overlap".

197. On procedure, first, on Ecuador's proposal, the EU did not see the need for further consultations and in fact agreed with China that the procedures provided for in the 2002 Decision were agreeable. They properly reflected what was laid down in Article 17.9 of the DSU, and did not require any changes at this stage. Second, with regard to the issue of circulation of written comments, the EU would have to assess, in light of the comments made by others at the present meeting, whether it would want to make written comments above and beyond what the EU had stated at the present meeting. If the EU would do so, it would request that they be made available to all Members.

198. The representative of Ecuador said that his country thanked those Members who had supported its proposal. Ecuador wished to clarify that its proposal, in no way, aimed to move away from the 2002 DSB Decision. Some delegations had expressed concerns that there was not enough time to hold an interactive dialogue with the Appellate Body, but Ecuador believed that the dialogue could even take place after 26 May 2010. Ecuador saw no problem with that and, in any case, it had not seen a total opposition to its proposal. Ecuador hoped that the Chairman of the DSB would take a correct decision on this matter, in line with Ecuador's expectation.

199. The Chairman proposed that the DSB take note of the statements. Furthermore, in accordance with the procedures contained in document WT/DSB/31, he said that the Chairman of the DSB would convey to the Appellate Body the views expressed by delegations at the present meeting and any written comments to be provided by the deadline of 26 May 2010 on the amendments under consideration by the Appellate Body and would request the Appellate Body to take them into account.

200. The DSB took note of the statements and agreed to the course of action proposed by the Chairman.

ANNEX

Written comments on the proposed amendments to the
Working Procedures for Appellate Review (WT/AB/WP/W/10)
submitted by the agreed deadline of 26 May 2010 by
Australia, Chile, China, Guatemala, Japan, Korea, Mexico, New Zealand,
Singapore, Chinese Taipei, Thailand, Turkey and the United States

Written comments submitted by Australia

1. I write to convey Australia's comments in relation to the *Proposed Amendments to the Working Procedures for Appellate Review*, circulated in document WT/AB/WP/W/10 of 12 January 2010.

2. In principle, Australia is sympathetic to the Appellate Body's view that amendments to the Working Procedures are needed to address the time lines for written submissions, electronic filing and the consolidation of appeals, where those amendments balance the needs of the Appellate Body with those of the parties to an appeal. However, Australia is concerned that the underlying rationale and objectives for certain aspects of the proposed amendments are unclear, with a resulting lack of clarity in some aspects of the drafting of each of the proposed amendments. Accordingly, Australia offers the following specific comments on the proposed amendments.

Time lines for written submissions

3. The Appellate Body has suggested a number of adjustments to the time lines for appellate proceedings. In Australia's view, any adjustments need to maintain a balance between the needs of the Appellate Body, parties to the appeal and third participants.

(a) Appellant and Other Appellant Submissions

4. Australia supports the proposal to eliminate the seven-day period between filing the Notice of Appeal and lodgement of the appellant submission, and for a corresponding adjustment to the times for lodgement of a Notice of Other Appeal and Other Appellant submission.

5. Eliminating that delay does raise the issue of the ongoing utility of the Notice of Appeal and Notice of Other Appeal, provided for in Rules 20(1) and 23(1) of the Working Procedures respectively. Australia considers these Notices to be important transparency tools in the appeal process, given that they may provide the only public record that informs Members not participating in the dispute and the public generally of the existence, nature and scope of the appeal. For that reason, we support their retention. We could, however, support the scope of the appeal being formally delineated by the appellant submissions themselves, on the assumption that the contents of the Notices and the respective submissions would be consistent.

(b) Appellee Submissions

6. Australia is sympathetic to the time pressures being faced by the Appellate Body in the appeals process, but we are also conscious that the current timetable already places severe pressure on the appellee. We are concerned that a reduction in the time available to the appellee following receipt of the principal appellant submission would disturb the current equilibrium of the parties' rights, to the disadvantage of the appellee. In our view, the current equilibrium between appellant and appellee should be retained, and to that end we suggest that appellee submissions should be filed on the 18th day following commencement of the appeal, rather than on the 15th day as proposed by the Appellate Body.

(c) Third Participant Submissions

7. We also support the proposal that additional time be allocated to third participants to prepare their submissions following lodgement of appellee submissions. Such a delay would allow time for third participants to reflect on arguments raised in appellee submissions, and to offer a holistic view in their written submissions on the arguments raised in both appellant and appellee submissions, as is the case in panel proceedings. Parties to the dispute and the Appellate Body would then have adequate

time to consider third participants' perspectives ahead of the oral hearing. Questioning of third participants at the oral hearing could, as a result, be focused on those aspects of third participant submissions of most interest to the Appellate Body.

8. However, Australia questions whether three days is sufficient time for third participants to prepare submissions that comment meaningfully on arguments that may be raised in appellee submissions. We think a more realistic time frame would be for third participants to be required to lodge their submissions on the 5th day following lodgement of appellee submissions. That said, we would like to emphasise that any additional time allowed for third participants to prepare their submissions should not be allocated at the expense of the time allocated to the parties to the dispute to prepare their submissions.

(d) Prohibited Subsidies Appeals

9. We note the timetable for prohibited subsidies appeals will largely be determined by the final timetable decided for general appeals. As in the case of general appeals, Australia supports the Appellate Body proposal that third participants be allocated some additional time to prepare their submissions. As with general appeals, however, we think the additional time should be such as to allow third participants to comment meaningfully on arguments in appellee submissions. For that reason, we think third participant submissions should be lodged on the 3rd day after appellee submissions.

Electronic filing

10. Australia supports the proposal to authorise electronic filing and service of documents, and notes that the Australian court systems have implemented effective electronic filing systems. That said, we are conscious that some other Members have raised valid technical and procedural issues and consider these require clarification if the proposed amendment is to be taken forward. Australia wonders too at the requirement to file submissions in hard copy as well as electronically.

Consolidation of appeals

11. Australia supports the consolidation of appeal proceedings in certain circumstances, and notes that consolidation has occurred in certain proceedings in the past. However, we are unclear as to the rationale for this proposed amendment, given the relative infrequency of consolidated appeal proceedings and the availability of Rule 16(1) of the Working Procedures.

12. We note too that the proposed amendments raise a number of questions, the answers to which are not clear on the face of the current draft.

i. Would proceedings be consolidated only where the proceedings concern the same measures of the same respondent?
ii. Would proceedings be consolidated only where there were similar claims in respect of the same measures of the same respondent?
iii. Would proceedings be consolidated where there were similar claims in respect of similar measures of different respondents?
iv. Could a party to the dispute object to the consolidation of proceedings and, if so, on what basis?
v. Could the Appellate Body decide to consolidate proceedings notwithstanding an objection by one or more of the parties to the disputes and, if so, on what basis?
vi. Could the Appellate Body reject a party to the dispute's request for separate reports to be issued and, if so, on what basis?

vii. At what point would consolidation of appeal proceedings have to be requested by a party to the dispute or decided upon by the Appellate Body on its own initiative? For example, would such a request or decision have to be made before an appeal is formally initiated for one, or both, of the relevant proceedings?

13. In conclusion, Australia would like to thank the Appellate Body for making suggestions to amend the Working Procedures. We think it important that the Procedures are periodically reviewed to ensure their continued effectiveness, and we commend the Appellate Body for its proactive efforts in that regard.

14. As a final matter, I ask that this letter be circulated as a publicly available document.

Written comments submitted by Chile

1. This communication is to convey Chile's comments on the proposals put forward by the Appellate Body (AB) to amend certain aspects of the Working Procedures for Appellate Review.

2. These comments have already been put forward by our delegation at the informal meeting of the Dispute Settlement Body (DSB) held on 20 April and at the formal meeting of the DSB on 18 May.

3. Without prejudice to the above, Chile requests that this communication be submitted to the AB together with any other communications submitted to it in the context of these procedures.

Timeline for Written Submissions

4. Chile favourably views the proposal that the appellant's written submission be filed upon commencement of the appeal. We agree with the AB's reasoning that such a change will contribute to more efficient use of the time available. On the other hand, we have a number of concerns regarding two aspects relating to this amendment. The first has to do with the adjustments to timelines for the other steps involved in appellate proceedings. In particular, we are concerned about the shortening of the time-period for the appellee to file its written submission. We believe that a balance should be kept between the parties and accordingly request that the AB reconsider this aspect of the proposal, so as to give the appellee more time to file its written submission. The second aspect of concern to us is that the notice of appeal would be maintained. We are not convinced of the need to do so if the deadline for filing the appellant's written submission were brought forward. In our view, the purpose of the notice would, from then on, be achieved by means of the appellant's written submission (to demarcate the scope of appellate review).

Electronic filing and Service of Documents

5. Generally speaking, we believe that it is appropriate to encourage the use of electronic facilities in panel and AB proceedings. We do, however, harbour serious doubts regarding this specific proposal. Why require the delivery of paper copies where the party has decided to file the documents by electronic means? What is the purpose of requiring certification that the electronic copy is identical to the paper copy when the following sentence provides that in case of discrepancy, only the electronic copy will be taken into account? In short, it seems to us that although the overall objectives are positive, the wording of the amendments proposed will thwart the achievement of these objectives.

Consolidation of Appellate Proceedings

6. Of all the proposals put forward, this is the one that gives us most cause for concern. What it does is to establish seriously diminished participation by the parties in the event of consolidation of proceedings. In my delegation's view, it is essential that the parties should agree to proceed in this manner. We disagree with the reasons given as underpinning this change, there is no need to codify a practice, and it is preferable to continue with ad hoc decisions that take into account the specificities of the case and the positions of the parties in dispute. We accordingly request that the AB reconsider this proposal, so as to safeguard the parties' right to decide on and control the course of the proceedings.

Written comments submitted by China

China thanks the great effort made by the Appellate Body and its Secretariat on the improvement of *Working Procedures for Appellate Review*. China considers that the practices up to date have proven that the *Working Procedures* work quite well, contributing significantly to the efficient settlement of disputes among Members and thus share the view of the Appellate Body that the *Working Procedures* have operated smoothly and effectively. We also recognize there might be room for further improvements and clarifications based on the DSU and growing practical experiences.

With regard to the proposed amendment of the *Working Procedures* on the table, China believes the following principles should be observed:

(1) Any amendment shall not nullify or impair the rights of defense of the Members under the dispute settlement proceedings.

(2) Any amendment shall consider the current practices, be introduced in a progressive manner and not disproportionately result in additional burden on Members.

(3) Based on the above two principles, any amendment shall be aimed at enhancing the efficiency of the Working Procedures, strengthening of credibility of the Appellate Body and alleviating unnecessary burden on the Appellate Body and its Secretariat.

(4) In the process of making amendment, the Appellate Body shall fully and impartially listen to and take into account the opinions of all Members, especially of developing country Members. Any ultimate amendment shall be based on the endorsement of all Members.

With respect to the details of the proposed amendments, China would like to make the following comments:

1. The timeline for written submissions

China understands and is able to accommodate the proposal to request the appellant to submit its written submission when an appeal is commenced, on the same day as the filing of a Notice of Appeal. We think the Notice of Appeal has its merit, and thus are not in a position to agree with suggestions to abolish it.

But we have serious concerns on the proposal to shorten the period of time allocated to the Appellee from 18 days to 15 days. China considers that, according to the current practices, 18 days is usually not enough for the Appellee to prepare its responses to all legal issues raised by the Appellant, and everyday is precious. The proposed shortened time frame will further squeeze the time period for the Appellee to fully assess appealed issues and have substantial adverse impacts on the Appellee. We therefore request that the Appellee continue to be given at least 18 days for its submission.

With respect to the time of submission of third participants, because third parties still have the opportunity to make comments on the submissions of the Appellee and other third participants during the oral hearing, whether or not giving third parties extra three days to prepare their submissions will not impair their substantial rights.

2. Electronic filing and service of documents

China acknowledges that electronic files are widely used nowadays as the result of the evolution of technology. In making the proposed 18(1)bis, the Appellate Body also says, in proposing to expressly authorize electronic filing, it does not intend to eliminate the need to file paper copies with the Appellate Body Secretariat and indeed anticipates having hard copies of submissions following Members' emails. In the meanwhile, Members who do not wish to file documents through electronic means could elect to file paper copies as contemplated in Rule 18(1).

Based on these understandings, China has the following comments:

(1) The content of electronic filing shall include an electronic cover letter (e.g. a scanned one) signed by officials of Members so that the authenticity and legality of the e-filed documents could be assessed.

(2) According to the proposed amendment, after the electronic filing has been submitted through emails, Members will receive a confirmation from the Secretariat. In practice, this will require both the Secretariat and the submitting Member to allocate a special person to monitor emails on a specific day. Furthermore, if Members send emails out in time but have not received confirmations from the Secretariat by 5.00 p.m., or if non-attributable technical problems occur and cause emails to be not correctly or properly received, it's not clear from the proposed 18(1)bis whether Members submitted the documents will be regarded as having done so within the required timeframe.

(3) According to the proposed 18(1)bis, hard copies of the electronic documents shall be delivered to the Appellate Body no later than 11.00 a.m. the following day otherwise a document sent by email is not considered duly filed. It's not very clear to China what purpose this requirement, namely the following submission of hard copies, is to serve if electronic document has been submitted in time and the Secretariat has confirmed the receipt of it. Indeed, it simply adds logistic burdens to Members electing to use email transmission and reduce the convenience and advantages of electronic filing compared with filing hard copies. Furthermore, because the proposed 18(1)bis stipulate that the electronic copy will prevail in case of discrepancy, it seems unnecessary to further require a signed certification from Members stating identicalness.

3. Consolidation of appellate proceedings

China understands the intention of the Appellate Body to make good use of resources available. China also understands consolidation of appellate proceedings has been handled properly on a case by case basis in the past. China also appreciated previous efforts of the Appellate Body to keep decision-making consistent and consolidate certain particular disputes after full consultations with parties, indeed getting agreements from them.

We consider that prior practices evidence that the previous approach adopted by the Appellate Body, namely consulting with parties on a case by case basis and getting consensus of them, operates smoothly and effectively and gets the full support and cooperation from Members. There seem to be no big practical problems and the Appellate Body in its proposal also did not inform Members of such problems which would make a change imperative. Thus, we remain to be convinced that it's necessary to make changes as proposed in 16(1)bis.

Having said that, with respect to the detail of the proposed 16(1)bis, China has the following observations:

(1) The definition of 'substantial overlap' is not clear from the text of 16(1)bis. It's also not very clear how the Appellate Body may take a decision only on the presumption that a substantive

overlap is likely. For instance, the text of 16(1)bis seems not to preclude the consolidation of appellate proceedings in two disputes in which neither the complainants nor the defendants are the same, as long as the Appellate Body decides there will be substantive overlap of the content of reports. China has doubts on the appropriateness of such consolidation in such a scenario.

(2) The proposed 16(1)bis says the Appellate Body may consolidate appellate proceedings "upon request by a party or on its own initiative" and "after consultations with the parties". It seems from the text that the Appellate Body could consolidate proceedings even if parties to the dispute disagree. Under such a scenario, it's difficult to understand how the appellate proceeding could operate efficiently and smoothly without the voluntary cooperation from parties to the disputes. It seems a great challenge to fully secure that Member's rights bestowed by the DSU will not be impaired or prejudiced.

(3) The consolidation of appellate proceedings in different disputes will necessarily lead to a number of procedural questions. For instance, how should the Appellate Body guarantee the confidentiality requirements in the DSU would be fully followed in consolidated appellate proceedings of different disputes to which parties and third parties are not the same? What's the DSU legal basis for a non third party participant to observe the Appellate Body hearing? The text of 16(1)bis did not seem to provide a clear answer. For these reasons, we kindly request the Appellate Body to reconsider its proposal on consolidation of appellate proceedings.

Written comments submitted by Guatemala

Guatemala hereby submits its written comments to the Appellate Body's proposals contained in document WT/AB/WP/W/10, in accordance with Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Rule 32(2) of the *Working Procedures for Appellate Review* (the "Working Procedures") and the *Additional Procedures for Consultations between WTO Members and the Chairperson of the DSB with respect to amendments to the Working Procedures* contained in document WT/DSB/31 (the "Additional Procedures").

These written comments address the three issues under discussion in the following order:

(i) the filing of the appellant's submission on the same day as the Notice of Appeal;

(ii) the authorization, subject to certain conditions, to file and serve documents electronically; and

(iii) the consolidation of appellate proceedings where two or more disputes share a high degree of commonality and are closely related in time.

I. Filing of the appellant's submission on the same day as the Notice of Appeal and consequential changes to certain deadlines:

The Appellate Body proposes that an Appellant's Submission be filed when an appeal is commenced (i.e., on the same day as the filing of a Notice of Appeal). As a consequence, the subsequent deadlines for the filing of the Notice of Other Appeal, the Other Appellant's Submission, and the Appellees' Submissions would also be adjusted. Thus, when comparing the periods of time between the current deadlines with those proposed by the Appellate Body, it is observed that there is an addition of three days for submissions from Third Participants while there is also a reduction of three days to file the Appellees' Submission after the filing of the Appellant's Submission.

The Appellate Body considers that the reduction of this period of time to file the Appellees' Submissions "would redress somewhat the imbalance resulting from the fact that – currently – an Appellee's Submission is due 18 days after the filing of the Appellant's Submission, whereas an Other Appellee's Submission is due 10 days after the filing of the Other Appellant's Submission" (compared with 15 and 10 days, respectively, in the Appellate Body's proposal).

Furthermore, according to the Appellate Body, "the proposed change is intended to allow the Appellate Body and the other WTO Members participating in the appeal to focus on the substance of the specific points of law appealed as soon as possible, thus contributing to a more efficient use of time during the 90-day appeal period". Clearly, the Appellate Body's intention is to allocate more time for the analysis of the submissions, by eliminating the "7-day waiting period".

The Appellate Body also explained that in making this proposal, it does not intend to eliminate the Notice of Appeal. In its view, the Notice of Appeal "remains necessary because it triggers an appeal and, together with a Notice of Other Appeal, serves the important function of demarcating the scope of appellate review in a specific dispute. In addition, the Notice of Appeal in a given dispute is the only public document notifying WTO Members of the commencement of an appeal and informing the Members of its nature".

Guatemala supports the idea of making a more efficient use of time and resources, including the possibility of giving third participants the opportunity to revise all documents (appellants and appellees' submissions) before filing their respective submissions. Guatemala believes that any

amendment to the Working Procedures should take into consideration both the needs and interests of the Appellate Body as well as of all participants in a given dispute.

While the Appellate Body's proposal moves in that direction, Guatemala considers that there are still some elements that need to be addressed. Particularly, the legal effects of the Notice of Appeal and the imbalance between the deadlines provided for each of the appellees in cases where there are cross appeals.

Concerning the first issue, Guatemala no longer sees the need to give certain legal effects to the Notice of Appeal: namely, the effect of commencement of an appeal and the demarcation of the scope of appellate review.

Firstly, by filing the appellant's written submission on the same day as the Notice of Appeal, such notice would not necessarily "trigger" the appeal. Put another way, the appeal could also be initiated by only filing the Appellant's Submission.

Secondly, the Appellant's Submission sets out detailed arguments in support of its position and spells out the recommendations and rulings requested. It is more complete and elaborated than the Notice of Appeal that only includes a *brief statement* of the nature of the appeal. By submitting both documents on the same day, Guatemala does not see the utility of "demarcating" the scope of appellate review through the Notice of Appeal when the Appellant's Submission explains in detail the scope of such appellate review.

Therefore, Guatemala suggests that the Appellate Body consider maintaining the Notice of Appeal only for transparency purposes. In the view of Guatemala, the function of demarcating the scope of the appellate review, as well as triggering the appeal, would be fulfilled by the Appellant's Submission. Further, a way to clearly differentiate the legal effects of these documents could be the institution of the obligation to submit such Notice of Appeal "x" number of days after the filing of the appellants submission.

Regarding the second issue (i.e., the imbalance between the deadlines provided for each of the appellees in cases where there are crossed appeals), Guatemala observes that the Appellate Body proposes a reduction of three days from the deadline previously provided for Appellees Submissions after the filing of the Appellant's Submission. However, there still remains a difference of five days between the deadline for the Appellee to file its submission after the filing of the Appellant's Submission and the deadline for the Appellee to file its submission after the filing of the Other Appellant's Submission.

In Guatemala's view, this could be solved if the Appellate Body addresses the issue of the legal effects of the Notice of Appeal and provides for the submission of the Appellants Submission and the Other Appellants Submission on the same day as illustrated in the table below.

	Guatemala's proposal
Notification under Article 16.4 of the DSU	0
Appellant's Submission and Other Appellant(s) Submission(s)	5
Notice of Appeal and Notice of Other Appeal	7
Appellee(s) Submission(s)	20
Third Participant(s) Submission(s)	23
Third Participant(s) Notification(s)	23
Oral Hearing	30-40
Circulation of Appellate Report	60-90
DSB Meeting for Adoption	90-120

As reflected in the table, Guatemala proposes that the appeal be triggered by the notification under Article 16.4 of the DSU. In accordance with this provision, a panel report "shall be adopted at a DSB meeting* unless a party to the dispute formally notifies the DSB of its decision to appeal" (footnote omitted). In this regard, the Appellant would only need to formally notify the DSB of its *decision to appeal* (and not necessarily to describe the scope and content of the appeal).

Five days after the presentation of formal notification of a decision to appeal under Article 16.4 of the DSU, it is proposed that the Appellant file its submission. In cases where there are cross appeals, it is also proposed that the Other Appellant file its submission on the same day as provided for the filing of the Appellant's Submission. The reason is that both the Appellant and the Other Appellant would have the same period of time to read and analyze the final panel report and commence their preparations for the appeal. Consequently, the proposed period of five days between the formal notification under Article 16.4 and the filing of these submissions is only intended to give the Other Appellant the necessary time to finalize and file its submission. This period of time is equal to the period of time proposed by the Appellate Body between the filing of the Appellant's Submission and the filing of the Notice of Other Appeal and the Other Appellant's Submission.

Two days after the filing of the Appellant's and Other Appellant's submissions, both participants would have to submit their respective Notices of Appeal. The idea of submitting such Notices of Appeal after the filing of the submissions is to make clear that the content of the notices no longer have the effect of triggering the appeal or demarcating its scope. The Notices of Appeal would simply be the public document notifying WTO Members of the commencement of an appeal and informing them of its nature.

On day 20, it is also proposed that both Appellees file their respective submissions. This would eliminate the time difference that currently exists (and is maintained in the Appellate Body's proposal) between the deadlines for each Appellee. Put another way, it would redress the existing imbalances between the Appellees.

Finally, after having access to all submissions, Third Participants would have to file their submissions on day 23.

Guatemala is of the view that the adjustments described above may contribute to improving the Appellate Body's proposal on this issue.

II. Authorization, subject to certain conditions, to file and serve documents electronically:

As expressed by the Appellate Body, it has been the practice of the participants to send a version of their documents by electronic mail to the Appellate Body Registry on the day the documents are due, followed by same-day delivery of paper copies to the Appellate Body Secretariat.

For this reason, the Appellate Body considers "appropriate, and practical, to explicitly allow electronic filing of documents in appellate proceedings". In addition, the Appellate Body anticipates that authorizing the submission of documents electronically "would assist participants and third participants in the filing process and better accord with their actual working practices".

In light of the above, the Appellate Body proposes a new Rule 18(1)bis in the Working Procedures. In general terms, this proposed rule would give the participants the "option" to file documents through electronic mail. Should the participants decide to submit a document through electronic mail, it would have to be sent by 5 p.m. on the day such document is due, with the obligation to deliver paper copies to the Appellate Body no later than 11 a.m. the following day.

In addition, the paper copies would have to be accompanied by a signed certification stating that they are identical to the electronic copy. Furthermore, the Appellate Body proposes that in case of any discrepancy between the electronic copy and the paper copies, the Appellate Body only would take into account the electronic copy.

In Guatemala's view, the only advantage of these proposed amendments is to give the participants a couple of extra hours to edit and correct their documents before submitting them electronically. In effect, participants deciding to file electronically would have until 11 a.m. of the following day to print, staple and deliver the paper copies to the Appellate Body Secretariat.

This could be very convenient for the participants, especially those that must consult with their respective capitals in different time zones. However, this proposal contains some elements of concern to Guatemala.

One of these elements is the fact that current technology does not guarantee on-time delivery of electronic communications. It is a common problem that electronic mails, especially those including big amounts of information, reach the servers of the recipients some minutes, hours or maybe days after the moment they were actually sent. Even though the Appellate Body provides for a confirmation of receipt by its Secretariat, the proposal does not address the consequences that would have late arrival of electronic communications (i.e., after 5 p.m.). Electronic communications register the date and time of receipt. According to Rule 29 of the Working Procedures, it could be the case that any communication arriving after 5 p.m. might be considered as a failure to submit a document "within the required time-periods". In Guatemala's view, this uncertainty could be resolved if the Appellate Body avoids including the expression "by 5 p.m." in its proposal.

Another element of concern to Guatemala is the "signed certification" stating that the paper copies are identical to the electronic copy. There is no indication as to who has to issue such certification. Neither is indicated the merit of such certification if, in case of any discrepancy between the electronic copy and the paper copies, only the electronic copy would be taken into account by the Appellate Body. This, in the view of Guatemala, would require that both the electronic version and the paper copies be revised, thereby creating an unnecessary burden on the Appellate Body Secretariat and the participants.

Therefore, Guatemala suggests that the Appellate Body also consider the possibility of eliminating the requirement of certification as well.

Finally, Guatemala is of the view that the Appellate Body should allow either the submission of electronic files or paper copies, but not both.

III. Consolidation of appellate proceedings where two or more disputes share a high degree of commonality and are closely related in time:

According to the Appellate Body, where two or more disputes share a high degree of commonality, consolidation of appellate proceedings has proven to be a pragmatic way of conducting appeals, as it maximizes the efficient use of resources available to the parties, third parties and the Appellate Body. In addition, the Appellate Body states that consolidation of appellate proceedings also fosters consistency in decision-making.

For this reason, on certain occasions, the Appellate Body deemed it appropriate to consolidate appeals of separate panel reports into single appellate proceedings by establishing a single division and conducting a single oral hearing.

The Appellate Body has found a legal basis for these consolidated appellate proceedings in Rule 16(1) of the Working Procedures. That rule provides that the Appellate Body may "adopt an appropriate procedure for purposes of [a given] appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and [the Working Procedures]".

Furthermore, the Appellate Body clarified that decisions to consolidate appellate proceedings have been made on an *ad hoc* basis in consultation with the parties. In its view, the frequent resort to consolidated proceedings makes it appropriate "to codify this practice" by adding a rule on consolidation to the Working Procedures.

Guatemala supports the idea of having clear rules regarding consolidation of appellate proceedings. It can enhance legal certainty and increase predictability. Nevertheless, Guatemala has doubts about the manner in which the Appellate Body interpreted current practice. In Guatemala's view, current practice exists because the parties have understood the advantages of consolidation and have given their consent to it. Further, to the best of Guatemala's knowledge, there is no precedent of any party opposing consolidation. This, probably, is due to the fact that both the Appellate Body and the parties have carefully analyzed all necessary elements to guarantee that due process is respected for each single appellate proceedings that is consolidated.

However, looking at the proposal, it seems that the Appellate Body could take a decision to consolidate, even if any or all the parties are opposed to such consolidation. Guatemala does not believe that this would be a reflection of current practice.

In addition, Guatemala observes that the Appellate Body is making an important effort to define the parameters for consolidation. Nevertheless, in so doing, the Appellate Body also introduces some phrases that may eventually be problematic and subject to different interpretations, such as "around the same time", "and/or" and "substantial overlap" in the first sentence; or "good reasons" in the penultimate sentence, to mention some examples.

Moreover, there is no clear indication as to why the Appellate Body decided to use the expression "substantial overlap in the content of [the panel reports]" in the first sentence and "substantial overlap in the content of the appeals" in the second sentence. Without more information than that provided in the Appellate Body's proposal, Guatemala assumes that the second sentence would authorize the Appellate Body to take a decision to consolidate appellate proceedings, without consultations with the parties, if it considers that the overlap in the content of the appeals is likely.

With respect to the issuance of the reports, the Appellate Body basically states that, in general, it will issue a single report. If there is a request of a participant and "there are good reasons", the Appellate Body may issue separate reports, in a "single document" or in "multiple documents".

While it appears to be a nuance (although not necessarily clear) between a "single report" and "separate reports in a single document", Guatemala would have preferred to see reflected in the Appellate Body's proposal only two options: either a single report (logically in a single document) or separate reports (in separate documents).

Further, for single reports, Guatemala is of the view that the Appellate Body should include separate pages containing the rulings and recommendations coming out from each appeal. Since all appeals may not necessarily refer to the same issues of law, this practice would be helpful in determining the specific results for each of them. Finally, Guatemala suggests the elimination of "separate reports in single documents" since it would avoid confusion with a "single report".

In the light of the expressed above, I would be very grateful if you could kindly circulate these written comments to the Appellate Body and the Membership of the WTO.

In addition, let me take this opportunity to thank the Appellate Body for its proposed amendments and to you for your consultations, your time and consideration of this issue.

Written comments submitted by Japan

I. Introduction

1. Japan thanks the Appellate Body for its endeavor to review and update the *Working Procedures for Appellate Review* (the "*Working Procedures*") and for seeking views of WTO Members on the amendments to the *Working Procedures* it proposed in the document WT/AB/WP/W/10 (the "*proposed amendments*").[1] Japan would also like to express its appreciation to the Chairman of the Dispute Settlement Body for providing WTO Members with an opportunity to present their views on the proposed changes in procedural rules at the critical stage of dispute settlement process under the DSU, which may have a significant impact on the rights and interests of all Members. Japan has carefully examined the *proposed amendments* and has benefited from useful exchanges of views, both formal[2] and informal[3], with other Members on this matter. Japan hereby presents its views and comments as follows:

II. General Comment

2. Japan believes that three proposals contained in *proposed amendments* are mutually independent and each one is a stand-alone proposal. Accordingly, each proposal should be considered on its own merit.

3. While Japan understands that the objective common to these proposals is to "maximize[] the efficient use of" time and resources for those who involve in appellate reviews[4] and Japan subscribes to this underlying objective as such, any amendments that purport to embody this objective must be consistent with the DSU and should not introduce a new rule that may potentially cause any procedural complication at the appellate review stage. As the Appellate Body acknowledges, "the Working Procedures … have operated smoothly and effectively".[5]

4. In this respect, Japan wishes to recall the following statement of the Appellate Body:

> … we emphasize that the Working Procedures must not be interpreted in a way that could undermine the effectiveness of the dispute settlement, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.[6]

Japan believes that this description of Working Procedures' interpretations equally applies to their amendments. Japan further notes the Appellate Body's observation that "the protection of due process is an essential feature of a rules-based system of adjudication such as that established under the DSU" and "guarantees … that *one party is not unfairly disadvantaged with respect to other parties in a dispute*".[7]

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[1] Proposed Amendments to the Working Procedures for Appellate Review ("*proposed amendments*"), WT/AB/WP/W/10.

[2] The *proposed amendments* were placed on the agenda of, and were discussed at, the DSB meeting held 18 May 2010.

[3] For example, the informal DSB meeting was held on 20 April 2010 in which WTO Members exchanged their views on the *proposed amendments*.

[4] *Proposed amendments*, page 9, second paragraph from the top; *See also* proposed amendments, p. 5, first paragraph from the top.

[5] *Proposed amendments*, page 1.

[6] Appellate Body report, *EC - Sardines*, para.139.

[7] Appellate Body report, *US - Hormones Suspension*, para. 433. *(emphasis added)*

5. Thus, Japan's general approach in examining the *proposed amendments* is:

(a) any new or amended rules should be simple and easy to understand and operate without causing unnecessary procedural complications;
(b) any new or amended rules should be well balanced, taking due account of the interests of all participants in the appellate review proceeding; and
(c) anything to be regulated under the *Working Procedures* must be within the authority of the Appellate Body conferred under the DSU.

6. Bearing the above general approach in mind, Japan now wishes to present its specific comments and observations pertaining to the *proposed amendments* as follows.

III. Specific Comments

A. Timeline for Written Submissions

7. Japan always attaches utmost importance to the high quality of the Appellate Body reports, because such high quality reports have served and will continue to serve the very objective of the dispute settlement system; to provide "security and predictability to the multilateral trading system"[8]; and to achieve "a satisfactory settlement of the matter in accordance with the rights and obligations under [the WTO agreement]".[9] Under the DSU, the time period allowed for appellate proceedings is limited to 90 days.[10] This proves to be extremely challenging, especially because disputes brought to the WTO dispute settlement proceedings have become more and more complex than before and, consequently, the volume of documents to be filed is ever increasing. Thus, even one working day may have a greater marginal utility and can make a big difference. Under these circumstances, a reallocation of timeline that would allow a better use of the limited time available for the Appellate Body may serve to maintain its high quality reports and should therefore be considered positively. Given the preparatory time generally available for parties to disputes[11], Japan is sympathetic to the proposal that an appellant's submission be filed on the day that a Notice of Appeal is filed.

8. However, at the same time, the time-constraint in appellate proceedings under the DSU applies to the parties to the dispute as well. Thus any change in the timeline or an allocation of time in appellate proceedings must strike a proper balance amongst interests of all participants in the proceedings, *i.e.* the parties to the dispute, third parties, and the Appellate Body, duly taking into account procedural fairness and burdens to be born by all participants.

9. For example, under the proposal, the time period between an appellant submission and an appellee submission will be reduced from present 18 days to 15 days. Given the limited time available for the appellate review, this could mean that the proposal would change the allocation of working time to the disadvantage of an appellee who will lose 3 working days.[12] Japan recognizes that an appellee would be basically a winning side in the panel proceedings and, like an appellant, have several months to prepare for an appeal proceeding (after the issuance of the interim report, for instance) anticipating possible challenges to the panel report by the other side, based on its extensive knowledge on the file of a case. However, because cases are often very close and the findings of the

[8] Article 3.2 of the DSU.
[9] Article 3.4 of the DSU.
[10] Japan notes that the time available for Appellate Body's substantive work during this period is even shorter due to the time required to translate draft reports to other WTO official languages.
[11] *Proposed amendments*, page 2, second paragraph from the top of the page.
[12] In addition to these 3 working days, under the proposal, an appellee would also lose 7-day period currently available between the Notice of Appeal and the filing of an appellant submission, which the Appellate Body describes as "waiting period". *See proposed amendments*, page 4.

panels may be reversed or modified by the Appellate Body, an appellee's task of defending the findings of the panels by an appellee can be formidable and may in turn require extra time to work for preparing its appellee submission. Thus for the sake of fairness to both an appellee and an appellant, Japan considers that the current 18-day period between the filings of an appellant submission and an appellee submission should be maintained at the minimum.

10. The Appellate Body also proposes that the date for filing of the other appellant submission be moved forward from Day 15 to Day 5. Since, like an appellant, other appellant/appellee also has several months (from the issuance of the interim report, for instance) to prepare for its other appeal if it wishes to do so, the Appellate Body may wish to consider the possibility of moving forward the date of filing of the other appellant submission further (say, to Day 3). Given that other appellant/appellee is likely to focus on its appellee submission after the filing of the other appellant submission, in this way, other appellant/appellee may be relieved of its burden somehow by gaining extra days for a period between its filings of the other appellant submission and the appellee submission, which is currently, and under the proposal as well, 10 days. Japan also recognizes that there would be a situation where other appellant/appellee may need more time for consideration and preparation taking into account the appellant submission. A case of a conditional appeal can be an example. Accordingly, a few additional days between the filing of the appellee submission and that of the other appellant submission to the proposed amendment (say, from Day 5 to Day 8) could be also an option as well.

11. Under the proposal, third participants will have extra 3 days between the receipt of an appellee submission and their submissions. This extra time would presumably enable the third participants to respond in their submissions to the appellee's arguments. Japan understands that this proposed amendment purports to afford an opportunity for all participants and the Appellate Body to review and analyze all possible arguments to be presented in the proceeding before the oral hearing. Japan sees certain merits in this underlying objective of fostering full and in depth analysis and discussions in appellate proceedings. However, Japan is not sure that, as a practical matter, 3 extra working days would make much of a difference in terms of comprehensiveness and extent of coverage of arguments achieved in third participants' submissions. This seems to be the case, in particular, for a non-WTO official language speaking Member like Japan. Moreover, giving extra time for third participants to prepare for their submission would assume more arguments in the third participants' submissions, but it would also mean less time for the participants and the Appellate Body to analyze third participants' arguments before the oral hearing. Thus the assumption of the proposed change would be more arguments to be reviewed within less time. Japan is further concerned that this amendment might create any presumption that third participants are afforded ample opportunities to set forth fully what they wish to say in their submissions, thus being afforded less opportunity to intervene at the oral hearing as a consequence. On balance, therefore, Japan considers that it would be more fair, efficient and effective use of time for all participants in the proceedings that the third participants would respond, if any, to the appellee's arguments during the oral hearing, as is the case for an appellant. This concern should also be applicable to the proposal on timeline with respect to prohibited subsidies appeals.

12. For the ease of reference, Japan would provide the following possible timelines which reflect the arguments developed above:

	General Appeals	Prohibited Subsidies Appeals
	Day	Day
Notice of Appeal	0	0
Appellant's Submission	~~7~~ **0**	~~4~~ **0**
Notice of Other Appeal	~~12~~ **5 -> 3 or 5 or 8**	~~6~~ **2**
Other Appellant(s) Submission(s)	~~15~~ **5 -> 3 or 5 or 8**	~~7~~ **2**
Appellee(s) Submission(s)	~~25~~ **15 -> 18**	~~12~~ **7**
Third Participant(s) Submission(s)	~~25~~ **18**	~~12~~ **9-> 7**
Third Participant(s) Notification(s)	~~25~~ **18**	~~12~~ **9-> 7**
Oral Hearing	~~35 – 45~~ **30 – 40**	~~17 – 23~~ **15 – 20**
Circulation of Appellate Report	60 – 90	30 – 60
DSB Meeting for Adoption	90 – 120	50 – 80

B. Electronic Filing and Service of Documents

13. As the Appellate Body noted in the *proposed amendments*[13], there is an emerging practice that electronic media and means are used for the filing of documents in the dispute settlement procedures. Japan has no quarrel with the general proposition that the dispute settlement system should be keeping up with the evolution of technology, and allow for the better and more efficient use of such means and media.

14. However, this must be done in full accord with the principle of procedural fairness, with due regard to the security and certainty of such delivery method and media.

15. Under the proposal, a party has an option as to a means of delivery that it will use. If one party decides not to file by an electronic means for legitimate reasons (e.g. security or certainty concerns) but the other party decides otherwise, given the time needed for printing and other clerical works requiring for paper filing, the former party must complete its substantive work on its submission much earlier than the latter. This would create a discrepancy in terms of the practical deadline for the works associated with the filings. In "a rules-based system of adjudication, such as that established under the DSU"[14], where a strict adherence to the principle of procedural fairness is required, Japan is not convinced why having a legitimate concerns about the security or certainty of filing methods would cause a party being treated differently or why those who have such concern should be placed in a disadvantaged position just for the sake of having such concern. [15]

[13] *Proposed amendments*, page 6.
[14] Appellate Body report, *US - Hormones Suspension*, para. 433.
[15] Japan would also note that under the proposed text there is no 5 p.m. deadline in the case of paper filing under the *Working Procedures*.

16. Further, proposed Rule 18(4) appears to assume that a means of serving document and the deadline can or do differ depending on recipients, *i.e.* between the Appellate Body and other parties to a dispute. For example, "where a party chooses to submit a document through electronic mail" to the Appellate Body, that party can still decide to serve that document on the other parties and third parties by a means of delivering a paper copy (Rule 18(4)(a)). In that case, there would be no 5 p.m. deadline provided for in the case of document filing to the Appellate Body under Rule 18(1)*bis* and no requirement to send to them an electronic copy of the document that the party filed to the Appellate Body as an authentic version.[16] In other words, under the proposal, the party has no fixed deadline as long as the document is served on the other party and third parties on the date that the document is due and is not required to share the authentic version with the other parties and third parties at all.[17] Japan finds no legitimate reason to justify such a different treatment in "a rules-based system of adjudication".

17. Finally, Japan is not convinced that e-mail is a secured means of delivery in the dispute settlement proceeding because of the possibility of failure of mail servers of the Secretariat or missions of parties in Geneva, mistyping of e-mail addresses, or e-mail spoofing. In addition, there would be a risk of discrepancy between the electronic version and what the party intends to submit due to the difference in the version or language setting of operational and/or word processing software. Japan considers that such concerns on the technical issues and security of delivery methods should be valid and must be addressed.

18. In light of these considerations, Japan finds little need to depart from the existing practice for the time being.

C. Consolidation of Appellate Proceedings

19. Japan has no quarrel with the Appellate Body's general observation that consolidation of appellate proceedings would "maximize[] the efficient use of resources available to"[18] the participants in the proceedings and "foster[] consistency in decision-making".[19] However, as Japan understands it, consolidation of appellate proceedings has been operated and made possible through practical and pragmatic cooperation and agreement among the parties to the dispute. Given the voluntary nature of such arrangement and practice with respect to consolidation of appellate proceedings that have worked so well thus far, Japan is not convinced that consolidation or practice thereof can be adapted to a formal and hard regulation by the Appellate Body. Although the Appellate Body may explain that the proposed rule is a mere codification of the existing practice, the proposed rule seems to go beyond a simple codification of the existing practices and add new elements or rules to the process, of which Japan is not supportive.

20. Furthermore, Japan has a number of concerns on the proposed rule for consolidating appellate proceedings from the conceptual, legal, and practical points of view.

21. For example, the proposed text indicates that the rule is designed to regulate not only the actual consolidation after the notice of appeal is filed; it appears to be designed to regulate the pre-appeal stage as well. The proposed text that contains such languages as "[w]hen more than one panel report is circulated … at or around the same time", and "the Appellate Body may take such a decision

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[16] Rule 18(1)*bis* provides that "In case of any discrepancy between the electronic copy and the paper copies, only the electronic copy will be taken into account by the Appellate Body."

[17] Even where the party elects to send to the other parties and third parties an electronic copy, there is no "5 p.m." deadline stipulated in Rule 18(1)*bis* with respect to those recipients. The same is true with respect to "11 a.m. of the following day" deadline also provided for in Rule 18(1)*bis*.

[18] *Proposed amendments*, page 9.

[19] *Proposed amendments*, page 9.

if it considers that a substantial overlap in the content of the appeals is *likely*" *(emphasis added)* is quite revealing. Japan understands that consolidation process contemplated under the proposal ordinarily involves such steps as consultations with the parties and a decision by the Appellate Body whether or not to consolidate. It may also foresee, where necessary, a specific order by the Appellate Body requesting the parties to act in a particular manner in accordance with such a decision, for example, to simultaneously file their notices of appeal on a specific (or the same) date. And under the proposal, all these procedural steps can be taken even before initiation of appellate proceedings. This brings us to a fundamental question. Is the Appellate Body, except for the certain institutional matter, authorized under the DSU to regulate or act on individual appeals that have yet to be initiated? To recall, Article 17.1 of the DSU provides "[t]he Appellate Body shall hear appeals from panel report". Rule 3(1) of the current Appellate Body Working Procedures elaborates, "[i]n accordance with paragraph 1 of the Article 17 of the DSU, decisions relating to an appeal shall be taken solely by the division assigned to that appeal". Rule 6(1) further provides that [i]n accordance with paragraph 1 of Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal". Given these explicit provisions, Japan fails to see how a division can be established and assigned to an appeal which is not even initiated, and hear and take any decisions as to such non-existing appeal including those on consolidation of the proceeding that has yet to be started with the other (also non-existing) appellate proceeding.

22. The language in the proposed text "[t]he Appellate Body may take such a decision if it considers that a substantive overlap in the content of the appeals is likely" also indicates that the Appellate Body, in deciding the issue of consolidation, may prejudge the scope of the possible appeals at the pre-appeal stage. This may lead to the situation where the parties may be forced to expose the possible scope and content of their appeals to other parties during the required consultations on the consolidation with the Appellate Body before they actually file their notices of appeal. Otherwise, how can the Appellate Body decide as to whether or not "a substantial overlap in the content of the appeals is likely"?

23. Under the proposal, the Appellate Body may decide *proprio motu* to consolidate appeals over the objection(s) of the parties.[20] This is a clear deviation from the current practice as Japan understands it.

24. While the proposed text authorizes the Appellate Body to consolidate appeals *proprio motu*, it does not set forth any rule for remedy accorded to the parties who feel their rights and interests are prejudiced as a result of consolidation.[21]

25. The proposed rule sets forth "substantial overlap in the content of [panel] reports" and a likely "substantial overlap in the content of appeals" as necessary condition for consolidation. As explained in pages 7 to 9 of the proposed amendments, these "substantial overlap" tests appear to be intended to cover a wide variety of scenarios. However, Japan is yet to be convinced whether this "substantial overlap" language can be applied consistently to cover such diverging situations. Furthermore, if the terms "substantial overlap" cover such a wide variety of situations, one may wonder whether the terms do meaningfully define and confine the situations that would warrant consolidation.

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[20] The proposed text provides that "the Appellate Body may … on its own initiative, and after consultations with the parties, decide to consolidate the appellate proceedings before a single division".

[21] Under the proposed rule, the Appellate Body can consolidate the several appellate proceedings (or "likely" proceedings), "provided that consolidation of the appellate proceedings can be done consistently with due process and with the requirements of the DSU". It is evident that the Appellate Body frames the issue of consolidation in terms of "due process". Japan notes that the words "due process" is not a treaty term existing in the DSU and nowhere in the DSU is this term or concept defined. Thus Japan is not sure how the Appellate Body ensures that consolidation be done, over the objection of the parties, consistent with this undefined term "due process".

26. Under the proposal, issuing of a single report becomes a norm and the parties must show "good reasons" when they wish to depart from this norm.[22] In considering the issue of a single report, we need to underline that findings and conclusions of the Appellate Body report would constitute a basis for a future implementation action by the responding party and for a claim of non-compliance or a possible enforcement action by the complainant. And because of the concern about a possible complication as to the rights and obligations of the parties at the implementation stage of a dispute in a multiple complainants' situation, the practice has been developed in which separate reports are issued, should the parties so request. This current practice has been established based on its own legitimate reason and background and therefore makes perfect sense. Japan finds little reason to justify a departure from this well established practice. In this respect, Japan notes that Article 9.2 of the DSU provides that "if one of the parties to the dispute so request, the panel shall submit separate reports on the disputes concerned". Thus under the DSU, at least at the panel stage, issuing separate reports upon request by any party to the dispute is a norm, not an exception that must be justified with "good reasons". More generally, Article 9.2 provides that the single panel shall organize its examination and present its findings in such a manner that *the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired*" *(emphasis added)*. Japan sees little reason to believe that "the rights which the parties to the dispute would have enjoyed" should be treated differently depending on the different stages of a dispute.

27. Finally, under the proposal consolidation can be made when "more than one panel report is … appealed at or around the same time". However, under the separate proposal on "the Timeline for Written Submissions", an appellant submission shall be filed on the same date as the notice of appeal. In a multiple complainants' situation, if the notices of appeal are filed and the appeals are initiated by different parties on the different dates, how could it be practically possible to consolidate these staggered proceedings and align the two or more timetables without prejudice to any parties to the dispute and within the prescribed 90 day time period? This is surely an important point that need to be addressed.

28. For all these reasons, Japan considers that consolidation of appellate proceedings should be left to ad hoc, practical and voluntary arrangements to be agreed on by the parties and confirmed by the Appellate Body.

IV. Conclusion

29. These are comments and views on the proposed amendments. Japan hopes that the Appellate Body would find these comments to be helpful for its further consideration of this matter.

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[22] The proposed text uses several different terms and concepts in this context without defining them: "a single report"; "separate reports; "a single document" and "multiple documents". Japan notes that under "Definitions" part of the current *Working Procedures*, the term "documents" "means the Notice of Appeal, any Notice of Other Appeal and the submissions and other written statements presented by the Participants or third participants". It appears that Appellate Body reports do not fall within this definition of the term "documents".

Written comments submitted by Korea

I. INTRODUCTION

1. In response to the request from the Appellate Body, Korea would like to provide its views on the *Proposed Amendments to the Working Procedures for Appellate Review* ("*Proposed Working Procedures Amendment*") dated 12 January 2010 in accordance with Article 17.9 of the *Understanding on Rules and Procedure Governing the Settlement of Disputes* ("DSU").[1]

2. Korea believes that the three items included in the *Proposed Working Procedure Amendmen*t have provided a solid and useful platform for productive discussions among Members in order to further facilitate and improve the appellate review of the WTO dispute settlement system. Korea thus appreciates the Appellate Body's and its Secretariat's efforts in preparing the *Proposed Working Procedure Amendment*.

3. As a general matter, Korea underscores the potentially significant impact the proposed amendments could bring in the overall operation of the WTO appellate proceedings. Any change to the Appellate Body's existing Working Procedure merits a careful and thorough analysis.

4. Korea recognizes the logistical burden the Appellate Body is currently facing in the course of discharging its duty under the DSU within a relatively short timeframe. We have been keenly aware of the need for the Appellate Body to conclude its work within the stringent deadline. In that respect, proposals for enhancement of time-saving and efficiency, as encapsulated in the three amendments, are indeed timely and appropriate.

5. The pursuit for time-saving and efficiency, however, could sometimes lead to unintended abridgement of Members' legitimate right under the DSU as parties participating in Appellate Body proceedings. In that spirit, Korea believes that discussions on the three proposed amendments should not lose sight of this potential conflict between the efficiency and Members' right, and that efforts should be made to strike a proper balance between the two.

II. THE SIMULTANEOUS SUBMISSION OF THE NOTICE OF APPEAL AND THE APPELLANT'S SUBMISSION COULD NEGATIVELY AFFECT MEMBERS' RIGHT IN THE APPELLATE PROCEEDINGS AND THUS DESERVES CAREFUL CONSIDERATION

6. *First*, one of the three proposals in the *Proposed Working Procedures Amendment* is to require an appellant to file its Notice of Appeal and the submission at the same time and to adjust subsequent proceedings accordingly. The purpose of this suggestion is to cut down time allocated to the parties and put it for better use by the Appellate Body.

A. Discussions to Re-allocate Time Between the Parties and Appellate Body Should Proceed with the Necessity to Maintain the Proper Balance of the Interests of the Two in Mind

7. It is almost undisputable that the simultaneous submission of a Notice of Appeal and an appellant submission coupled with following curtailment of time for subsequent steps will expedite the entire appellate proceedings and thus provide the Appellate Body with more time to contemplate on appealed issues. The practical benefit such an expedited procedure may bring notwithstanding, the reality also tells us that to many Members standing at the doorstep of initiating the appellate

[1] WT/AB/WP/W/10 (Jan. 12, 2010).

proceedings the initial 7-day period after the submission of a Notice of Appeal offers crucial opportunities to prepare overall strategies and develop legal arguments.

8. Consequently, eliminating the 7-day period by collapsing the two separate submissions could impose a significant logistical burden on the appellant Member. It is not so uncommon that a decision to appeal an adverse panel report is made only at the last minute. Under these circumstances, having an appellant Member to lay out all its legal claims and arguments as early as the submission of the Notice of Appeal may carry the potential of undermining the Member's right to present its claims and arguments effectively.

9. Under the proposed scheme, an appellee would face a similar logistical burden as well, because it would have to submit an appellee's submission 15 days (rather than the current 18 days) after the filing of the Notice of Appeal and the appellant's submission. In other words, the appellee does not get any advance warning about the appeal *until* the appellant files its submission together with the Notice of Appeal. The appellee then has only 15 days to respond. We are concerned that the absence of an advance warning and the curtailment of critical three days under the proposed scheme would make it practically difficult for the appellee to seek effective defense.

10. If such a concern were indeed realistic, Members would have to ponder how such expedited proceedings would actually serve the DSU's basic objective of "providing security and predictability to the multilateral trading system".[2] The appropriateness of time-saving for time-saving's sake should be questionable if the time-saving does not guarantee better fulfilment of the objective of the DSU. In Korea's view, Members should remain mindful that time-saving and efficiency of the Appellate Body proceedings should not be achieved at the expense of the Members' right to present its claims and defenses effectively.

11. Therefore, in addressing this particular issue, it seems critical for Members to strike a careful balance between the interest of the Appellate Body to enhance overall efficiency in the appellate proceedings and the interest of the Members to preserve their right as participants in the proceedings. The merits and demerits of eliminating the 7-day preparation period for the appellant and subsequent period adjustment should be put into perspective. This issue deserves careful consideration of Members.

B. The Notice of Appeal Has Its Own Distinct Function and Role in the Appellate Proceedings

12. Another potential consequence to be effected by this proposal is that a notice of appeal would then become a mere formality. The Notice of Appeal would cease to have its own *raison d'être* and become a cumbersome incidental document which is virtually subsumed in the appellant submission. Given that the notice of appeal has a designated role to play under the DSU[3], including its status as the only document available to the public, Members will have to ponder over the appropriateness of rendering the notice of appeal virtually "meaningless", as proposed in the *Proposed Working Procedures Amendment*. For instance, while stressing the importance of the Notice of Appeal in the context of preserving the due process principle, the Appellate Body stated in *US – Countervailing Measures on Certain EC Products* stated:

> In sum, our previous rulings have underscored the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively,

[2] *See* Article 3.2 of the DSU.
[3] *See* Article 17.5 of the DSU.

> and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively...[4]

As such, we note that the current proposal does not necessarily dovetail with the Appellate Body practice concerning the Notice of Appeal.

13. In addition, Members have also observed from previous disputes that sometimes an important procedural issue arises regarding whether the appellant's submission is compatible with its Notice of Appeal[5], as the latter provides for the outer parameter of the former. All these practices and precedents collectively stand for the proposition that a Notice of Appeal has its own distinct function and role in the appellate proceedings.

14. Under these circumstances, collapsing the Notice of Appeal and the appellant's submission is tantamount to virtually terminating the unique role of the Notice of Appeal under the DSU and the appellate proceedings. We believe that a decision to adopt that path requires more discussions and consensus among Members.

III. CONSIDERING BROADER APPLICATION OF IT TECHNOLOGIES TO ASSIST THE APPELLATE BODY IN CONDUCTING THE APPELLATE REVIEW SEEMS APPROPRIATE PROVIDED THAT SOME TECHNOLOGICAL SAFEGUARDS ARE INTRODUCED

15. *Secondly*, the *Proposed Working Procedure Amendment* suggests that Members consider wider application of recent IT technologies in the Appellate Body proceedings. As a general matter, Korea believes this proposal both appropriate and timely, considering the effort of other international and domestic tribunals to reflect IT development in their respective proceedings.

16. As mentioned by some Members, application of the IT technologies also poses new challenges as well. Confirming authenticity of the electronic submission, preserving confidentiality of the electronic documents and maintaining a reliable electronic submission system to accommodate a large volume of documents are some examples of such new challenges. Experience of other tribunals may shed some helpful light on how to deal with and overcome these new challenges.

17. In addition, Korea also recognizes that some Members propose duplicate submission of hard copies one day after the electronic submission. We note the benefit of such duplicate submission as it could provide the Appellate Body with full sets of hard copies and probably ease the colossal logistical burden the Appellate Body faces. But at the same time, a concern could be raised that such a system would virtually impose double deadlines for the parties. If duplicate submission were to be found indeed necessary even if the Appellate Body allows parties to make their submissions electronically, the deadline for hard copy submission could be pushed back so as to give the parties sufficient time to prepare the official, electronic submission.

18. At the same time, if the Appellate Body requires Members to submit both electronic submission and paper submission either at the same time or with some interval, it may also explore adopting a guideline to determine which of the two (*i.e.*, electronic submission vs. hard copy submission) supersedes in the case of inconsistency of contents.[6]

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[4] *United States – Countervailing Measures Concerning Certain Products from the European Communities* (WT/DS212/AB/R) (Jan. 8, 2003), at para. 62.

[5] *See US - Byrd Amendment*, paras. 161-162.

[6] For instance, Members may include the provision that says "in case of inconsistency, the electronic version will prevail".

IV. THE APPELLATE BODY'S CONSOLIDATION OF MULTIPLE CASES SHOULD PROCEED WITH THE CONSENT OF PARTIES

19. *Lastly*, regarding the proposal for consolidation of the multiple appellate proceedings, Korea shares some Members' concern that the proposal is somewhat vague and does not necessarily reflect the current practice. Particularly, in our view it is not entirely clear from the proposed text whether or not the Appellate Body retains the authority to consolidate multiple cases even in the absence of clear consent from the parties.

20. In our view, such *ex officio* consolidation without the parties' consent may run the risk of undermining or abridging Members' legitimate right for appellate review as guaranteed under Article 17 of the DSU. Here again, an effort to strike a proper balance between facilitation of Appellate Body proceedings and the preservation of Members' right is arguably in order.

21. Consideration of this proposal should proceed with the existing Appellate Body practice in mind. In our view, the current practice dictates that consolidation becomes an option only with the Members' consent, either explicit or implied. When a Member does not agree to a proposed consolidation, for whatever reason, in a particular case, such a decision will have to be respected by the Appellate Body. The Appellate Body's statements in previous cases clearly indicate that parties' consent is one of the essential elements in reaching a decision to consolidate. It thus stated that:

> In a letter dated 30 May 2008, the Division noted that, in the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the *Working Procedures*, and in agreement with the participants, the appellate proceedings in respect of the European Communities' appeal from the Panel Reports in *US - Continued Suspension* and *Canada - Continued Suspension* would be consolidated due to the substantial overlap in the content of the disputes.[7] (underlines added)
>
> The Division further noted that, in the interests of "fairness and orderly procedure", as referred to in Rule16(1) of the *Working Procedures*, and in agreement with the participants, the appellate proceedings in respect of the appeals by both Thailand and India would be consolidated due to the substantial overlap in the content of the disputes.[8] (underlines added)

22. The consolidation in the panel proceedings is mostly for the situation where multiple complainants challenge the same measure of the respondent. On the other hand, according to *Proposed Working Procedures Amendment*, the consolidation at the Appellate Body proceedings could sometimes involve two different measures from different respondents, simply because the underlying legal issues are the same or similar. If two more different measures are involved, however, it is possible that there are legitimate reasons for an appellant to seek a separate review even if the underlying legal issues are the same.

23. Members should also be fully cognizant of the practical obstacle in this regard. In accordance with time limits in Article 17.5 of the DSU, multiple appeals could only be grouped in one single procedure if they are brought within a few days after the initiation of the first appeal. As it is indeed difficult to say what is a range of permissible spreads of dates among multiple initiations of appeals, it would make more sense to seek consent from the parties at this juncture.

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[7] *Canada/United States – Continued Suspension of Obligations in the EC - Hormones Dispute* (WT/DS320/AB/R, WT/DS321/AB/R) (Nov. 14, 2008), at para. 27.

[8] *United States – Measures Relating to Shrimp from Thailand* (DS343), *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* (DS345) (WT/DS343/AB/R, WT/DS345/AB/R) (Aug. 1, 2008), at para. 16.

V. CONCLUSION

24. Overall, Korea does recognize and share the reasons and rationale of the three amendments that could help expedite and facilitate the appellate proceedings. At the same time, these issues do raise wider systemic implication including, most notably, how to preserve Members' right to effectively present claims and defenses throughout appellate proceedings.

25. In Korea's view, the systematic benefit from the expedited appellate proceedings and the systematic benefit from preserving the parties' right during the appellate proceedings are equally important, and one does not necessarily outweigh the other. Korea suggests that Members be especially mindful, throughout our development of the new Working Procedures, of the necessity to provide all parties with the fundamental right to be heard, both in writing and orally.

26. Korea looks forward to working with Appellate Body and other Members to exchange views and find workable solutions. Korea will also continue to provide its views in the light of its own practical experience in appellate proceedings.

Written comments submitted by Mexico

1. We thank the Chairman of the Dispute Settlement Body (DSB) for giving us the opportunity to comment on the proposed amendments to the Working Procedures for Appellate Review. Article 17.9 of the Dispute Settlement Understanding (DSU) expressly authorizes the Appellate Body (AB) to draw up its working procedures in consultation with the Chairman of the DSB and the Director-General. Members play an indirect role in the establishment of the AB's working procedures, but any amendment thereto has an immediate impact on WTO Members' dispute-related work. Therefore, Mexico sees it as extremely important to take part in these exercises to exchange views within the DSB on potential amendments to the AB's working procedures.

Proposal 1. Simultaneous filing of the notice of appeal and the appellant's written submission

2. ***New time-frames***. We are pleased to note that all the time-frames, except one, between an appeal's procedural stages have remained the same in terms of the number of days or the number of days is being increased under this proposal. This is a very positive development. The only instance in which the number of days has been reduced is the deadline for the appellee's submission. This is a negative point because the appellee needs sufficient time to prepare its submission. The following alternative may be more efficient:

a. We would suggest extending the time-period for appellees' submissions in the AB proposal to 18 days instead of 15. This would give appellees three more days to present their written submissions.

b. We note that this amendment to the AB's proposal would leave no time for third participants to respond to appellees' submissions in their written submissions. However, we consider it more important to give sufficient time to appellees, even if this shortens the deadline for third parties by three days. In any event, three days is very little time for incorporating appellees' arguments efficiently into third-party written submissions.

3. ***Use of the notice of appeal***. With this proposal, the notice of appeal loses much of its legal utility. Although it would continue to be a document served in the interests of transparency, its legal utility would appear to be considerably diminished.

4. We note that Article 16.4 of the DSU provides that a panel report shall be adopted " … unless a party to the dispute formally notifies the DSB of its decision to appeal … ". This Article of the DSU in principle gives the AB the opportunity to amend, abolish or regulate the notice of appeal in some other way under its working procedures. In other words, the DSU does not require a notice of appeal for the party commencing the appeal to notify the DSB of its intention to appeal.

5. To our mind, the status of a notice of appeal that is to be delivered simultaneously with the appellant's or other appellant's submission should be clarified.

Proposal 3. Consolidation of appellate proceedings

6. The criteria for consolidation appear to give the AB discretion in terms of whether or not to consolidate, which is not necessarily a bad thing. We do have a comment to make, however. To our understanding, the AB does not have jurisdiction over panel reports at the circulation stage. The AB's jurisdiction begins only once the appeal has commenced. This should be reflected at the beginning of paragraph 16(1)*bis* of the proposals for amendment.

7. One basic question as regards consolidation of proceedings is the format of an AB report. The last two points of the AB proposal do not specify what the format will be in the event that reports are issued as a single document. Cases where there is more than one complainant or more than one defendant involve a series of bilateral legal relationships. Therefore, each of these legal relationships needs to be very clearly specified in the conclusions and recommendations part of the AB report. It would be very useful if such a format were provided for in the AB's working procedures. This would prevent a great many implementation problems.

Written comments submitted by New Zealand

1. Introduction

New Zealand welcomes the opportunity to provide written comments on the Appellate Body's proposed amendments to its working procedures. New Zealand's written comments reflect the oral statement New Zealand made at the meeting of the DSB on 18 May 2010.

New Zealand expresses its support and appreciation for the work of the Appellate Body. New Zealand is sympathetic to the Appellate Body's wish to make more efficient use of time during the 90-day appeal period. It supports changes that will give the Appellate Body more time to engage in its careful and thorough analysis. New Zealand wishes to ensure that, at the same time, this goal is balanced with the needs of all the parties involved in the appeals process.

New Zealand is happy for its written comments to be circulated to DSB Members, and to the Appellate Body.

2. Timeline for notice of appeal and written submissions

a. Removal of 7-day period between Notice of Appeal and Appellant submission

New Zealand supports the proposal to require the appellant to file its submission on the same day as the Notice of Appeal. New Zealand believes that the 7 days currently allocated to the appellant from the time of filing its Notice of Appeal can be more effectively and appropriately used by the appellee. By the time the appellant files its Notice of Appeal, it will already have had sufficient time to prepare for the appeal and to draft its submission. The appellee, however, has much to gain from seeing the appellant's full submission as soon as possible, in order to give the appellee adequate time to prepare its own submissions in response. New Zealand addresses this issue further under the heading "Appellees".

b. Notice of Appeal

New Zealand notes that during DSB discussions, there was debate over the utility of retaining the Notice of Appeal, if it is to be submitted at the same time as the appellant's submission. New Zealand considers that there is benefit to be had for the parties, and the public, in the filing of a Notice of Appeal. The Notice serves important functions, both in terms of transparency and delineating the scope of the appeal.

c. Appellees

New Zealand has concerns over the proposal to bring forward the appellee's submission date. Currently the appellee has 25 days from the date of Notice of Appeal (and 18 days from receipt of the appellant's submission) during which to prepare and file its submission. The AB's proposal would see the Notice of Appeal and appellant's submission due on the same day, with the appellee's submission due 15 days later. This reduction in time for the appellee (10 days from the Notice of Appeal and 3 days from receipt of the appellant's submission) risks upsetting the balance of rights between the principal parties, particularly in the case of resource-constrained appellees. Not only would the appellee lose time in which to prepare its submission after having seen the appellant's submissions, but it would also lose the 7 days otherwise available to organise resources and to prepare based on the information provided in the Notice of Appeal.

New Zealand considers that it is important for the effective functioning of the appeal process that appellees have sufficient time to prepare and to consider the appellant's submission. As noted above, the extra 7 days gained by requiring the Notice of Appeal and appellant's submission to be filed on the same day would be appropriately allocated to the appellee. New Zealand considers that 25 days from Notice of Appeal to tabling of the appellee's submission would represent a fair balance of rights between the principal parties.

d. Third Parties

In principle New Zealand supports third parties having the opportunity to review the appellees' submission before submitting their own. However, the extra three days proposed for third parties to prepare their submissions should not come at the expense of the preparation time for the principal parties, particularly the appellee.

3. Combined proceedings

New Zealand is sympathetic to the idea of formalizing current practice around consolidation of proceedings in appeals, particularly to the extent that it would make it easier for third parties with limited resources to participate. However, real and meaningful consultation with the parties before determining whether or not to consolidate would be vital. New Zealand agrees with the point made by other Members during DSB discussions that, in reality, consolidation will only work if the parties to the dispute agree to it.

4. Electronic filing

With regard to electronic filing, New Zealand notes that the Appellate Body's proposal contemplates that filing would not be complete until both electronic and paper copies were received by the Appellate Body. However, New Zealand is sympathetic to concerns expressed orally by other Members regarding the potential for corruption of electronic documents. New Zealand would therefore prefer that paper copies continue to be regarded as the official filed documents. The obligation also to supply electronic copies to the parties to the dispute and to the Secretariat should be formalised, but not be a requirement of successful filing.

We understand that more general discussions on the topic of electronic filing are underway within the WTO Secretariat, which may provide for more secure and reliable means of filing. We would support leaving this proposal and considering amendment at a later date, once there is a clearer picture of the infrastructure that may be put in place.

Written comments submitted by Singapore

1. Singapore submits these written comments pursuant to paragraph 3 of the decision adopted by the Dispute Settlement Body ("DSB") on 19 December 2002 on the Additional Procedures for Consultations between the Chairperson of the DSB and WTO Members in relation to Amendments to the *Working Procedures for Appellate Review*.[1] Singapore made oral comments on the Proposed Amendments to the *Working Procedures for Appellate Review* (WT/AB/WP/W/10) during the meeting of the DSB on 18 May 2010. These written comments add to and elaborate on the comments that Singapore made at the DSB meeting.

2. The *Working Procedures for Appellate Review* ("*Working Procedures*") are important not only for appeal proceedings. They may have important implications on proceedings at the panel stage. They can, possibly, set precedent standards for procedures in other fora, which may look towards the WTO as the model for international dispute settlement. Singapore thanks the Appellate Body for document WT/AB/WP/W/10. We appreciate the Appellate Body's efforts to improve the *Working Procedures* and make them current.

3. In principle, Singapore supports the Appellate Body's efforts to amend the *Working Procedures*, provided that the amendments do not undermine the parties' rights. Having a smooth and efficient appeal process and preserving the rights of the parties are not mutually exclusive, nor do they need to compete. An appropriate balance must be struck.

4. Any amendment to the *Working Procedures* should be simple, clear and improve the existing procedures. It must be within the power of the Appellate Body to make. Although the Appellate Body is not bound by the provisions in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*") relating to panel proceedings, procedures at both the appellate and panel stages should be consistent.

5. The following are Singapore's specific comments on the proposed amendments.

Timelines

6. In the proposed amendments, third parties have three days after the appellee's submissions, to file their submissions. Singapore welcomes this aspect of the proposal that provides third parties with the opportunity to consider and address both the appellant's and appellee's arguments in their submissions. In addition to making the third parties' submissions more balanced and their arguments for and against both the appellant and appellee more transparent, the proposal can potentially save the time otherwise taken by the third parties to address the appellee's submissions in the oral proceedings.

7. We have heard the proposal from other Members, during their oral interventions, to extend the timeline for the third parties' submissions to be due from 3 days to 5 days after the appellee's submissions. We support this extension provided that it does not extend the appellate review beyond 90 days.

8. We note that in the current proposal, the appellee will have 15 days instead of 18 days to consider the appellant's submission. The reduction in time for the appellee needs to be considered in conjunction with the proposal for the notice of appeal and the appellant's submission to be filed at the same time. The appellee will also be disadvantaged by not having an earlier notice of the appeal.

[1] WT/DSB/31.

9. The improvement to the procedures for the third parties should not be at the expense of the appellees. On the understanding that the overall timeline of 60-90 days for appellate review would not be affected, the current timeline for the appellee's submission to be due 18 days after the appellant's, should be maintained together with the improvement in timelines for submissions by third parties.

Electronic Filing

10. Singapore recognises that electronic filing is a trend in many judicial systems around the world. In Singapore's domestic judicial proceedings, all matters relating to civil proceedings, including documents for civil litigation, are electronically filed. In principle, Singapore supports the initiative for documents to be electronically filed. We recognise that electronic filing can substantially reduce the many paper copies of submissions that are currently submitted. A lot of time can also be saved for the parties. However, we find that the proposal is silent on the system supporting electronic filing.

11. The proposal provides for submission through an e-mail as an alternative mode of submission. Although paper copies will still need to be submitted, in the event of discrepancy, the version sent via e-mail would prevail. For electronic submission to be relied on as a mode of submission envisaged by the proposal, the system supporting it must address:

a. the security of confidential information which may be contained in the submission;

b. the format of the documents submitted,

c. the veracity of the identity of the sender, and

d. the accuracy and certainty of the time at which documents are received electronically.

12. The current proposal does not contain sufficient information on these important matters, which need to be addressed before parties can rely on electronic submission with full confidence in the integrity of the system. If the system is not ready, it is pre-mature to provide any detailed provision on submissions via electronic mail.

13. The proposal stipulates several conditions for submissions by electronic mail to be valid. The submission will need to be submitted by 5 p.m. on the day of the deadline. The Appellate Body Secretariat will also need to acknowledge receipt of the submission. Paper copies will need to be submitted by 11 a.m. the following day, with a signed certification that the versions submitted by electronic mail and in the paper copy are the same.

14. With these conditions, the submissions via electronic mail may not result in a more streamlined appeal process or a reduction of the number of paper copies that need to be submitted. Without any clear advantage to offset the conditions, the proposal does not make submissions via e-mail a better option for parties. As already stated by some Members at the DSB meeting on 18 May 2010, the proposal will provide parties with the option of submitting hard copies alone or hard copies with e-mail and added conditions.

15. It is also not clear from the proposal how the conditions will work in practice. First, it is not clear how the deadline of 5 p.m. will be calculated if there is no acknowledgement by the Appellate Body Secretariat that the submission has been received. Second, there is an issue of how the 11 a.m. deadline for submission of paper copies will be calculated if the submission is sent via e-mail way before the due date. Third, it is not apparent what effects there will be on a party if the certification sent with the paper copies is inaccurate.

16. We understand that in practice, submissions are sent by electronic mail to supplement the submission of paper copies without any of the conditions or effects proposed by the amendments. If the Appellate Body needs to provide clarification in the *Working Procedures* about electronic submission to justify the current practice, the provision should simply allow submissions by electronic mail to supplement and facilitate paper submissions without any of the conditions or effects imposed.

Consolidation

17. Singapore supports the efforts to consolidate proceedings and reports. We recognise that consolidation can save the time and resources of the Appellate Body and the parties involved. We are aware that consolidation for appellate reviews takes place in practice.

18. In the proposal, the Appellate Body can consolidate proceedings without the consent of the parties. Does this reflect the current practice? We also find the tests of "substantial overlap" for consolidation of proceedings and "good reasons" for issuance of separate reports in the proposal difficult, because of their subjectivity and lack of clarity. The proposal provides for single reports to be issued from consolidated proceedings as the norm. We question why this should be the case when single reports do not seem to clearly delineate the rulings applicable to respective parties and can make the separate adoption and implementation of the rulings by different parties difficult.

19. The proposal does not provide when the consolidation process will take place. It suggests that the consultation with the parties and decision on consolidation can take place even before any notice of appeal is filed. This raises questions on whether the parties' positions may be prejudiced and whether the Appellate Body can decide on consolidation before the notices of appeal are filed.

20. We note that the proposal takes a different approach from Article 9 of the *DSU* which provides for the equivalent procedure at the panel stage. No reason has been provided why the approach for consolidation at the appellate stage should be different from the panel stage. If there needs to be a provision in the *Working Procedures* on consolidation, we suggest that the Appellate Body rely on a formulation along the lines of Article 9 of the *DSU*.

Written comments submitted by Chinese Taipei

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as "TPKM") appreciates the efforts of the Appellate Body and its Secretariat in putting forward these Proposed Amendments to the Working Procedures for Appellate Review. Noting the significant impact these proposed amendments may have on the appellate review proceedings and the WTO dispute settlement mechanism as a whole, TPKM would like to provide some comments on these proposed amendments.

2. With respect to the first proposal on the Timeline for Written Submissions, the focus of our comments is on two issues: 1) the shorter time period for appellees to prepare their written submissions, and 2) the three-day period given to the third participants to comment on the appellees' submissions.

3. On the first issue, TPKM notes that, compared with the current eighteen-day period, the appellees, according to the proposal, would have three fewer days to work on their submissions, as such submissions would be due only fifteen days after the filing of the Notice of Appeal and the appellant's submission. TPKM considers this proposal would constitute such a drastic change that puts the appellees at a great disadvantage in the litigation process, especially when they are developing Members.

4. According to the statistics provided in Annex A of the Appellate Body's Proposed Amendments to the Working Procedures for Appellate Review, the appellants already have a very long time to craft their submissions, on average spanning more than four months between the issuance of the interim report and the filing of the Notice of Appeal.[1] On the other hand, the appellee has no way of knowing the scope and nature of the issues appealed by the appellant before receiving the submission, and the time allotted to an appellee for analyzing the appellant's submission and crafting responses within the original eighteen-day period already makes for a challenging task, to say the least. It seems to us that subtracting three days from the already short period of time allotted to the appellee for crafting a response to an appellant's submission would only serve to exaggerate the pre-existing imbalance in the process. We therefore believe it would be more reasonable to maintain the current rule of the appellee's submission being filed within eighteen days.

5. Turning to the second issue, the proposed amendment to make the filing of third participants' submissions due three days after the filing deadline for the appellee's submission, TPKM sees this adjustment as a positive development in the appellate review on the following grounds.

6. First, the present rules do not allow third participants to comment in writing in response to the appellee's submission, and the only chance for commentary would be the third participants' statements at the oral hearing, which is quite short. The proposed amendment would mean the appellate proceeding being held with rules that parallel the panel stage as provided in the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as "DSU"), where third parties get a chance to comment in writing in response to both parties' written submissions. It would allow the Appellate Body and all the participants an opportunity to consider third participants' arguments in response to appellee's submission before the oral hearing, rather than encountering such arguments for the first time right on the spot at the hearing.

7. Second, this design would make the entire appellate proceeding more balanced among the interests of stakeholders in the dispute and the dispute settlement system, i.e., the appellant(s), the appellee(s) and third participant(s).

[1] WT/AB/WP/W/10, p. 5, footnote 6.

8. Therefore, TPKM supports providing third participants with an opportunity to respond to both the appellant's and the appellee's submissions in writing before the oral hearing. We have noticed that some Members suggest that third participants' submissions be due five days after the filing date for appellee submissions. We would have no problem with such a proposal if it is acceptable to a majority of Members.

9. On the second proposal, i.e., the Electronic Filing and Service of Documents, TPKM notes that the Appellate Body proposes to codify current practices of parties/participants and third parties/third participants sending electronic version of their submissions on the day the filings are due, and of delivering their paper copies after such electronic filing is made. While such practices may have been maintained for years and appear to be operating smoothly, there are instances where parties/participants have encountered problems in the past. For example, parties may have sent via email attachment their submissions to the Appellate Body and copied other participants and third participants. However, there may have been instances of some recipients not receiving the email and its attachments due to mail server problems and both parties being unaware of such issue until hours or even a whole day later.

10. While TPKM welcomes the Appellate Body's proposal to incorporate a technological advance with a view to making the filing and servicing documents more efficient, it would like to remind the Appellate Body that electronic communications may not be as reliable as the filing and serving of documents via hand delivery or courier/post-delivery under current rules. There may be "crashes" or problems with the internet or mail servers at either end of the parties or the WTO secretariat. We share the concerns of many other Members that the current proposal may not be as comprehensive as it may be required. TPKM finds that the doubts expressed by Members on the issues surrounding the mixed mechanism of filing and servicing documents seem not to have been fully addressed by the Appellate Body's proposal. As the current practice has been in place for years without much trouble, it would not seem the best time for particular changes to be made to current practices in this regard. Rather, if and when a more secure and reliable technological infrastructure or electronic communication system is in place, such a proposal with more comprehensive rules may find more support among Members.

11. On the third proposal, i.e., Consolidation of Appellate Proceedings, TPKM understands and, in principle, sympathizes with the Appellate Body's attempt to codify the current practice of consolidating the appellate proceedings that share a high degree of commonality. However, the language of "substantial overlap in the content" may not be as clear as it may have to be, and it appears that many Members, including TPKM, are still concerned that the discretion to consolidate appellate proceedings will lay exclusively in the hands of the Appellate Body, while parties shall retain a higher degree of control of the dispute resolution proceedings. Therefore, TPKM would urge the Appellate Body to further consider revamping such design in its current proposal and make changes accordingly that would not overly deprive the Parties to the dispute of their control over the appellate proceedings.

12. On the issue of Appellate Body's discretion in issuing a single report as a default rule, the Appellate Body's proposal seems different from what the DSU provides for at the Panel stage.

13. DSU Article 9.2 provides that whenever any party to the dispute makes a request, the single Panel shall defer to that request without determining whether there's any "good reason" and issue separate reports in a dispute with multiple complainants. Therefore, it is a right of the Parties to have separate reports issued to them if they so wish even when a single Panel was established to examine the same matter of concern to multiple complainants.

14. However, the amendment proposed by the Appellate Body would change such a default rule and make issuing a single report a default rule unless requested by a party to issue separate reports, and only when the Appellate Body finds "good reasons" to do so.

15. Apart from the ambiguous and undefined term "good reasons", this proposal appears to differ from the rules and current practices at the Panel stage as provided in the DSU. Such inconsistency may likely create instability and unpredictability in the dispute settlement system. Further, it has been a party's right to have a separate report if it so wishes for the purpose of clarity and for any other reasons "the party" finds sufficient to justify such a request. It seems unclear as to why it would be necessary for the Appellate Body to obtain such discretion in determining whether a single report or multiple reports are to be issued.

16. In summary, TPKM appreciates the Appellate Body's hard work on this subject and looks forward to more balanced and agreeable amendments that accommodate not merely the efficiency of the appellate review proceedings but also the expectations of most Members in structuring a fair and predictable dispute settlement system that properly balances the rights and obligations of Members.

Written comments submitted by Thailand

I have the honour to refer to the request by the Chairperson of the DSB meeting on 18 May 2010 that Members should make written comments on the proposed amendments to the Working Procedures for Appellate Review as contained in WT/AB/WP/W/10 dated 12 January 2010, to the Chairperson by 26 May 2010. In this connection, Thailand appreciates and supports the Appellate Body (AB)'s effort and hard work to constantly review its working procedures in order to improve its efficiency for the benefits of all parties concerned.

However, Thailand would like to share comments on the three amending proposals, namely, the timeline for written submissions, the electronic filing and service of document and the consolidation of Appellate proceedings as follows:

1. On the issue of time line for written submissions, Thailand is sympathetic to the AB that the time period to issue its reports under the DSU is quite limited. However, we do not agree to its proposal to entirely eliminate the 7-day period between the filing of the notice of appeal and the appellant's submission to the AB in order to have more time to prepare the AB' s report. As a developing country, we need the said time period for coordinating among our relevant authorities and consulting with lawyers in our preparatory process for the written submission. Furthermore, the proposal will also dismiss the opportunity for the conflicting parties to have a consultation in order to reach an acceptable solution before entering the Appellate proceedings.

2. Regarding the issue of electronic filing and service of documents, Thailand welcomes and supports the AB's initiative to introduce electronic filing of documents as an option in appellate proceedings. It is our understanding that, according to the proposal, the participants in the electronic filing of documents may, at any stage in the proceedings before the electronic documents are received by the WTO Secretariat, revert to the hard-copy submissions for whatever reason e.g., computer system failure, security concern, etc. We are also concerned about the reliability and security of the electronic communication system of the WTO Secretariat, including some technical issues as expressed by a number of Members. In this regard, we would be appreciative if the AB and the WTO Secretariat could share with us their views on this matter.

3. Finally, Thailand has no objection to the AB' s proposal on the consolidation of the appellate proceedings before a single division. However, we are of the opinion that, upon the completion of the appellate proceedings, the AB should issue separate reports by default in order to avoid confusion and to highlight the importance of individual cases.

Written comments submitted by Turkey

Turkey believes that any proposal to facilitate the appeal process would be useful for all members.

In general terms, Turkey is of the view that these amendments

- shall not nullify and impair the rights and obligations of the Members under WTO,
- shall not impose disproportionate burden to the parties,
- shall alleviate the unnecessary burden and time pressure of the Appellate Body,
- should take into account the needs and the views of members who are the ultimate users of the mechanism, especially the developing members which have significant difficulties to be a part of the dispute settlement system.

The specific comments of Turkey regarding the proposed amendments to the working procedures of the Appellate Body are submitted below:

TIMELINES FOR WRITTEN SUBMISSIONS:

With respect to the filing of the "appellant's submission" on the same day as "Notice of Appeal", Turkey supports the proposal to eliminate the seven-day period between filing the "Notice of Appeal" and the appellant's submission and similarly where there is an "other appeal". Turkey considers that this amendment will contribute to using the limited time period in a more effective and efficient manner. It will also contribute to alleviating time pressure on the Appellate Body to some extent.

However, this proposal is based on two assumptions. The first assumption is that the appellant does not work on its submission after the filing of "Notice of Appeal". The second assumption is that the appellee does not work after receiving of "Notice of Appeal". Both of the assumptions are invalid and unsounded. "Notice of Appeal" is an "early warning mechanism" not only for the appellee but also for the third parties.

"Notice of Appeal" includes information regarding a brief statement of the nature of the appeal as stated in Article 20(2)(d). The information provides significant clues for appellees to be informed and be given an opportunity to make themselves ready about the claims of the appellant.

In this respect, taking into account the elimination of the meaning of the notice of appeal for the appellee, the shortening of seven days does not have the same effect for the appellant as for the appellee. Therefore, Turkey strongly believes that 15 days for the appellee should be extended to at least 18 days.

This amendment (filing the appellant's written submission on the same day as "Notice of Appeal") also assumes that there will be no certain legal effects of "Notice of Appeal". The "Notice of Appeal" will not "trigger" the appeal, the appeal could be iniated by providing "appellant's submission". In this respect, Turkey believes that "Notice of Appeal" could be submitted later than filing "appellant's submission".

In addition to this, taking into account that the "Notice of Appeal" is the only publicly available document regarding the existence and the scope of the appeal, it should be retained for the sake of transparency.

Turkey welcomes the timeline changes for the third parties. It is an important improvement for the enhancement of third party rights in the appellate process. Turkey supports giving opportunity to third participants to comment on appellants and appellees' submissions in writing.

Turkey considers that this amendment also provides a sequencing process for the appellate review stage parallel to that for the panel stage.

However, we also believe that three days are not really sufficient for third participants to consider and reflect upon the appellees' submissions and take them into account when drafting their third participant submissions.

Turkey is of the view that increasing this time to five days (from the proposed three days) would provide a more realistic timeframe for third participants to respond properly to the issues raised by the interested parties rather than to leave the substantive issues to be addressed at the oral hearing in which they have time constrains. This would allow third parties sufficient time to prepare a fully considered submission that addresses issues raised not just by the appellant but also by the appellee.

Turkey considers that any additional time allowed for third participants to prepare their submissions should not be allocated at the expense of the time allocated for the appellees to prepare their submissions.

ELECTRONIC FILING:

With respect to the electronic filing Turkey supports any amendment that will encourage electronic filing. Turkey believes that submission of the documents electronically would assist interested parties and third parties in the filing process and better accord with their working procedure.

However, Turkey is of the view that this proposed amendment would not encourage electronic filing, because it does not eliminate the requirement to file paper copies and it creates new rules for the parties who submit electronic filing. Turkey considers that there should be no additional paper copies requirement for the members who submit electronic filing in due time.

In addition to this, we have some technical questions regarding the proposal: What will be the consequences if there is a last minute technical problem with sending electronic-file or receiving confirmation message? In this case, would the deadline (11 a.m. for the following day) for the paper copies also be valid? Why do paper copies have prevalence over electronic filing? Who will be the authorized person to sign certification stating that the paper copies are identical to electronic copy? If electronic copies have prevalence over paper copies, why do we need such a certification?

In addition to this, the requirement to review both the electronic and paper copies to identify the discrepancies between them, if any, would create an unnecessary burden on the Appellate Body Secretariat and the participants.

CONSOLIDATION OF APPELLATE PROCEEDINGS:

With respect to consolidation of appellate proceedings, Turkey supports the consolidation of appellate proceedings in certain circumstances and notes that this has occurred in certain appellate proceedings in the past. Turkey believes that having clear rules regarding consolidation of appellate proceedings will give guidance to the participants and enhance transparency and predictability.

One of the main aspects of this proposal is giving discretion to the Appellate Body to consolidate the appeals by disregarding the view of the parties. The proposal states that "[t]he Appellate Body may take such a decision if it considers that a substantial overlap in the content of the appeals is likely."

Turkey is of the view that this creates problems because this proposed amendment allows the Appellate Body to consolidate with or without the parties' consent. The question that how this process moves forward without parties' cooperation should be addressed. Turkey believes that the parties' consent or at least non-objection is probably a necessary precondition to this consolidation.

Turkey notes that the Appellate Body is making an important effort to introduce a new guideline to consolidation of appellate proceedings. However, the Appellate Body also introduces new concepts while trying to do this. The phrases such as "around the same time", "and/or", "a substantial overlap" and "likely" in the first sentence and "good reasons" in the penultimate sentence are vague and ambiguous in the language of the proposed amendment.

This will create uncertainty and unpredictability for the participants and may cause problems in terms of different interpretations.

With respect to the single report, the proposed amendment assumes that the Appellate Body will always issue a "single report" unless a reasonable request is received from the participants. As it is drafted the proposed amendment imposes the "burden of request" regarding the need of the separate reports on the participants. Turkey considers that issues regarding this burden of proof should be addressed.

Written comments submitted by the United States

I. Introduction

1. The United States thanks the Chairperson of the Dispute Settlement Body ("DSB") and the Appellate Body for providing Members the opportunity to comment on the "Proposed Amendments to the *Working Procedures for Appellate Review*" (WT/AB/WP/W/10) ("Proposed Amendments") pursuant to Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the procedures established by the DSB on December 19, 2002 (WT/DSB/31). Discussions held with Members, including during the formal and informal sessions of the DSB devoted to the Proposed Amendments, have afforded delegations time to study the proposed amendments and exchange views on them, which has led to a deeper understanding of the proposals. Our comments are organized in the same order, and using the same headings, for each of the three proposals as is found in the Proposed Amendments.

II. The Timeline for Written Submissions

A. Filing Appellant Submission on Day 1/Notice of Appeal

2. First, it has become increasingly apparent that the 90 days allotted for Appellate Body reports places significant time pressure on the Appellate Body. Of course, the time period is effectively less than 90 days once account is made for translation. Accordingly, it is important that this time be used productively.

3. It is thus helpful to view the proposal regarding filing of the appellant's submission on the same day as the notice of appeal and consequential changes to the deadlines in light of the desire to optimize the use of the time allotted to appeals.

4. An appellant typically has had a significant amount of time before filing an appeal to develop its appeal, including its appellant submission. For example, even aside from the interim report, the final report of the panel is typically provided to the parties weeks, if not months, before the report is circulated. As a result, the time currently provided between commencing an appeal and filing the appellant submission does not appear to be time that is being used as productively as it could be. These seven days could better serve the system if they were used for the Appellate Body's work. An appellant should be able to prepare its appellant submission in advance such that it can be filed at the beginning of an appeal.

5. Therefore we are sympathetic to making the appellant submission due on the first day of an appeal.

6. However, as many delegations have noted in their comments, this does raise questions about the continued role of a notice of appeal. We note that the proposed amendments would retain the Notice of Appeal as a separate document. That notice would continue to retain some role in expressing the scope of the appeal. This raises questions about whether there would be jurisdictional arguments in an appeal based on the Notice of Appeal.

7. With the full appellant submission in hand, it is hard to understand why the Notice of Appeal should serve to limit or constrain the scope of appeal. Presumably the appellant intends its submission to be a full expression of its appeal. In particular, the Working Procedures already provide that the appellant submission must contain: "[A] precise statement of the grounds for the

appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof."[1]

8. It would seem that there should be ways to provide the transparency currently afforded by a notice of appeal while avoiding the procedural issues that accompany giving the notice of appeal some sort of jurisdictional status. Furthermore, it would seem contrary to the desire to use the time for an appeal as productively as possible to invite jurisdictional arguments based solely on the notice of appeal.

9. The United States notes that Article 16.4 of the DSU requires a notice of appeal, but that notice is to the DSB only – it does not call for one to be filed with the Appellate Body.[2] Therefore it would appear that one option could be for the Appellate Body's Working Procedures to omit specifying any requirement for a Notice of Appeal to the Appellate Body and rely simply on the DSU.

10. Alternatively, the Appellate Body typically requests that the appellant submission be accompanied by an executive summary. Perhaps the executive summary could serve the function of a notice of appeal, or some other brief statement of the appeal could be filed, without according that document any sort of jurisdictional status.

B. Other Appellant's Submission/Notice of Other Appeal

11. The Proposed Amendments would alter the subsequent deadlines after the filing of the appellant submission. With respect to the deadline for filing the other appellant submission, the Proposed Amendments would shorten this time period from the current eight days following the filing of the appellant's submission to five days. As other delegations have noted, five days may be insufficient time to permit a party to review the appellant submission that it has received and complete or revise the other appellant submission in response to the appellant submission. In light of Members' concerns, perhaps it would be preferable to have the other appellant submission due no earlier than seven days after the appellant submission. A seven day period also has the advantage of facilitating scheduling since that would ensure that the due date would not fall on a weekend.

12. As a separate matter, while there is some symmetry in also requiring the other appellant submission to be filed on the same day as the Notice of Other Appeal, this would raise the same concerns regarding a Notice of Other Appeal as with respect to a Notice of Appeal. In other words, it would seem that there should be ways to provide the transparency currently afforded by a Notice of Other Appeal while avoiding the procedural issues that accompany giving the notice some sort of jurisdictional status.

C. Appellee Submission

13. The United States also would not see value in shortening the time for appellee submissions from 18 days to 15 days. As the Appellate Body noted in the proposed amendments, "Appellants' submissions are typically the longest written submissions in an appeal."[3] A number of delegations have commented that the time period for the appellee submission is the most challenging in the current appellate time line. Accordingly, reducing the time for appellee submissions could prove particularly disadvantageous for an appellee.

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[1] *Working Procedures for Appellate Review*, WT/AB/WP/5, Rule 21(2)(b)(i) ("Working Procedures").

[2] DSU, Article 16.4 ("Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.").

[3] WT/AB/WP/W/10, at 4 n. 3.

14. Instead, there would appear to be merit to affording a slightly longer period of time for the appellee submission – for example, 21 days from receipt of the appellant's submission instead of the current 18 days. A period of 21 days would have the scheduling advantage of ensuring the submission is not due on a weekend.

15. Making the appellee submission due on day 21 would provide even greater relative benefits to the other appellee, which currently only has 10 days to respond to the other appellant's submission; under this option, the other appellee would have instead 14 days (if the other appellant's submission were due on day 7, as suggested above). With the appellee submission due on day 21, the Appellate Body would still be in a position to hold the oral hearing over a time period similar to what it has proposed.[4] Making the appellee submission due on day 21 and scheduling the oral hearing between days 31-40 would provide a minimum of 10 days from filing of that submission to the oral hearing, as is currently the case under the Working Procedures.[5] Finally, extending the time period for the appellee submission may address the concerns expressed by some Members in their comments that the increased length of appeals has increased burdens on Members.[6]

D. Third Participant Submission

16. There does not appear to be value in changing the existing practice of the past 15 years so as to provide for third participant submissions to be filed after the appellee submission. In the first place, it appears odd that third participants should be provided an opportunity to respond in writing to the appellee submission while the appellant does not have that opportunity.

17. Second, the explanation for the proposal is to allow third participants time to respond to the appellee submission. However, in reality the additional three days proposed would not be sufficient time to prepare a written response to the appellee submission. As one delegation explained, this may particularly be the case for those WTO Members whose native language is a non-WTO official language. Indeed, some delegations in their comments have proposed giving third participants even *more* time to prepare their submissions. The three days proposed would likely preclude a third participant from addressing the appellee submission other than perhaps providing a simple indication of support or disagreement with the positions in that submission. We assume that the Appellate Body would be interested in more than such a simple indication and would instead prefer a reasoned reaction. That reasoned reaction has been provided to date in the oral hearing, just as the reasoned reaction of participants has been provided in the hearing.

18. Moreover, this proposed change could undermine the objective of using the time for an appeal more productively. The United States assumes that the oral hearing is set for the earliest date possible after the appellee and third participant submissions, taking into account the need to review those submissions and prepare for the hearing. Providing for a later date for third participant submissions would imply delaying the hearing, thus reducing the time for the Appellate Body's deliberations and work during the 90-day period. The proposals by some delegations to provide even more time for third participant submissions – for example, five days – would only heighten the difficulties with such a change.

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[4] *See* WT/AB/WP/W/10, at 24 (proposed amendment to Rule 27(1), with oral hearing to be held between days 30-40); *id.* at 26 (proposed amendment to Annex I to Working Procedures, with oral hearing to be scheduled between days 30-40).

[5] Under the current Working Procedures, the appellee submission is due on day 25, and the oral hearing is scheduled for day 35-45. The explanation of the proposed amendments does not indicate that the current minimum 10-day period between appellee submission and oral hearing has given any cause for concern or is intended to be addressed by the amendments.

[6] *Compare* WT/AB/WP/W/10, at 4 ("In certain exceptionally large and complex appeals over the past three years, these problems have been further amplified by the increased length of appellants' submissions.") (footnote omitted).

III. Electronic Filing and Service of Documents

19. With respect to the second proposal – electronic filing of documents – as an initial matter the United States appreciates the fact that filing electronic versions of documents has become much more prevalent since the Working Procedures were first developed.

20. However, since it has become typical for Members to file an electronic version in addition to the paper copy, it is not clear why this amendment is needed or what is its value added. And the proposed amendments do raise some concerns.

21. The proposed amendment would appear to mean that a Member must either file only paper copies, or be subject to the new rules, including that the electronic version prevails. This may discourage rather than encourage electronic filing.

22. The mandatory time for filing ("the document shall be sent by 5 p.m. on the day it is due") in the proposed amendment also raises concerns. In particular, imposing a mandatory time for filing electronically would only add further disincentive to electronic filing. And experience has shown that a mandatory time may only lead to further procedural issues to distract the Appellate Body from its review of the merits. For example, there would be a question as to whether there would be an electronic receipt verifying time of receipt. In the case of last minute difficulties with electronic mail, it is unclear what would happen if the filing is received at 5.15 p.m. instead, or even later. As some delegations have noted, time zone differences can also affect the ability to coordinate with capital, for example, to ensure that the electronic version being filed is the correct one, and the problem would appear particularly acute for those Members in the Western Hemisphere.

23. There have been previous instances in which differences in software or hardware, or merely transmitting via email, has meant that the electronic version appears differently on one system than on another system. There is a concern about what it means to say that the electronic version prevails over the paper copy since in those circumstances there could be more than one electronic version.

24. The proposed requirement for a signed certification also raises a number of concerns. It is not clear what the purpose of such a certification is other than to highlight the fact that allowing paper copies to be filed the following day could increase the chance that the paper copy would diverge from the electronic copy. In addition, there would be concerns as to what would be the consequence if, despite the best efforts of the Member, there were any inadvertent discrepancy. The proposal does not provide any indication of what those consequences might be.

25. As a result, the concerns raised by the proposal would appear to outweigh any potential benefits.

IV. Consolidation of Appellate Proceedings

26. The third proposal concerns consolidation of appellate proceedings. The proposed amendments raise a number of questions and concerns.

27. For example, consolidation of appeals to this point has been handled on a case-by-case basis and with the consent of the parties. Dealing with consolidation on a flexible basis is not a flaw in the system but a strength. We are concerned by the possibility raised by the proposal that the Appellate Body could consolidate two appeals when at least one party says that it should not. We are not aware of any appeal in which parties did not consent to consolidation. But neither are we aware of any instance of consolidation over the objection of a party.

28. Also of concern is the idea that the Appellate Body would decide to consolidate two appeals based on the Appellate Body's view that a substantial overlap in two appeals is "likely". This raises the question of on what basis the Appellate Body would determine a substantial overlap is "likely", perhaps even at a time when no appeal has yet been filed. The wording of the proposed amendments implies that the Appellate Body has not yet seen the appellant submissions in both appeals. Thus, there does not appear to be any clear basis on which to make this determination.

29. Furthermore, if an appeal has not been filed, then there is no basis for the Appellate Body to prejudge the question of whether there will be an appeal, nor is there any legal basis for the Appellate Body to take any decision with respect to such a hypothetical appeal.

30. Concerning issuing single or separate reports, the proposal also raises a number of questions. Again, the United States does not understand what is not working about the current approach where, at least recently, the Appellate Body has issued separate reports (even if in a single document) when at least one party has requested it. We are troubled by the possibility raised by the proposal that the Appellate Body could issue a single report covering appeals of separate panel reports when at least one party to the dispute says that it should not, and perhaps even where a party believes that its rights could or would be impaired by a single report.

31. Again, the concerns raised by the proposal would appear to outweigh any potential benefits.

V. Effective Date for Amendments

32. As a final matter, the United States has taken note of the proposed revision on the first page of Annex B of the Proposed Amendments stating that: "The *Working Procedures for Appellate Review* consolidated in this document will be applied to appeals initiated after [2010]."[7] The United States understands by this language that the Appellate Body, upon adoption of any final amendments to the Working Procedures, would specify as from which date and to which appeals the amendments would apply (*e.g.*, to appeals already pending or only to appeals begun after the amendments are issued).

[7] WT/AB/WP/W/10, at 11 (strike-through and underlining omitted).