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Dispute Settlement Body
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ON 28 MAY 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

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1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.183)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.158)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.121)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.5)

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

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.183)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.183, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Hot-Rolled Steel".

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 17 May 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

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

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.158)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.158, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Section 110(5) Copyright Act".

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 17 May 2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation thanked the United States for its status report and its statement made at the present meeting. The EU referred to its previous statements and reiterated that it would like to resolve this case as soon as possible.

1.9. The representative of China said that his country noted that the United States had submitted the 159th status report without demonstrating any progress in the implementation of the DSB's recommendations and rulings. This status report was substantively not different from the first status report, which had been submitted by the United States in November 2004. More than ten years had passed and Members were still waiting. The WTO Membership was waiting for the US implementation. China was interested in the reasons and the intent behind the US continued non-compliance. China reminded the WTO Membership that Section 110(5) of the US Copyright Act, which had been found by the Panel to be inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. The United States failed, for more than a decade, to provide intellectual property right holders with the minimum standards of protection as required by the TRIPS Agreement. The United States remained the only WTO Member who failed to comply with the DSB's recommendations and rulings under the TRIPS Agreement, long after the expiry of the reasonable period of time. China believed that no WTO Member should be above WTO rules to which WTO Members had explicitly agreed. China urged the United States to honour its obligations under the DSU and the TRIPS Agreement by implementing as soon as possible the DSB's recommendations and rulings in this dispute.

1.10. The representative of the United States said that by intervening under this Agenda item, China attempted to give the appearance of concern for intellectual property rights. Under Agenda item 4, the United States would discuss the significant and trade distorting shortcomings in China's treatment of intellectual property. For now, the United States could say that, as the companies and innovators of China and other WTO Members well knew, the intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other WTO Member. Indeed, as China also well knew, none of the damaging technology transfer practices of China that were at issue under Agenda item 4 were practices that Chinese companies or innovators faced in the United States.

1.11. The representative of China said that, as at previous DSB meetings, the United States intervened, once again, to divert the focus from this Agenda item. The matter at issue under this Agenda item was whether or not the United States had implemented the DSB's recommendations and rulings. The answer was negative. As always, China looked forward to an explanation by the United States regarding the reason or reasons for its continued non-compliance, which had already lasted more than a decade.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.121)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.121, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case "EC – Approval and Marketing of Biotech Products".

1.14. The representative of the European Union said that his delegation continued to progress with the authorizations where the European Food Safety Authority had finalised its scientific opinion and had concluded that there were no safety concerns. On 23 April 2018, two draft authorizations had been presented for vote to the member States committee, one for a renewal of genetically modified maize[1] and one new authorization for genetically modified maize[2]. As the votes resulted in "no opinion", the draft measures would be submitted for a vote to the Appeal Committee in May 2018. While the EU continued to be committed to acting in line with its WTO obligations, the EU also recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.15. The representative of the United States said that the United States thanked the EU for its status report and its statement at the present meeting. The United States continued to have concerns with the EU's approval of biotech products. The United States continued to see prolonged, unpredictable and unexplained delays at every stage of the approval process. The delays had affected the products that had been previously approved by the EU, and continued to affect the dozens of applications that had been awaiting approval for months or years. Even when the EU finally approved a biotech product, the EU had facilitated the ability of individual EU member States to impose bans on the supposedly approved product. As the United States had noted at previous DSB meetings, the EU had adopted legislation that permitted EU member States to "opt-out" of certain approvals, even where the European Food Safety Authority had concluded that the product was safe. In its intervention at the April 2018 DSB meeting, the EU's response to the United States' concerns with the "opt-out" legislation[3] had been that the EU had enacted this legislation after the adoption of the DSB's recommendations in this dispute. The EU's response was particularly unconvincing. The EU surely did not take the position that measures serving to move a WTO Member further out of compliance were somehow irrelevant to the DSB's surveillance of a Member's implementation of a DSB recommendation to bring WTO-inconsistent measures into compliance with WTO rules. The EU's opt-out legislation permitted EU member States to restrict, for non-scientific reasons, certain uses of EU-authorized biotech products in their territories. At least seventeen member States, as well as certain regions within EU member States, had submitted requests to opt-out of EU approvals. The United States again urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were supported by scientific evidence, and that decisions were taken without undue delay.

1.16. The representative of the European Union said that the United States had referred to the EU's opt-out legislation. The EU understood that the United States referred to the so-called "opt-out Directive". The EU noted that the said "opt-out Directive" was not covered by the DSB's recommendations and rulings. As provided under the Directive, the applicants had accepted to reduce the geographical scope of their cultivation applications for specific EU member States. As a result, no EU member State had imposed any ban. Moreover, under the terms of the Directive, an EU member State could adopt measures restricting or prohibiting cultivation only if such measures

[1] Maize GA21.
[2] Maize 1507 × 59122 × MON 810 × NK603.
[3] EU Directive 2015/412.

were in line with EU law and if such measures were reasoned, proportional, non-discriminatory and based on compelling grounds.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.5)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.5, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Washing Machines".

1.19. The representative of the United States said that the United States had provided a status report in this dispute on 17 May 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the US Trade Representative had requested that the US Department of Commerce make a determination under Section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programs, in accordance with findings that had been adopted by the DSB. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination. Interested parties then had had an opportunity to provide rebuttal comments. Commerce was reviewing the comments and rebuttal comments for purposes of preparing a final determination. The United States continued to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute.

1.20. The representative of Korea said that his country thanked the United States for its latest status report and statement at the present meeting. Korea noted that the United States had taken steps to revise its countervailing duty determination by issuing its preliminary determination on 4 April 2018, however, it had some concerns about the results of the preliminary determination, which Korea believed did not properly address the DSB's recommendations and rulings. At the same time, Korea was deeply concerned that, until now, there was barely any development in the US implementation efforts regarding the anti-dumping measures at issue, more than 20 months after the adoption of the Panel and Appellate Body reports in this dispute. In this regard, Korea, once again, urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute to fully comply with its obligations under the covered agreements.

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

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

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

A. Statement by the European Union

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

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

2.3. The representative of Canada said that his country thanked the EU for having placed this item on the DSB Agenda. Canada shared the EU's view that the Byrd Amendment should remain under surveillance by the DSB until the United States stopped its application.

2.4. The representative of Brazil said that his country, as an original party to the Byrd Amendment dispute, thanked the EU, once again, for keeping this item on the DSB Agenda. Despite that more than 15 years had passed since the DSB's recommendations in this dispute and more than 12 years had passed since the enactment of the Deficit Reduction Act, which had repealed the Amendment at issue, millions of dollars' worth of anti-dumping and countervailing duties applied to Brazilian and other WTO Members' exports, were still illegally disbursed to US domestic petitioners. Brazil called on the United States to fully comply with the DSB's recommendations and rulings in this dispute.

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

2.6. Once again, this month the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance. In fact, while the EU had put on the Agenda of the present meeting an item relating to the "EC and Certain Member States – Large Civil Aircraft" dispute (DS316), it had not submitted a status report despite the US view that the EU had not complied in that dispute, a view that had been confirmed by two sets of conclusions that the United States would discuss shortly. Finally, the United States noted the EU's recent announcement that it would maintain its suspension of concessions on US goods at a very low level. This was regrettable, especially given our close collaboration generally. The United States continued to review the action by the EU and would not accept any characterization of such continued countermeasures – no matter how small – as consistent with the DSB's authorization. The United States also took note of Canada's support for the EU's decision to place this item on the DSB Agenda of the present meeting. In light of Canada's position, the US would expect Canada to object to the failure by a responding Member to place on the DSB Agenda any dispute where Canada considered that Member not to be in compliance. That situation could include "China – Cellulose Pulp" (DS483). Based on Canada's statement under this item, the United States observed that the decision by Canada not to place its dispute with China on the DSB Agenda, or object to that failure, could be understood as agreement with a WTO Member's claim of compliance. The United States asked whether it should understand that to be the implication of Canada's statement at the present meeting.

2.7. The representative of the European Union said that the United States had mentioned that the EU had failed to provide status reports in one or more disputes in which the EU was involved. The EU disagreed with that statement. The EU had provided status reports for all disputes, in which the EU was involved, at the present meeting, this was only one, namely "EC – Approval and Marketing of Biotech Products" (DS291). The United States had made a reference to "EC and Certain Member States – Large Civil Aircraft" (DS316). As the EU had mentioned before, there was a difference between the mentioned case and the case that the DSB was discussing under the present Agenda

item. In the present case, the dispute had been adjudicated and there were no further compliance proceedings pending. With regard to "EC and Certain Member States – Large Civil Aircraft" (DS316), the DSB would have a more detailed discussion at the next Agenda item.

2.8. The representative of Canada said that, contrary to the suggestion by the United States, Canada did not agree that China's measures taken to comply in "China – Cellulose Pulp" (DS483) had brought China into compliance. In this regard, Canada and China had jointly notified a sequencing agreement to the DSB recently. Canada would initiate compliance proceedings in this dispute if and when it deemed it appropriate.

2.9. The DSB took note of the statements.

3 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT – COMMUNICATION BY THE EUROPEAN UNION (WT/DS316/34)

3.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of the European Union, and drew attention to the communication from the EU contained in document WT/DS316/34. She then invited the representative of the EU to speak.

3.2. The representative of the European Union said that his delegation referred to its communication dated 17 May 2018, which had been circulated to all WTO Members in advance of the present meeting. By means of that communication, the EU informed the DSB that it had taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the recommendations and rulings in this dispute. Specifically, among the measures, which had been notified by the EU, were contractual changes to the loan terms for the A380 and the A350XWB aircraft models, where it had been found that the repayable loans, which had been provided to Airbus for these aircrafts, had not sufficiently reflected market conditions. The EU measures, contained in the compliance communication, included contractual changes to these loan terms in order to bring them in line with market benchmarks. The EU stood ready to engage with the United States on the basis of the EU's compliance communication to close the aircrafts-chapter at long last. Finally, the EU expected the adoption of the reports of the Appellate Body and the Panel at the present meeting, under Agenda item 8, in line with the rules applicable to all Appellate Body reports, pursuant to Article 17.14 of the DSU, through the procedure known as "negative consensus".

3.3. The representative of the United States said that the United States was surprised to receive this communication only when circulated to all WTO Members. Given that the United States had brought this dispute, and would be entitled to take further steps under WTO rules once the compliance reports were adopted later in this meeting, the United States would have thought that the EU would contact the United States directly if it had information relevant to resolving the dispute. The EU's failure to communicate directly with the United States might therefore communicate a lack of seriousness about resolving this dispute. It would be for the EU and its member States to confirm or disprove that impression. Based on the US review since WTO Members had received this communication, the EU document did not reflect new developments that might somehow resolve this long-standing dispute. To the contrary, over six years ago, back in December 2011, the EU had submitted a similar document.[4] That 2011 document had itemized 36 so-called "steps" that the EU had characterized as actions taken to come into compliance with the original WTO findings. The compliance panel, however, had found that 34 of these supposed steps were not even actions at all.[5] In short, the 36 "steps" that had been listed in the 2011 document certainly had not brought the EU into compliance with the recommendations of the DSB. The present document identified 18 so-called "steps". Most of them were essentially the same as the items listed in the 2011 document. The Reports proposed for adoption at the present meeting had found the EU's supposed "steps" had done nothing to end the inconsistency with Articles 5 and 6.3 of the SCM Agreement. For instance, in the present document, the EU characterized as a "measure taken to comply" the "attenuation, through the passage of time and events that occurred during that time" of a causal link. The United States failed to see how anyone could characterize this as a "step", let alone a "measure taken to comply". Indeed, the EU itself seemed to have difficulty deciding how to characterize it – the EU

[4] WT/DS316/17.
[5] "EC and Certain Member States – Large Civil Aircraft" (21.5) (Panel), para. 6.42.

document alternated between "step", "measure taken to comply" and "measure that constitutes appropriate step". There were a handful of new assertions, namely that the EU member States had renegotiated certain financing packages to reflect "a contemporaneous market benchmark". But these assertions were so vague, they indicated nothing about what, if anything, may have been done.

3.4. The EU had been arguing for a decade that its financing of Airbus had reflected market benchmarks. Four sets of dispute reports had disagreed with that assertion. In this light, it was difficult to give any credence to the EU's latest assertions. Indeed, in the past, the EU had used these sorts of vague assertions to cloak non-compliance with its WTO obligations. The United States remained ready to hold serious discussions with the EU with the goal of reaching a mutually agreed solution. But this would require the EU to communicate directly and candidly with the United States, rather than indirectly and vaguely through a communication to all WTO Members. The United States said that it would be regrettable if this document signalled not a desire to fix EU contraventions of WTO rules, but rather an intention to prolong this already lengthy dispute.

3.5. The DSB took note of the statements.

4 CHINA'S TECHNOLOGY TRANSFER POLICIES

A. Statement by the United States

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

4.2. The representative of the United States said that, as Members were aware, at the past two monthly DSB meetings, China had raised the US investigation of China's technology transfer policies. As Members were also aware, the United States had initiated a WTO dispute in relation to one aspect of those technology transfer policies.[6] The problems, however, were much broader than the matters covered by the dispute, and ran contrary to basic notions of fairness that underlay the multilateral trading system. The United States had issued a factual report that detailed China's distortive policies on technology transfer in March 2018. Two months had passed, and China had yet to provide any evidence to refute the Report's facts or conclusions. At the last DSB meeting, China had asserted that the findings in the US report were "baseless". For China to say this was unfortunate. In fact, the US findings were explained in great detail in that 200-page report. The report was publicly available on the USTR website, and Members were encouraged to review it.[7] The report analysed four particular aspects of China's distortive policies on technology transfer. At the present meeting, the United States would respond to China's assertions by summarizing one aspect of China's policies that had been covered in the investigation. China's state-centered, non-market policies on trade and technology transfer affected all WTO Members. The policies created the legal conditions for Chinese economic actors to effectively coerce foreign companies to transfer technology to Chinese firms on non-market terms. If left unchecked, the commercial effect of these policies would erode all of our economies and our long-term competitiveness. Central pillars of China's technology transfer regime were China's foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes. In combination, these policies required or pressured technology transfer from foreign companies. The foreign ownership restrictions prohibited foreign investors from operating in certain industries unless they partnered with a Chinese company, and in some cases, unless the Chinese partner was the controlling shareholder.[8]

4.3. These requirements precluded foreign companies from entering the market on their own terms, and laid the foundation for China to coerce the transfer of technology. The United States documented in the factual report how this co-opting of foreign technology was accomplished. When companies negotiated the terms of the joint venture, the foreign side may be asked – or required – to transfer its technology in order to finalize the partnership. Especially in instances

[6] "China – Certain Measures Concerning the Protection of Intellectual Property Rights" (WT/DS542/1).
[7] The report is available at: https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.
[8] Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 23-35.

where the Chinese partner was a state-owned or state-directed company, foreign companies had limited leverage in the negotiation if they wished to access the market. This type of technology transfer was often an unwritten rule for market access.[9] China argued that foreign companies willingly entered into these agreements. China's tilting of the commercial playing field, however, created a lose-lose choice for foreign companies: they must either transfer their technology to the new China-based joint venture, or they must cede access to one of the world's fastest-growing markets, thus harming both their short term growth and their long-term competitiveness. China also used its administrative licensing and approvals processes to coerce technology transfer in exchange for the numerous approvals needed to establish and operate a business in China. Foreign investment in China required obtaining numerous government approvals depending on the terms of the investment and the industry and location in which the investment occurred. At each stage of the approval process, vaguely worded provisions provided government officials with significant discretion to impose technology transfer requirements or otherwise pursue China's industrial policy objectives.[10]

4.4. One of the US leading industry associations had described how the Chinese government used its discretion in the review process to apply vague and unwritten rules in a selective and non-transparent manner as follows: "The relatively opaque nature of the inbound FDI approval processes enables China's investment approval authorities to favor domestic competitors over foreign investors, should they so desire, without leaving a paper trail of discriminatory written regulations …. Foreign investors have reported this favoritism occurring in two ways: (i) through the application of vaguely worded or unpublished rules or requirements in ways that discriminate against foreign investors; and (ii) through the imposition of deal-specific conditions that go beyond any written legal requirements".[11] This was not the rule of law. In fact, it was China's laws themselves that enabled this coercion. Fundamentally, China had made the decision to engage in a systematic, state-directed, and non-market pursuit of other Members' cutting-edge technology in service of China's industrial policy. This was not fair. This was not how Chinese companies or individuals were treated when they went out to engage in activity in other markets. The United States had only touched on one aspect of China's technology transfer policies of concern. China needed to re-evaluate and undertake a serious change in its policies of seeking development at the expense of its trading partners.

4.5. The representative of China said that first of all, the DSB was not the suitable forum to discuss Members' trade policies in specific sectors. Before moving to the substance, China would briefly comment on the relevance of this Agenda item for the DSB, as proposed by the United States. As specified in Article 2.1 of the DSU, the DSB was established to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes, as well as the consultation and dispute settlement provisions of the covered agreements. The technology transfer policies of China were a broad issue in nature and not the subject of dispute settlement proceedings, which had been initiated by the United States. Hence, this issue was out of the scope of the DSB's functions. The DSB was not a suitable forum to discuss such issue. China questioned the legal basis for inclusion of this item on the DSB Agenda. Moreover, at the last DSB meeting on 27 April 2018, the United States had clearly stated that three categories of China's policies, including the technology transfer policies, under Section 301 investigation, did not appear to implicate specific WTO obligations. Therefore, the US request to include item 4 on the DSB Agenda demonstrated either a self-contradictory position or a change of position. If it was the latter, namely that the United States had decided to abandon its unilateral position and return to multilateralism, China would welcome such a change. Although China had serious doubts on the appropriateness to include item 4 on the DSB Agenda of the present meeting, China had chosen not to block the adoption of the Agenda. China emphasized, however, that the inclusion should not constitute a precedent, and could not be understood as consensus among Members to include similar issues on the DSB Agenda in future. China requested that the DSB take note of China's position.

[9] Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 22-23.

[10] Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 35-43.

[11] Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 37.

4.6. China said that before responding to the questions raised by the United States with regard to China's technology transfer policies, China wished to underscore a few points. First, China believed that the DSB was facing many more pressing issues that needed to be discussed and resolved, in particular, the impasse of the selection of new Appellate Body members. This issue required the most urgent action. The issue of technology transfer raised by the United States only diverted Members' attention. Second, it seemed that the United States had placed itself in the position of a judge to "adjudicate" the trade policies of other WTO Members, but no matter how many pages of a report the United States would draft, it would never change the nature of unilateralism of US Section 301 measures. Third, irrespective of the US concern, as long as the United States took measures such as tariff retaliation, the United States would inevitably be subject to the jurisdiction of the WTO and would inevitably violate WTO rules. As Mr. Frederick Abbott, a professor of international law in the United States had recently pointed out in his article: "The retaliatory tariff measures that the United States proposed would clearly violate WTO norms. They would be inconsistent with MFN treatment under Article I of GATT 1994 as they apply to China only. Almost certainly, they would be inconsistent with US commitments on bound tariffs under Article II of the GATT 1994. As the US tariff measures would be imposed without the authorization of the DSB, they would be inconsistent with US obligations under the DSU". According to the US view, China forced US companies to transfer technologies by imposing joint venture requirements, foreign equity limitations and administrative licensing procedures. But the fact was that nothing in these regulatory measures required technology transfer from foreign companies. These two things were entirely different animals like a deer and a horse.

4.7. China referred to a following ancient Chinese fable. He said that once upon a time, there was a powerful minister in the Qin Dynasty. One day, this minister worked out a way to test how many people in the court would dare to challenge him. He led a deer to the court and said, "[t]his is a horse". The Emperor did not believe him and asked around, "[i]s this a deer or a horse?" Some ministers, out of fear, said it was a horse. Other ministers who were honest said it was a deer. Later, those who called the deer a deer were persecuted by that powerful minister. No matter how the story would end, the truth was, "a deer is a deer", it could never turn into a horse, and the Minister was remembered for his arrogance and ignorance.

4.8. China then turned to the findings of the US Section 301 report, demonstrating how the said report was trying to turn "a deer into a horse". This was illustrated through the US approach in determining alleged forced technology transfer policies in the report. First, on page 24 of the said report, it was stated that "[a]ccording to submissions and testimony in this investigation, China's imposition of [joint venture requirements and foreign equity limitations] … lays the foundation for the Chinese government to require or pressure technology transfer". Second, on page 26, the report listed the evidence of joint venture requirements, all of which were explicitly or implicitly allowed by the WTO, like the ones in the telecommunication and banking services sectors, which were in accordance with China's schedules, annexed to China's Protocol of Accession. Third, on page 45, the report concluded that "China's technology transfer regime is unfair, inequitable". At the present meeting, the United States referred to it as forced technology transfer. To sum up, the US logic appeared to be the following: first, the US companies believed that joint venture requirements constituted forced technology transfers and the USTR agreed, without providing evidence of a linkage between the two in the said report, and since China appeared to have joint venture requirements, it had, thus, forced technology transfer policies. To follow the logic of "presumption of guilt", which prevailed throughout the entire said report, on page 39, for example, the report accepted a US association's speculation with regard to China's telemedicine policy as a fact and evidence. On page 28, the report attributed private infringement of trade secrets to the Chinese Government, while ignoring the fact that this infringement had actually been penalized by a Chinese court. Moreover, the whole Section IV of the report attributed pure market transactions of Chinese companies in overseas mergers and acquisitions as conspired acts of the Chinese Government. As a matter of fact, in the dozens of submissions, which had been made by US companies and associations, not a single Chinese regulation had been identified, which contained a forced technology transfer requirement, and none of the submissions had provided any tangible evidence that could demonstrate that the Chinese Government had actually forced foreign companies to transfer technology. The Section 301 report relied heavily on unverifiable anonymous surveys. However, even in those anonymous surveys, most respondents had denied that any forced technology transfer had taken place. China provided another example, and referred to the determination in Section IV of the report, whereby China allegedly aimed to acquire foreign technology through outbound investments, China's "International Industrial Capacity Cooperation Policy" was indicated as evidence in this regard.

4.9. However, the "International Industrial Capacity Cooperation Policy" applied to the industries where China had a comparative advantage, such as textile, construction materials, railway equipment and electric infrastructure. The outbound investment under this initiative was to share and disseminate China's advanced technologies, rather than acquiring any technology from others. One more example, with respect to a submission made by Rohdium Group, a US consulting firm, the USTR selectively had used only the part that supported its "presumed conclusion" that investment in the United States was targeted at acquiring technology and transferring it back to China. However, the report had intentionally ignored the following statements in the same submission, i.e. the magnitude of Chinese investment in the United States was in line with the expectations of typical growth in outbound direct investment for nations at China's stage of economic development: there was no simple correlation between Chinese industrial policy and the investment in the United States. China asked why the USTR had chosen to ignore these facts in the same submission. One reasonable answer could be that these facts would lead to the opposite conclusion. In the Section 301 investigation, the USTR had attempted to exaggerate the complaints of a small number of companies and associations, using it as "public opinion" and, thus, as a basis to take tough policy decisions vis-à-vis China. However, the record showed that most stakeholders who had made submissions to the USTR, including the US Chamber of Commerce, the US China Business Council, the Software Alliance, the Pharmaceutical Research and Manufacturers of America, the Semiconductor Industry Association, the Computing Technology Industry Association, the Consumer Technology Association and the American Apparel and Footwear Association, they all had indicated in their submissions that the economic and trade frictions and differences between the United States and China should be resolved through dialogue and consultations in accordance with WTO rules. Most stakeholders had provided positive comments on the efforts and achievements of the Chinese Government with regard to intellectual property protection.

4.10. China said that there was no forced technology transfer in China. With regard to China's technology transfer policy, China wished to make three clarifications. First, technology transfer was a normal commercial activity, and normal commercial activities were not mandatory government actions. Companies needed to commercialize their innovations. Otherwise, they could not pay off the investment that had gone into developing the innovations. As the most developed country in the world, the United States was the largest beneficiary of technology transfer. China, as a developing country, was one of the main export destinations of US technology. China's law allowed foreign investors to bring technologies as a type of investment into joint ventures. Chinese companies welcomed the introduction of new technologies and paid fair and reasonable royalties to use them, which accounted for the US companies' profits in technology transfer. China, thus, emphasized that the transfer of technology from US companies to China was normal business. It was done based on mutually agreed terms between businesses, and such transactions represented the companies' will. The principles of commercial considerations, contractual freedom and market competition were fully observed in these transactions. In fact, many US companies had made great profits by establishing joint ventures in China, with profits earned in China exceeding their profits earned in the US home market.

4.11. Second, WTO Members had legitimate rights to make reservations on market access, and these reservations were listed in the Members' WTO commitments. Market access and forced technology transfer were "two different animals". The main targets of the Section 301 report were China's joint ventures and cooperation requirements, foreign ownership restrictions and administrative review and licensing procedures. These were essentially market access regulations and were not linked to forced technology transfers. There were indeed joint venture requirements and foreign ownership restrictions in certain areas in China, but they were the result of negotiations between China and other WTO Members, including the United States, and were fully in line with WTO rules and China's WTO commitments. Market access reservations for foreign investors were common practices by most WTO Members, including the United States. Examples for this were administrative review and licensing procedures. All WTO Members would provide their government agencies in administrative review and licensing procedures with certain levels of discretion. This was a common feature of public administrative systems of most WTO Members. Nevertheless, China had continuously deepened the reform of its administrative review and licensing procedures, and had promoted the streamlining of government functions, delegating powers and improving regulations. The United States' accusation that China had abused the joint venture requirements, foreign ownership restrictions and administrative discretion to achieve forced technology transfers, was neither based on evidence, nor convincing.

4.12. Third, the original purpose of the protection of intellectual property rights was to promote the transfer and dissemination of technology and should not be abused, nor should it be a tool for trade protectionism. In fact, the US Section 301 investigations had no evidence that China's law had stipulated that foreign companies should transfer technologies to Chinese partners, nor had it provided evidence on the alleged violation of China's WTO commitment not to use the transfer of technology as a prerequisite for foreign investment to access its market. The Section 301 investigations had generalized and exaggerated the concept of forced technology transfer, so as to intentionally mix up normal commercial activities with government actions. The United States was a global leader in innovation, but innovation was not unique to the United States. Chinese companies were advanced in artificial intelligence, financial technology and robotics. China's progress and achievements in innovation were based on the diligence and entrepreneurship of the Chinese people, investment in education and research, and efforts to improve the protection of intellectual property. It was not the result of alleged forced technology transfer. Further, strengthening the protection of intellectual property rights served not only the need to expand China's openness to the world, but also the need for China's own development. Intellectual property and technology should serve as a bridge for innovation and cooperation among countries around the world, contributing to the goal of promoting technological innovation and technology transfer and dissemination, as had been stipulated in the WTO TRIPS Agreement, and enabling the benefits of innovation to be shared by all humankind. Intellectual property could neither be used as a tool for trade protectionism, nor could it be used as an obstacle to contain the development of other WTO Members. As China had stated at the May 2018 General Council meeting with regard to the Section 301 investigation, the United States had essentially sought to obtain free market access from China. If that was the case, it could only be achieved through bilateral or multilateral negotiations, not by blatant threatening with unilateral measures.

4.13. China said that it would safeguard its rights in accordance with WTO rules. China noted that the United States had initiated WTO dispute settlement procedures with respect to China's measures regarding the conditions for technology licensing. This specific issue was within the DSU's mandate. China had always respected WTO rules and supported the multilateral trading system, and China would not hesitate to use WTO rules to safeguard its own legitimate rights.

4.14. The representative of the European Union said that his delegation shared both, the concerns expressed by the United States and the description of the problem regarding China's technology transfer policies. Foreign ownership restrictions, opaque administrative procedures, vague and unclear rules that left discretionary margins to the administration, discriminatory laws and practices, lack of transparency and consistency, were all elements that created the conditions for the Chinese Government and State-influenced actors to pressure foreign companies to transfer their technology to Chinese entities. Foreign investors knew that the transfer of technology represented an unavoidable requirement, which would have to be met, if they wished to access the Chinese market. Most of them had no choice, but to accept these conditions if they wished to survive in the global market. Foregoing the Chinese market was simply not an option, as this would mean undermining their short-term growth and profitability to the advantage of competitors. Typically foreign companies were pressured into transferring their technology through informal and non-written practices that were steered by an internal eco-system, which had been developed through top-down education, strategic planning and industrial policy. Companies were afraid to complain openly about this situation. They faced a tangible and concrete risk of retaliation to their businesses, and this was a risk they could not afford to take. Having said this, the EU was of the view that there were ways to find solutions to these issues other than resorting to unilateral actions that would pose a risk of undermining the multilateral trading system and triggering unnecessary trade wars. The EU would therefore not support any measure, which would be contrary to the WTO, and called on the relevant WTO Members to ensure WTO compliance of their trade actions.

4.15. The representative of Japan said that his country referred to its statement made at the General Council meeting on 8 May 2018 under Agenda item 6.[12] Japan recalled that in that statement, it had stated that stronger protection of intellectual property rights and their effective enforcement were important. Japan recognized and shared the concerns raised by the United States regarding the requirement for disclosure of technological information and discriminatory licensing practices. Japan also emphasized that no one would benefit from unilateral

[12] WT/GC/M/172

measures and counter-measures. Furthermore, any trade measure had to be taken in a manner consistent with the WTO Agreement.

4.16. The representative of Pakistan said that his country echoed China's view that the DSB was not the suitable forum to discuss Members' trade policies in specific sectors. Previously, Pakistan had also expressed its systemic concerns on this matter. Pakistan was of the view that unilateral measures could disrupt global trading patterns, not to mention their detrimental impact in particular for developing countries. Unilateral action triggered a wave of concerns and fears among the global trading community and had the potential to spur a worldwide protectionist reaction from other WTO Members, which would in turn lead to dire consequences for the overall global trading system. While larger economies could be able to absorb the consequent shocks, this could leave developing countries in an uncomfortable and difficult situation. As had been mentioned before, Pakistan encouraged all WTO Members to continue to work towards trade multilateralism and avoid taking steps to restrict free trade. Pakistan believed that this was the only path which would benefit all WTO Members, especially the smaller economies.

4.17. The representative of Chinese Taipei said that his delegation had reviewed the Section 301 report[13] and had carefully assessed the facts contained therein, and Chinese Taipei shared the US concerns with regard to intellectual property protection and forced technology transfers. All of China's trading partners were affected by China's technology transfer policies. Chinese Taipei was of the view that any measures, which had an impact on fairness and the world market, irrespective of whether such measures implicated specific WTO obligations, should be properly addressed, especially when such measures could result in advancing interest of certain WTO Members at the expense of others in a systematic way. Therefore, Chinese Taipei encouraged all WTO Members to work together to uphold the spirit and fundamental essence of the TRIPS Agreement and provide effective and adequate protection of intellectual property rights.

4.18. The representative of Brazil said that as his country had already stated at previous DSB meetings, as well as at the 8 May 2018 General Council meeting, Brazil had been following with close attention the recent actions taken under Section 301 of the Trade Act of 1974. Brazil considered that while WTO Members were entitled to implement their trade policies according to their national legislation, including by promoting investigations into alleged unlawful practices, any actions to remedy such practices should be fully consistent with their obligations and the WTO Agreement.

4.19. The representative of the Bolivarian Republic of Venezuela said that his country would also like to add its voice to the systemic concerns expressed by previous speakers with regard to the application of unilateral measures that were contrary to the WTO rules and principles.

4.20. The DSB took note of the statements.

5 UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS AND THE USE OF FACTS AVAILABLE

A. Request for the establishment of a panel by the Republic of Korea (WT/DS539/6)

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 27 April 2018 and agreed to revert to it. She drew attention to the communication from Korea contained in document WT/DS539/6, and invited the representative of Korea to speak.

5.2. The representative of the Republic of Korea said that, in its panel request, Korea had raised its concerns about the use of facts available by the authorities of the United States in its anti-dumping and countervailing duty proceedings vis-à-vis certain products from Korea. Subsequently, on 27 April 2018, Korea had requested the establishment of a panel to review this matter. As explained in its panel request, Korea considered that the US measures, with regard to the use of adverse facts available in the challenged anti-dumping and countervailing duty proceedings, were inconsistent with the US obligations under the Anti-Dumping Agreement, the

[13] Office of the United States Trade Representative, "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947" (22 March 2018), available at https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

SCM Agreement and the relevant provisions of other WTO Agreements. Therefore, Korea was requesting, for the second time, the establishment of a panel, with standard terms of reference.

5.3. The representative of the United States said that the United States was disappointed that Korea had chosen to move forward with a request for panel establishment. As the United States had explained to Korea, the determinations that had been identified in Korea's request for panel establishment were fully consistent with US obligations under the WTO Agreement. Additionally, as the United States had noted at the April DSB meeting, Korea sought to challenge certain items that were not measures and did not fall within the scope of a dispute settlement proceeding. For these reasons, the United States was disappointed that Korea had submitted its panel request for a second time.

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

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

6 PAKISTAN – ANTI-DUMPING MEASURES ON BIAXIALLY ORIENTED POLYPROPYLENE FILM FROM THE UNITED ARAB EMIRATES

A. Request for the establishment of a panel by the United Arab Emirates (WT/DS538/2)

6.1. The Chairperson drew attention to the communication from the United Arab Emirates contained in document WT/DS538/2, and invited the representative of the United Arab Emirates to speak.

6.2. The representative of the United Arab Emirates said that, on 24 January 2018, his country had requested consultations with Pakistan regarding the dispute: "Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates" (DS538). The UAE had engaged in consultations with Pakistan in good faith with a view to reaching a mutually satisfactory solution. Unfortunately, these consultations had not been fruitful and had failed to resolve the dispute. The UAE thus felt obliged to request the establishment of a panel to resolve this dispute. As had been outlined in the UAE's request for panel establishment, contained in document WT/DS538/2, the UAE was concerned that the anti-dumping measures, which had been imposed and maintained by Pakistan on BOPP Film from the UAE were inconsistent with Pakistan's obligations under the GATT 1994 and the Anti-Dumping Agreement. As reflected in the UAE's panel request, the UAE's list of concerns with regard to the definitive anti-dumping measures was long. The UAE's concerns related, amongst other things, to the initiation of the investigation without sufficient evidence, the determination of dumping and injury based on an outdated period of investigation, the rejection of accurate cost data inflating the margin of dumping, the lack of fair comparison between normal value and export price at the same level of trade, the lack of an objective examination of virtually all aspects of injury and causation and the continuation of the measures beyond the initial five-year period, which was based on a flawed sunset review determination. It also appeared that numerous procedural errors nullify and impair the determinations that had been made on this basis. The UAE was, thus, requesting the DSB to establish a panel to examine this matter, as set out in the UAE's panel request, with standard terms of reference.

6.3. The representative of Pakistan said that his country regretted the UAE's decision to request the establishment of a panel at the present meeting. Pakistan felt that this request was premature, because in Pakistan's view, the parties had not yet exhausted all possibilities to reach a mutually convenient solution in this dispute. At present, efforts were underway in both Pakistan and the UAE to find ways to resolve this dispute. In this regard, a meeting with UAE officials had taken place in Islamabad on 15 May 2018 and Pakistan envisaged more bilateral meetings to reach a mutually agreed solution in this dispute. Under the circumstances, Pakistan was not in a position to agree to the establishment of a panel at the present meeting.

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

7 INDIA – EXPORT RELATED MEASURES

A. Request for the establishment of a panel by the United States (WT/DS541/4)

7.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS541/4, and invited the representative of the United States to speak.

7.2. The representative of the United States said that the United States recalled that all WTO Members, including India, were required to provide any subsidies consistently with the obligations in the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In the case of India, this included the obligation of Article 3.1(a) of the SCM Agreement that prohibited subsidies contingent upon export performance. Regrettably, it appeared that India provided subsidies contingent upon export performance inconsistently with its WTO obligations. In particular, India appeared to provide export subsidies through: (i) the Export-Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme; (ii) the Merchandise Exports from India Scheme; (iii) the Export Promotion Capital Goods Scheme; (iv) Special Economic Zones; and (v) a duty-free imports for exporters program. Prior to initiating this dispute, the United States had attempted to resolve its concerns with India's subsidy programs, both bilaterally and in the SCM Committee. However, India had continued to grant these export-contingent subsidies. Further, India had expanded the scope and scale of its export subsidies. The United States and India had consulted on the matters set out in the US request for consultations, but the consultations had failed to resolve the dispute. For these reasons, the United States requested that the DSB establish a panel to examine the matter set out in the US panel request, with standard terms of reference. Consistent with Article 4.4 of the SCM Agreement, which provided for "the immediate establishment of a panel" upon a party's request, the DSB would establish the panel at the present meeting.

7.3. The representative of India said that her country was disappointed that the United States had chosen to move forward with a request for the establishment of a panel in this dispute, as India believed that the bilateral consultations of 11 April 2018 had been constructive. During these consultations, India had provided details about the schemes implemented under India's Foreign Trade Policy by answering all the questions raised by the United States. India would also like to reiterate that the schemes identified by the United States, did not violate India's WTO obligations. These schemes were in conformity with all the elements of the SCM Agreement, as well as its Annexes. India had concerns with the broad and imprecise nature of the US initial request for consultations, which was not in conformity with the requirements under the SCM Agreement and the DSU. This also applied to the US panel request, which was unspecific. India maintained that the request for consultations and panel establishment were not in accordance with the relevant provisions of the SCM Agreement and the DSU. Additionally, India was of the view that this case involved a substantive interpretation of Article 27 of the SCM Agreement, as well as the Annexes thereof. A panel could, thus, not be established under Article 4 of the SCM Agreement. The panel establishment can only be governed by Article 7 and Article 30 of the SCM Agreement read together with Article 6 of the DSU. For these reasons, India could not agree to the establishment of a panel under Article 4.4 of the SCM Agreement. India was willing to work with the United States bilaterally to seek a mutually beneficial solution. India believed that open, bilateral discussions between the two parties would result in a more constructive outcome, rather than seeking recourse to the already stretched resources of the WTO dispute settlement system. India would also be willing to seek the good offices of the Director-General to resolve this matter amicably.

7.4. The representative of the European Union said that, with regard to this Agenda item, his delegation understood that consultations in this dispute had already taken place. This was surprising, as the EU had asked India on 23 March 2018, thus, within the timeline set by the SCM Agreement and the DSU to be joined in the consultations. India had not yet replied to the EU's request. In the EU's view, it should be good practice for all WTO Members to respond in a timely manner to requests to be joined in the consultations made by other Members. The EU was disappointed that India had not replied to the request and the EU had thus been unable to participate in the consultations.

7.5. The representative of Canada said that his country was in the same position like the EU. Canada fully supported the EU's statement on this matter.

7.6. The representative of the United States said that the United States took note of India's statement at the present meeting. The text of the DSU and the SCM Agreement were clear that a panel must be established at the present DSB meeting. Accordingly, the United States insisted that a panel must be established by the DSB at the present meeting.

7.7. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 4.4 of the SCM Agreement and Article 6 of the DSU, with the standard terms of reference.

7.8. The representatives of Canada, China, Egypt, the European Union, Japan, Kazakhstan, Korea, the Russian Federation and Sri Lanka reserved their third-party rights to participate in the Panel's proceedings.

8 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. Report of the Appellate Body (WT/DS316/AB/RW and WT/DS316/AB/RW/Add.1)and Report of the Panel (WT/DS316/RW and WT/DS316/RW/Add.1)

8.1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS316/33 transmitting the Appellate Body Report in the dispute: "EC and Certain Member States – Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States", which had been circulated on 15 May 2018 in document WT/DS316/AB/RW and Add.1. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report". She invited the parties to the dispute to present views on the Reports before the DSB.

8.2. The representative of the European Union said that his delegation welcomed the Report of the Appellate Body, which had been issued on 15 May 2018, in this long-standing dispute. In particular, the EU welcomed the fact that the Appellate Body had dismissed all US claims that any of the EU's support was outright "prohibited" under WTO rules. The EU further noted that the Appellate Body had stated that a Member could not be required to take steps to remove adverse effects of subsidies that had already expired. The Appellate Body had found that the EU had no compliance obligations for adverse effects in the single-aisle large civil aircrafts market. The Appellate Body had also reduced the EU's compliance obligations with regard to the twin-aisle and the very large aircraft. At the same time, the EU acknowledged that the Appellate Body's ruling left the EU with certain limited steps to take in order to bring itself into full compliance with the Panel's findings, as modified by the Appellate Body. The EU had promised to take swift action with respect to these remaining obligations. It was precisely in recognition of those outstanding obligations that the EU had informed the DSB Members, in its compliance communication of 17 May 2018, which had been discussed under Agenda item 3, of the measures that the EU had taken to bring itself fully in line with WTO rules. The EU wished to stress that there was no doubt that the Report before the DSB at the present meeting was an Appellate Body Report, and the EU looked forward to its adoption in accordance with the adoption rules applicable to Appellate Body reports, pursuant to DSU Article 17.14, i.e. the procedure known as "negative consensus". The EU also noted that the United States had included item 9 on the Agenda of the present meeting. The EU considered that this item was of no consequence, not because it came after item 8, but because it did not reflect a proper interpretation of the DSU provisions.

8.3. The representative of the United States said that the United States thanked the Panel, the members of the division, and the Secretariat staff assisting them for their work on this matter. This had been a large and complicated proceeding, and the United States sincerely appreciated their efforts to produce high-quality reports. These reports found that the EU and the Airbus member States, namely, France, Germany, Spain, and the United Kingdom, had failed to bring WTO-inconsistent subsidies into compliance with WTO rules and had continued to breach their

WTO obligations by giving massive amounts of subsidized financing to Airbus. These subsidies had caused adverse effects on US aircraft sales and exports worth tens of billions of dollars. This was as true now as it had been when Airbus began 50 years ago. The reports at issue at the present meeting concluded explicitly that EU member State financing of the A380 and A350 XWB had been at below-market rates and had resulted in massive lost sales and market share losses. The United States had seen an EU statement, in which it asserted some small vindication in the findings that some of its oldest subsidies had been found to have expired. The United States had heard some of these assertions again at the present meeting. However, this view ignored that the latest report had not disturbed the compliance Panel's findings that all of the EU launch aid financing of Airbus had been subsidized, and had caused immense adverse effects to the interests of the United States. Thus, the launch aid had been inconsistent with Articles 5 and 6.3 of the SCM Agreement. The findings in the more recent report meant only that those older subsidies had created a wrong under the SCM Agreement that no longer had a remedy.

8.4. With respect to adoption of the reports, the United States raised again an important systemic concern regarding the service on appeals of Appellate Body members whose terms had expired. As the United States had explained at the November 2017 meeting of the DSB in the context of the "Indonesia – Horticultural Products, Animals and Animal Products" dispute, Mr. Ramirez's term had expired on 30 June 2017. The DSB had taken no action to permit him to continue to serve as an Appellate Body member, and, therefore, he had not been an Appellate Body member on the date of circulation of this report. Similarly, Mr. Van den Bossche's term had expired on 11 December 2017, and the DSB also had taken no action to permit him to continue to serve as an Appellate Body member. Furthermore, no DSB authorization had been sought or obtained by the division to exceed the mandatory 90-day deadline for an appellate report under Article 17.5 of the DSU. The United States therefore considered that the implications for this report were the same as in the "Indonesia – Horticultural Products, Animals and Animal Products" dispute, specifically, that the report had not been issued consistent with the requirements of Article 17 of the DSU. Accordingly, it cannot be an "Appellate Body report" subject to the special adoption procedures set out in Article 17.14 of the DSU, which applied to an appellate report in conformity with that Article. The United States supported the adoption of the panel and appellate reports in this dispute. The United States understood that the EU and the Airbus member States, the other parties to the dispute, did also, as the EU had proposed this Agenda item so that the DSB could adopt these reports. As Article 3.7 of the DSU made clear, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Therefore, as the parties considered that adoption of these reports would help them achieve a "positive solution to the dispute", the United States invited other Members to join the parties' consensus to adopt the reports proposed for adoption at the present meeting, that is, the report contained in WT/DS316/AB/RW and WT/DS316/AB/RW/Add.1 and the panel report contained in WT/DS316/RW and WT/DS316/RW/Add.1, as modified by the former report.

8.5. The United States also wished to address next steps in this dispute, which was very economically significant for the United States and had occupied so many WTO dispute settlement resources. To be clear, the United States' preferred outcome was a mutually agreed solution with respect to aircraft financing. The United States remained ready to hold serious discussions to achieve this goal. But, again, this would require the EU to communicate directly and candidly with the United States, rather than indirectly and vaguely through a communication to all WTO Members. The United States was ready to discuss with the EU and its member States how the parties might resolve both sides' disagreements with respect to existing WTO-inconsistent subsidies and reach an agreement so that neither side adopted new WTO-inconsistent subsidies. If necessary, the United States was prepared to move forward with a process to impose countermeasures on EU products. But in the US view, what was needed to resolve this dispute was not more WTO litigation, but a real desire to resolve this dispute.

8.6. The representative of the European Union said that his delegation recalled that the DSU excluded the right of any particular WTO Member to block the adoption of panel or Appellate Body reports. This was a central feature of the DSU, and a major difference with the dispute settlement mechanism that had operated under the GATT 1947. Article 17.14 of the DSU was clear: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report […]". The EU understood that, at the present meeting, there was no formal objection to the adoption of the Appellate Body Report, and in any event, the EU emphasized that it would not be the case at the present meeting that "the DSB decides by consensus not to adopt" the Reports. Therefore both

Panel and Appellate Body Reports would in any event be "adopted by the DSB" within the meaning of Articles 16.4 and 17.14 of the DSU. The EU recalled that these provisions were without prejudice to the right of WTO Members to express their views on the Report, and such views had been expressed at the present meeting. However, while there was a right to express a view, there was no right to veto. Any theories attempting to underpin such a right to veto were without any merit.

8.7. The representative of Canada said that his country's statement was in respect of items 8 and 9 of the Agenda of the present meeting. Canada wished to comment both on the Report of the Appellate Body and the assertion of the United States that the reverse-consensus rule in Article 17.14 of the DSU did not apply to this Appellate Body Report. First, regarding the Appellate Body Report, Canada had participated as a third party in this dispute, and wished to thank the Panel, the Appellate Body, and the Secretariat for their hard work in these proceedings. Canada had participated in this dispute because of its substantial systemic interest in the interpretation and application of WTO rules on subsidies. Canada welcomed the Appellate Body's confirmation that a subsidy that required the production by the recipient of both specialized input goods and final goods did not constitute a prohibited subsidy under Article 3.1(b) of the SCM Agreement. In addition, Canada was pleased that the Appellate Body had reversed the compliance Panel's findings with respect to the nature and scope of the compliance obligation under Article 7.8 of the SCM Agreement. In particular, Canada welcomed the Appellate Body's clarification that Article 7.8 permitted a Member to comply through either removing the adverse effects of the subsidy, or withdrawing the subsidy altogether. Canada further considered it important that the Appellate Body had made explicit that the compliance obligation in Article 7.8 had exclusively concerned subsidies that continued to be "grant(ed) or maintain(ed)" at the end of the implementation period. Accordingly, Canada considered that the Appellate Body had correctly concluded that a WTO Member had no compliance obligation with respect to subsidies that had expired, or otherwise no longer existed, at the end of the implementation period. Regarding the assertion of the United States that the reverse-consensus rule in Article 17.14 of the DSU did not apply to this Appellate Body Report, Canada wished to register its disagreement. In Canada's view the reverse-consensus rule applied. Canada had heard the US concern about the continued service of certain Appellate Body members. In this respect, the United States reiterated its invitation to the United States and other Members to work together to resolve the procedural issues that had been raised by the United States.

8.8. The representative of Brazil said that his country took note of the views expressed by the United States regarding in particular the DSB procedure for adoption of the Panel and Appellate Body Reports in this dispute. Brazil understood that these views, however, were to be taken as no more than a Member's opinion about procedural rules, as set out in the last sentence of Article 17.14 of the DSU that "this adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report". It was clear that these views or opinions certainly could not and did not override the rules set forth in Article 17.14 of the DSU in its first part, explicitly established the negative consensus rule for the adoption of Appellate Body Reports. The Reports at issue under the present Agenda item complied with all of the DSU requirements and, thus, had to be subject to the negative consensus adoption procedure. The fact that the disposition of an appeal had been completed in compliance with Rule 15 of the Working Procedures for Appellate Review, to which we had all agreed, had no bearing on the nature of the adoption of the Reports. These Working Procedures for Appellate Review had been adopted in strict conformity with Article 17.9 of the DSU. The link being made between a certain novel reading of Rule 15 and the rule of negative consensus for adoption of reports was unwelcome and had no legal merit. In conclusion, the Reports, which were before the DSB for adoption at the present meeting, had the same nature and were being adopted in the same manner as all of the Appellate Body Reports, which had been adopted previously.

8.9. The representative of Australia said that her country wished to comment briefly on the procedural issues that had been raised with regard to the adoption of the Reports at the present meeting. Australia was of the view that the correct process for adopting the Report of the Appellate Body in this dispute was set out in Article 17.14 of the DSU. Australia believed that the negative consensus principle was central to the ongoing effectiveness of the WTO dispute settlement system and should be applied in this instance. However, Australia also noted the concerns that had been raised by the United States, and underscored Australia's willingness to discuss how to resolve these concerns in a constructive and pragmatic way.

8.10. The representative of Japan said that, as a third party in this dispute, his country thanked the compliance Panel, the Appellate Body and the respective Secretariats for their hard work in this dispute. Japan was in the process of reviewing both the Panel Report and the Appellate Body Report and reserved its right to express its views on these Reports, pursuant to Articles 16.4 and 17.14 of the DSU. Japan had carefully listened to the respective statements by the EU and the United States, expressing divergent views on the adoption procedure that should be applied. On the one hand, the United States argued that the adoption procedure set out in Article 17.14 did not apply to the Report in question because it had not been issued by the Appellate Body in accordance with Article 17 of the DSU. The EU, in contrast, stated that Article 17.14 of the DSU applied irrespective of any alleged procedural defects. Japan did not believe any WTO Member questioned the legitimacy, propriety or legality of the adoption procedure itself, which WTO Members had established under Article 17.14.

8.11. All WTO Members, including the disputing parties in this dispute, shared the common interest in preserving and maintaining the integrity and functionality of the adoption procedure under Article 17.14. The question was how Members could ensure that a Report, prepared by the Appellate Body, was an "Appellate Body report" within the meaning of Article 17 of the DSU, and thus, was subject to the DSU Article 17.14 adoption procedure. When faced with specific challenges in a specific dispute, WTO Members had always found a way to overcome such challenges in accordance with the DSU. Given both disputing parties' apparent support for the adoption, there was no reason not to adopt the Reports in question at the present meeting, as there was no procedural hurdle that would hinder the DSB's ability to act accordingly.

8.12. The representative of New Zealand said that, as her country had stated at the time of adoption of Reports in DS477/DS478, New Zealand did not see the application of Rule 15 as affecting the nature of reports as Appellate Body reports, or their method of adoption through negative consensus. As stated many times under the Agenda item "Appellate Body Matters", New Zealand remained willing to work with other delegations to engage constructively in discussions with regard to the concerns about Rule 15, to try finding a way forward.

8.13. The representative of Norway said that her country noted with interest the views that had been expressed by other WTO Members under this Agenda item. From Norway's point of view, it was crucial to have a well-functioned WTO dispute settlement system where all stages of a dispute could operate in an efficient and effective manner. Extending the mandate of Appellate Body members to let them complete the work on a dispute, to which they had been assigned, had been common practice for years in the WTO; which was also the case in other international tribunals. This was a sensible way to address a practical matter and one that had been accepted by the WTO Membership in a number of disputes. Norway did not see the alleged need for a sudden change in this practice. Norway was, however, willing to engage in a constructive dialogue on the possibility of exploring alternatives to the current Rule 15 of the Working Procedures for Appellate Review. This should nonetheless not prejudge the effective operation of the WTO dispute settlement system, including the adoption of the Reports under this Agenda item at the present meeting.

8.14. The representative of China said that his country's statement referred to Agenda items 8 and 9. China welcomed the Panel and the Appellate Body Reports in this dispute, and hoped that these Reports would help solve the long-standing dispute between the parties. China reiterated its position that the Appellate Body was acting well within its mandate by including Rule 15 of the Working Procedures for Appellate Review. Therefore, the Appellate Body Report, contained in WT/DS316/AB/RW and Add.1, should be adopted in line with the negative consensus rule pursuant to Article 17.14 of the DSU. In addition to the procedures for the adoption of Appellate Body Reports, China also had to address the current situation where the United States appeared to utilize its concerns over Rule 15 as an excuse to challenge the negative consensus rule, and ultimately, the rules-based multilateral trading system. It seemed that the United States selectively chose to acknowledge the WTO rules that could be distorted to serve the US interests and to disregard other rules if those rules prevent the United States from taking unilateral actions. An example of the former would be the United States expressing concerns about Rule 15 based on its own interpretation of the DSU, attempting to expand the negative impact of such a distorted interpretation. An example of the latter would be the United States taking unilateral action under Section 301, disregarding its obligations under WTO rules. This was certainly not what had been agreed upon the establishment of the WTO. China emphasized that the assertions by the United States did not have any legal basis and should, thus, not have any influence or effect on the Reports to be adopted at the present meeting.

8.15. The representative of Mexico said that although her country was not involved in this dispute as a third party, Mexico would like to express its opinion with regard to a systemic issue. Mexico reiterated what had been stated by previous speakers with regard to the adoption procedure of the Appellate Body Report and what had been set out in Article 17.14 of the DSU. Members should not be challenging the validity of the Reports and Mexico believed that Rule 15 should not be affected. Similarly, Mexico reiterated its availability to discuss the concerns about Rule 15 raised by the United States.

8.16. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS316/AB/RW and Add.1 and the Panel Report contained in document WT/DS316/RW and Add.1, as modified by the Appellate Body Report.

9 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. Report of the Panel (WT/DS316/RW and WT/DS316/RW/Add.1) and the report contained in WT/DS316/AB/RW and WT/DS316/AB/RW/Add.1

9.1. The Chairperson said that, in connection with this Agenda item, she wished to note that the Reports pertaining to this dispute had just been adopted under the previous Agenda item. She asked if any representative wished to speak at this point.

9.2. The representative of the United States said that the DSB had adopted the reports contained in WT/DS316/RW and WT/DS316/AB/RW under Agenda item 8 of the present meeting. Therefore, there was no further action for the DSB to take under the present Agenda item, and in this circumstance, the DSB may move on to item 10. Rather than reiterate its views on this dispute, the United States referred Members to the views it had expressed under Agenda item 8 in relation to this item.

9.3. The DSB took note of the statements.

10 EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

A. Report of the Appellate Body (WT/DS486/AB/R and WT/DS486/AB/R/Add.1) and Report of the Panel (WT/DS486/R, WT/DS486/R/Add.1 and WT/DS486/R/Corr.1)

10.1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS486/10 transmitting the Appellate Body Report in the dispute: "European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan", which had been circulated on 16 May 2018, in document WT/DS486/AB/R and Add.1. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

10.2. The representative of Pakistan said that his country thanked the Panel, the Appellate Body, as well as the Legal Affairs Division and the Appellate Body Secretariat, for their work in this dispute. As a developing country Member that used the WTO dispute settlement system very infrequently, Pakistan very much appreciated the contribution of the WTO dispute settlement process to the rules-based multilateral trading system. In this context, Pakistan appreciated that both the Panel and the Appellate Body had vindicated Pakistan's right to continue proceedings despite that the measure at issue had expired during the Panel proceedings. The measure in this dispute had expired before the Panel's ruling, in fact, before the Panel had begun its work. This was the case for a simple reason, namely, Pakistan had to wait for almost an entire year for the Panel to start its work, due to the backlog of WTO disputes, which was, in turn, caused due to the shortage of WTO Secretariat staff. If the Panel would have begun its work immediately upon composition, as envisaged by the DSU, under the DSU timelines, the measure would have most

likely expired only after the issuance of the interim report. As the Panel and Appellate Body had confirmed, consistent with prior jurisprudence, a dispute did not vanish simply because a measure had expired. This notion was important for developing countries that would neither have the time, nor the resources to "chase moving target measures", through repeated disputes.

10.3. Pakistan welcomed the clear guidance on the definition of a subsidy in cases of duty drawback schemes and the rules pertaining to those schemes under Article 1, Footnote 1 and Annexes I to III of the SCM Agreement. Both Reports made evident that only an excess remission of duties could be treated as a subsidy under those schemes and that investigating authorities had to always investigate whether an excess remission had occurred, on the basis of record evidence. Moreover, investigating authorities had to provide a genuine and timely opportunity to exporting WTO Members to conduct "further examination", as had been envisaged in Annexes II and III of the SCM Agreement. This ruling was of great practical and systemic relevance to all WTO Members, in particular, developing countries that exercised their WTO right to use duty drawback schemes to promote the competitiveness of their export industries, in a WTO-consistent manner. Pakistan also appreciated that the Panel had sided with Pakistan concerning two factors relevant to the causation analysis. However, Pakistan was disappointed with the Panel's and the Appellate Body's ruling on the "breaking the causal link" approach. By upholding the approach, the Appellate Body had interpreted the two-step non-attribution analysis by prioritizing the first step of identifying a link between the dumped/subsidized imports over the second step of examining the effect of other factors in a manner that made a negative finding highly unlikely. Finally, Pakistan also welcomed the Panel's and the Appellate Body's ruling on disclosure of the results of verifications. A proper disclosure of the results of verification was important for the exporters' and the governments' ability to defend interests before investigating authorities, as well as in subsequent judicial or multilateral reviews.

10.4. The representative of the European Union said that his delegation took note of the Appellate Body Report. The EU also took note of Pakistan's statement with regard to the issue of delays. The dispute concerned EU countervailing duties, which had expired almost three years ago. Accordingly, the Appellate Body had made no recommendations to implement the ruling.

10.5. The representative of the United States said that, as a third party in this dispute, the United States had provided views primarily focused on the interpretation of the DSU with respect to the matter that Pakistan had put before the Panel. In the course of the Panel proceedings, the measure at issue had terminated and Pakistan had confirmed that it did not seek a recommendation from the Panel. In other words, Pakistan had confirmed that no dispute remained between the parties that the challenged measure had been brought into conformity with WTO rules. Nevertheless, Pakistan had continued to request findings from the Panel and later from the Appellate Body. The EU had appealed the Panel's issuance of findings in this dispute, and the United States had supported the EU's appeal. As the United States had explained[14], the DSU did not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of the covered agreements in the abstract. A complaining party may not structure its case in a manner that in effect would create such an authority. Rather, the WTO dispute settlement system aimed to secure a positive solution to a dispute between the parties.[15] Pakistan had confirmed before the Panel and on appeal that it did not seek a recommendation from the DSB when it had stated "that panels cannot make recommendations on expired measures under Article 19.1 of the DSU".[16]

10.6. Pakistan's statement that it did not seek a recommendation confirmed that there had been no dispute between the parties. Rather, as the Panel had found, Pakistan had sought findings

[14] EU Appellant Submission, paras. 35-37.

[15] DSU Article 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.").

[16] See Pakistan Response to EU Request for Preliminary Ruling, para. 4.19 ("Pakistan acknowledges, of course, that panels cannot make recommendations on expired measures under Article 19.1 of the DSU. This makes sense, because Article 19.1 foresees only one type of recommendation, that is, that a Member must 'bring the measure into conformity' with a covered agreement. Logically, measures cannot be brought into conformity if they no longer exist. As panels and the Appellate Body have repeatedly shown, however, panels may – and regularly do – make rulings on measures that expired after the panel was established.") (citing "US – Certain EC Products" (AB), para. 81; "US – Poultry" (China) (Panel), para. 7.56; "US – Upland Cotton" (AB), para. 272; and "EC – Bananas III" (Article 21.5 – Ecuador II) / "EC – Bananas III" (Article 21.5 – US) (AB), para. 271).

because "the parties dispute, on a fundamental level, how investigating authorities should determine the extent to which duty drawback schemes like the [one at issue] may constitute countervailable subsidies within the meaning of the SCM Agreement".[17] That was, Pakistan had sought an advisory opinion regarding the application of the SCM Agreement in the future, with respect to different duties on different products, and potentially based on different programs. The appellate report confirmed that the finding was advisory in nature. The appellate report appeared to agree with the Panel that it had been relevant to "resolve" the issue under the SCM Agreement because "similar" cases could arise and "similar" reasoning could be applied in those cases.[18] A disagreement between the parties "on how investigating authorities should" administer the countervailing duty law, in other circumstances that had not been presented in this dispute, did not fall within the terms of reference for the Panel, which also delimited appellate review, as set out by the DSB for this dispute.

10.7. As the text of the DSU indicated, the terms of reference of a panel under Article 7.1 of the DSU provided for a panel to make an "objective assessment of the matter", words Members all knew well, but to make the "findings as will assist the DSB in making the recommendation" under the DSU to bring a WTO-inconsistent measure into conformity with WTO rules.[19] Article 11 of the DSU, on the function of panels, repeated these words and this structure.[20] But those latter words – to make "findings as will assist the DSB in making the recommendation" under the DSU – had been essentially disregarded in the reports before the DSB at the present meeting. Where a complaining party requested an adjudicator to make findings not consistent with the terms of reference established by the DSB, the panel must decline to do so. As Pakistan had requested findings with respect to the interpretation and application of the SCM Agreement, but no recommendation on the challenged EU measure, the Panel should have found Pakistan's request to be outside its terms of reference and refrained from making the requested, purely advisory, findings on that basis. The United States therefore agreed with the EU's appeal that Pakistan's alleged "dispute" had been a purely advisory exercise. The United States further agreed with the EU that the DSU did not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of provisions of the covered agreements in the abstract, and outside the context of resolving a dispute.[21] The United States had been warning Members for some time about the concern that WTO adjudicators had been giving "findings" that were advisory, or unnecessary to resolve the dispute.[22] The United States recalled one egregious instance, in the appeal in "Argentina – Financial Services", in which more than two-thirds of the Appellate Body's analysis – 46 pages – had been in the nature of *obiter dicta*. This was not only inconsistent with the DSU and terms of reference established by the DSB, but contributed to delays in dispute settlement and increased complexity for all WTO Members.

10.8. This dispute could and should have been resolved upon Pakistan's statement that it had sought no recommendation on the EU's withdrawn measure. In that circumstance, there had been no "findings as w[ould] assist the DSB in making the recommendations" in the DSU. The reports in this dispute had not been necessary to resolve a dispute, but rather, as the EU had rightly pointed out, an exercise in making unnecessary interpretations. With respect to the appellate report in this dispute, the United States raised again an important systemic concern regarding the service on appeals of an Appellate Body member whose term had expired. In this proceeding, the term of

[17] Panel Report, para. 7.13 (emphasis added), citing to Pakistan's response to the European Union's preliminary ruling request, para. 4.72.

[18] Appellate Report, paras. 5.48-5.49.

[19] DSU Article 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.") (footnotes omitted); see DSU Article 21.1 ("Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.").

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

[21] See "US — Wool Shirts and Blouses" (AB), WT/DS33/AB/R and WT/DS33/AB/R/Corr.1, at 19 ("Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.").

[22] See, e.g., The President's 2018 Trade Policy Agenda, at 26-27 (available at https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017).

Mr. Van den Bossche had expired on 11 December 2017, and the DSB had taken no action to permit him to continue to serve as an Appellate Body member. Therefore, the report in this appeal had not been issued by three Appellate Body members. Furthermore, the report had been issued well beyond the mandatory 90-day deadline in Article 17.5 of the DSU. The DSB had taken no action to authorize that departure from WTO rules. The United States therefore considered that the implications for this report were the same as in the "EC – Large Civil Aircraft" dispute and others in which WTO rules had been broken by the adjudicator. Specifically, the report had not been issued consistent with the requirements of Article 17 of the DSU and so could not be an "Appellate Body report" subject to the adoption procedures reflected in Article 17.14 of the DSU.

10.9. The United States had serious concerns with these reports. The United States did not support adoption of alleged "findings" that were merely advisory and inconsistent with the DSU and the terms of reference established by the DSB. However, the United States understood that both parties would agree to adoption of these reports because they both agreed that the absence of any recommendation by the DSB would help them reach a positive solution. If the statements in the panel and appellate reports that no recommendation was being made helped the parties reach a positive solution, the United States could support adoption to the extent of that statement. However, and especially given the breaches of Article 17 of the DSU the United States had outlined at the present meeting, the United States did not support adoption of any of the alleged "findings" contained in the panel and appellate reports. The United States therefore did not consider those alleged "findings" to be adopted by the DSB at the present meeting.

10.10. The representative of Japan said that his country was not a third party in this dispute. However, Japan noted that the Panel and the Appellate Body pertaining to this dispute had dealt with the issue of whether the measures in question, which had expired during the Panel's proceedings, were subject to the Panel's assessment and findings. As this matter would concern all WTO Members, including Japan, his delegations wished to offer some observations. Japan noted that the Appellate Body had set the following standard with regard to whether an expired measure was subject to Panel's findings, namely, the fact that a measure had expired was not decisive in answering the question whether a panel could address claims with respect to the expired measure at issue. Instead, among a panel's inherent adjudicative powers was the authority of a panel to assess objectively whether the "matter" before it, within the meaning of Article 7.1 of the DSU and Article 11 of the DSU, had been fully resolved or still required to be examined despite the expiry of the measure at issue.[23] The Appellate Body had then applied this standard to the case in question and had enquired whether the Panel had made an objective assessment on the issue of the expired measure. In reviewing the Panel's considerations of the specific circumstances surrounding this dispute, the Appellate Body had made several critical findings. First, the Appellate Body had found that the Panel had not erred "by giving importance to the fact that, in the present dispute, the measure expired after the DSB had established the Panel".[24] The Appellate Body had explained "generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'".[25] To decline to rule on expired measures, simply due to their expiry, "may have the unintended consequence of providing a tool for shielding measures from scrutiny by" a WTO adjudicator.[26]

10.11. Second, given the self-regulating nature of a WTO Member's decision to initiate a WTO dispute settlement process under Articles 3.3 and 3.7 of the DSU, the Appellate Body had found that "a complaining Member's continued request for findings following the expiry of the measure at issue is a relevant consideration".[27] After making these findings, the Appellate Body had turned to the Panel's consideration of the third and final factor, i.e. the "reasonable possibility that the European Union could impose CVDs on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute".[28] While rejecting the "reasonable possibility" of reimposition of "the very same measure that had expired and had ceased to have legal effect" as a relevant factor to consider[29], the Appellate Body had observed, approvingly, that the Panel had been concerned with the correct interpretation of the

[23] Appellate Body Report, para. 5.19. See also paras. 5.40, 5.43, 5.49, 5.51, 5.54, 5.55, 5.58 and 6.2.
[24] Appellate Body Report, para. 5.39.
[25] Appellate Body Report, para. 5.39.
[26] Appellate Body Report, para. 5.39.
[27] Appellate Body Report, para. 5.42.
[28] Panel Report, para.7.13. See also Appellate Body Report, paras. 5.46, 5.47 and 5.48.
[29] Appellate Body Report, para. 5.47.

relevant provisions of the SCM Agreement and the GATT 1994, and the conformity, with this correct interpretation, of the Commission's reasoning and findings underpinning the measure that had expired.[30] The Appellate Body had further stated that the expired measure at issue "continued to serve as the framework for" the Panel's assessment under Article 11 of the DSU.[31] In contrast, the separate opinion had implied that the Panel's ruling was "based on the possibility of re-imposition of the same or similar measure, as well as the fact that such investigations had been initiated in other jurisdiction, and that a wide range of Pakistani exports other than PET benefit from the MBS".[32] Japan was not sure what the Appellate Body had meant by the phrase "the Commission's findings underpinning the now expired measure"[33], but it appeared that the Appellate Body had understood the Panel's concerns to be "the correct interpretation of the relevant provisions"[34], with the measure at issue only serving "as framework for"[35] the Panel's assessment. Or alternatively, "on the minority's reading", the Panel could have wished to give some guidance for similar but distinct CVD investigations that had been initiated or would be initiated in the EU or other jurisdictions with regard to a range of Pakistani exports allegedly benefitting from the MBS, which could give rise to WTO inconsistencies, similar to the one in this dispute. To the extent that the Panel's concerns were a clarification and the correct interpretation of the relevant provisions of the SCM Agreement outside the context of resolving a particular dispute[36], as claimed by the EU, Japan agreed that WTO dispute settlement "should not serve as a vehicle to obtain 'advisory opinions' on legal matters".[37]

10.12. Japan noted, however, that the Appellate Body had also observed "the Panel's legal interpretations and reasoning were made in the context of addressing Pakistan's claims that specifically challenged a measure that was in existence at the time that the DSB established the Panel and set out its terms of reference".[38] Importantly, toward the end of its analyses, the Appellate Body had emphasized that "there still existed a dispute between the parties on the 'applicability of and conformity with the relevant covered agreements' as regards the Commission's findings underpinning the measure at issue, despite its expiry".[39] Due to this continued dispute or "disagreement"[40] between the parties with respect to the WTO consistency of the expired measures at issue, the Appellate Body had ultimately found that "the 'matter' within the jurisdiction of the Panel was not fully resolved by the expiry of the measure".[41] In other words, the Panel's objective determination that "a dispute still persisted between the parties as regards the 'applicability of and conformity with the relevant covered agreements' with respect to the expired measure at issue"[42] had been the key for the Appellate Body to uphold the Panel's decision to make findings on the expired measure at issue. Japan agreed that the continued existence of the parties' "disagreement" with regard to the WTO consistency of the expired measure at issue was the decisive factor, together with the timing of a measure's expiry and a complaining Member's continued request for findings, in deciding whether to make findings on a complainant's claim with respect to the measure at issue, which had happened to have expired during the Panel's proceedings.

10.13. Finally, Japan noted the Appellate Body's conclusion that "the measure at issue in this dispute has expired and has ceased to have legal effect" and "[t]herefore, we do not make any recommendation to the DSB under Article 19.1 of the DSU".[43] Similarly, as noted by the Appellate Body, the Panel had not "consider[ed] it possible to issue meaningful recommendations under Article 19.1 of the DSU"[44] and had made no recommendations.[45] The approach that had been advocated by the Appellate Body and the Panel had no basis in the text of the DSU and was deeply troubling. Article 19.1 of the DSU expressly stated, that "[w]here a panel or the Appellate Body

[30] Appellate Body Report, para. 5.48.
[31] Appellate Body Report, para. 5.48. See also Appellate Body Report, para. 5.44.
[32] Appellate Body Report, para.5.57.
[33] Appellate Body Report, para. 5.48. See also Appellate Body Report, paras. 5.49, 5.51, 5.58 and 6.2.
[34] Appellate Body Report, para. 5.48. See also Appellate Body Report, para. 5.58.
[35] Appellate Body Report, para. 5.48. See also Appellate Body Report, para. 5.44.
[36] Appellate Body Report, para. 5.46.
[37] Appellate Body Report, para. 5.31.
[38] Appellate Body Report, para. 5.32.
[39] Appellate Body Report, para. 5.49.
[40] See Appellate Body Report, paras. 5.49, 5.51, and 6.2.
[41] Appellate Body Report, para. 5.49. See also Appellate Body Report, para.5.51 and 6.2.
[42] Appellate Body Report, para. 5.49.
[43] Appellate Body Report, para. 6.16.
[44] Appellate Body Report, para. 5.36.
[45] Panel Report, para. 8.3.

concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned" bring the measure into conformity with the agreement in question. The text of Article 19.1 of the DSU was written "in mandatory terms" and made no distinction between expired and non-expired measures. Under the terms of this provision, there was no room for any discretion for the WTO adjudicator to decide whether or not making a recommendation was "meaningful" with respect to the measure that had been found to be WTO-inconsistent. The preferred approach by a panel and the Appellate Body would effectively require that a WTO adjudicator determine whether a recommendation was implemented before making such a recommendation. However, such a determination was the task of a WTO adjudicator at the compliance stage, not at the original proceedings stage. Indeed, if the measure at issue had actually expired and had ceased to have legal effect and the implementing Member considered that the expiry of the measure had already achieved compliance, the respondent could simply notify to that effect and declare its compliance with the DSB's recommendations. If the complaining Member was satisfied, the dispute was resolved. If there was any disagreement between the parties as to the implementing Member's compliance, with the recommendations, such "disagreement" could be resolved through recourse to a compliance proceeding under the DSU. By contrast, should there be no recommendation there would be no implementation obligations irrespective of whether there was any "disagreement" between the parties. Unsatisfied, the complaining Member may have to start the dispute settlement process all over again. It was difficult to ascertain why making a recommendation in such circumstances was not "meaningful". As observed by the Appellate Body in the past, in the absence of a recommendation, a finding of WTO inconsistency "would not result in implementation obligations for a responding Member, and in that sense would merely be declaratory".[46]

10.14. The representative of Mexico said that her country thanked the Appellate Body and the Panel for their work. Mexico was not a party to this dispute, but wished to express its position on a systemic issue concerning the situation in which a measure had expired while a dispute settlement procedure was ongoing and related to that the discretion of panels to determine as to whether or not the expired measure should continue to be analysed by a panel. Mexico agreed that the expiry of a measure was not a decisive factor for determining whether or not a panel should continue to analyse a matter.[47] Mexico, likewise, agreed that the repeal of a measure did not, in and of itself, constitute a satisfactory settlement of the matter within the meaning of Article 3.4 of the DSU.[48] However, Mexico considered that, under the circumstances of this case, the Panel should have carefully considered whether there were good reasons for continuing with the analysis, particularly in light of the fact that the measure in question could not be re-imposed and that the provisions, on which the measure had been based, had been modified.[49] Thus, in this particular case, Mexico had sympathy for the individual opinion expressed by one member of the division. At a time when the WTO dispute settlement mechanism was subject to a heavy workload, panels should exercise the utmost care when exercising their discretion to resolve a dispute.

10.15. The representative of the European Union said that the United States had drawn a distinction between the adoption of the Reports and the "adoption of the alleged findings" contained in the Reports. The EU did not understand the distinction that the United States was trying to draw between the Reports and the findings contained in these Reports. At the present meeting, the Appellate Body Report was being adopted by the DSB pursuant to DSU Article 17.14. This meant that it would be adopted in its entirety and unconditionally.

10.16. The representative of China said that his country noted the statements made at the present meeting. With regard to the issue of "expired measures", China noted that there was great divergence between the parties in this dispute. Thus, the dispute would not be appropriately resolved if the Panel and the Appellate Body would "rule silence". The Panel's terms of reference had been determined at the time of the establishment of the Panel. China recalled that under Articles 7.1 and 11 of the DSU, a panel had to make findings regarding the measure at issue, which formed part of the Panel's terms of reference. The Panel and the Appellate Body had to do so in order to secure a prompt and positive resolution to the dispute, as required by Articles 3.4 and 3.7 of the DSU. As stated previously, China did not believe that the US assertions had any legal basis and should thus not have any influence or effect on the Reports to be adopted at the

[46] AB Report, "China – Raw Materials", para. 264.
[47] AB Report, paragraph 5.25.
[48] AB Report, paragraph 5.27.
[49] AB Report, paragraph 5.70.

present meeting. China understood that the Appellate Body Report was adopted in accordance with Article 17.14 of the DSU and that the negative consensus rule applied in this instance.

10.17. The representative of the United States said that the US view was that the report in this appeal had not been issued consistent with the requirements of Article 17 of the DSU and so could not be an "Appellate Body report" subject to the adoption procedures reflected in Article 17.14 of the DSU. The report could therefore be adopted by consensus of the DSB at the present meeting. The United States had explained its serious concerns with the alleged "findings" in the reports that were purely advisory. Given Pakistan's statement that it had sought no recommendation on the EU's withdrawn measure, there had been no "findings as w[ould] assist the DSB in making the recommendations" in the DSU. Accordingly, those alleged "findings" were contrary to Articles 7, 11, 17 and 19 of the DSU and were outside the terms of reference established by the DSB. The United States also had expressed that it understood that both parties would agree to the adoption of these reports because they both agreed that the absence of any recommendation by the DSB would help them reach a positive solution. Therefore, to assist the parties to the dispute, the United States was willing to join a consensus to adopt that conclusion, that is, that no recommendation was being made in this dispute. The United States did not support the adoption of those alleged "findings" in the reports that were inconsistent with the DSU and outside the terms of reference established by the DSB. The United States did not understand why any WTO Member would wish to adopt statements by WTO adjudicators that were inconsistent with WTO rules.

10.18. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS486/AB/R and Add.1, and the Panel Report contained in WT/DS486/R, Add.1 and Corr.1, as upheld by the Appellate Body Report.

11 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA AND VIET NAM (WT/DSB/W/609/REV.4)

11.1. The Chairperson said that this item had been placed on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. She drew attention to the proposal, contained in document WT/DSB/W/609/Rev.4, and invited the representative of Mexico to speak.

11.2. The representative of Mexico said that the delegations of Argentina; Australia; the Plurinational State of Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; Iceland; India; Indonesia; Israel; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay; the Bolivarian Republic of Venezuela and Viet Nam had agreed to submit the joint proposal dated 17 May 2018, contained in document WT/DSB/W/609/Rev.4, to launch the Appellate Body selection processes. Mexico, speaking on behalf of 67 Members, said that the considerable number of co-sponsors of this joint proposal expressed their concerns about the current situation in the Appellate Body, which was affecting the WTO's work and the functioning of the dispute settlement system and was against the best interest of Members. Mexico noted that WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was their duty to launch the selection processes for new Appellate Body members, as set out in the proposal that was before the DSB at the present meeting. This proposal sought to (i) start three selection processes, namely: to replace Mr. Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; to fill the vacancy that had arisen with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; and to replace Mr. Peter Van den Bossche, whose second term had expired on 11 December 2017; (ii) to establish a Selection Committee to carry out the processes; (iii) to set a deadline of 30 days for the nominations of candidates; (iv) to request the Selection Committee to make its recommendations after 60 days from the deadline for nominations of

candidates. While the proponents were flexible with regard to the deadlines for the selection processes, these should, however, take into account the urgency of the situation. The co-sponsors of the proposal continued to urge all Members to support this proposal before the DSB at the present meeting in the interest of safeguarding the multilateral trading system as well as the dispute settlement system.

11.3. The representative of the Bolivarian Republic of Venezuela said that his country thanked the delegation of Mexico for introducing the joint proposal, contained in WT/DSB/W/609/Rev.4, which was co-sponsored by Venezuela. Venezuela urged all Members to support the joint proposal and to start the selection processes for new Appellate Body members. Venezuela wished to reiterate its deep concern about the major delay in appointing new Appellate Body members due to the lack of consensus. Venezuela, once again, called on the WTO Member that objected to this proposal to understand the urgency of the situation and the need to unblock the selection processes to appoint new Appellate Body members.

11.4. The representative of the United States said that the United States thanked the Chairperson for the continued work on these issues. As the United States had explained in prior meetings, the United States was not in a position to support the proposed decision. For at least the past eight months, the United States had been raising and explaining the systemic concerns that arose from the Appellate Body's decisions that purport to "deem" as an Appellate Body member someone whose term of office had expired and thus was no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15). During that period of time, the DSB had adopted by positive consensus four reports signed by someone no longer an Appellate Body member, and there currently remained two ongoing appeals where the term of one of the persons appointed to the division had expired. However, the DSB had not yet addressed the problem of persons continuing to hear appeals well after their terms had expired. Under the DSU, it was the DSB that had the authority to appoint Appellate Body members and to decide when their term in office expired[50], and so it was up to the DSB to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal. Last month, the United States had repeated concerns with the Background Note circulated by the Appellate Body on Rule 15 and had asked for Members to be provided additional information. To recall, the United States had pointed out that, unlike other international tribunals cited in the Background Note, Rule 15 was not set out in the constitutive text of the WTO dispute settlement system – that is, the DSU. It had therefore not been agreed to by WTO Members. This was contrary to what the delegate from Brazil may have suggested earlier at the present meeting. The United States therefore asked to be informed by the Appellate Body why this basic difference between the DSU and "some international tribunals" was not reflected in what had been purported to be a background document.

11.5. The United States had also called Members' attention again to a misleading, at best, statement that appeared to have been very carefully crafted to avoid mentioning that Rule 15 had been, in fact, "criticized by [a WTO] Member in the DSB" and had been "called into question" at the time of its adoption[51], contrary to assertions in the Background Note. The criticism of Rule 15 in the DSB by a WTO Member at the time of its adoption was the type of basic information one would expect to be included in a document with the intention to make an objective presentation of the issue. The United States therefore had asked to be informed by the Appellate Body why India's intervention had not been drawn to the attention of WTO Members in the Background Note and had further asked why the Appellate Body's statement had been drafted in the manner it had been. The United States had yet to receive information in response to either of these inquiries.

[50] Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 17.1 and 17.2 ("DSU").

[51] DSB Meeting Minutes for 21 February 1996 at 12 (WT/DSB/M/11) (19 March 1996): India raised "a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, inter alia, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU".

11.6. The United States appreciated the recognition by Members at the previous DSB meeting of the fact that addressing this issue was a joint responsibility of all Members, and the United States appreciated the willingness these Members had expressed to engage on this issue. The United States remained resolute in its view that Members needed to resolve that issue as a priority. A number of ideas had been mentioned in the context of informal discussions in which the United States had participated, representing a diversity of views on possible solutions. The United States therefore would continue its efforts and its discussions with Members and with the Chairperson to seek a solution on this important issue.

11.7. The representative of Canada said that his country regretted that the DSB had been unable to fulfil its legal obligation under DSU Article 17.2 to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the three current vacancies. Canada was pleased to join the proposal and urged the DSB to adopt it without further delay. Like other Members, Canada was disappointed that the United States had linked the start of the Appellate Body selection processes to the resolution of certain procedural concerns it had shared with the WTO Membership. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that it had raised. Canada remained committed to working with other interested Members, including the United States, with a view to finding a way to address those concerns so as to allow the selection processes to start and be completed as soon as possible. On a related matter, in response to the assertion by the United States that the DSB had adopted four reports of the Appellate Body lately, Canada wished to register its disagreement. Canada was not aware of any such instances where an Appellate Body Report had been adopted by positive consensus. All Appellate Body Reports had been adopted by reverse consensus, in accordance with Article 17.14 of the DSU.

11.8. The representative of Australia said that her country referred to its previous statements on this matter and reiterated its serious concerns regarding the long-standing impasse, which had prevented the appointment of Appellate Body members. Australia was, once again, pleased to join so many other WTO Members in co-sponsoring the proposal for the DSB to commence immediately a process to make appointments to the Appellate Body. Australia invited other Members to support this proposal to help meet the obligation under Article 17.2 of the DSU to fill vacancies as they arose. Australia also remained willing to explore options for addressing the concerns that had been identified regarding the functioning of the WTO dispute settlement system. Australia was committed to efforts to find positive, long-term solutions to the matters before the DSB and asked other Members to join and engage in good faith in such efforts.

11.9. The representative of Colombia, speaking on behalf of the GRULAC, said that the countries in question wished to acknowledge the Chairperson's efforts to seek a solution to the problem related to the AB deadlock and thanked her for the opportunities to express views on this matter at the present meeting. In this regard, the countries reiterated their deep concern about the present situation, which affected the functioning of one of the central WTO body. If this problem was not solved the Appellate Body would be paralysed in the near future. This would put the entire dispute settlement system at risk. With the continued delay in launching the selection processes, with three vacancies at present, the WTO Membership failed to comply with its mandate, and therefore breached its legal obligations under the covered agreements. This had serious systemic consequences and set a bad precedent for the WTO. This situation caused damage and affected the image and credibility of the WTO, in particular, under the complex international environment that was adversely affecting the multilateral trading system. Concerns had been raised regarding the functioning of the dispute settlement system and some specific issues regarding the decision-making process. These concerns blocked the Appellate Body selection processes and prevented Members from meeting their legal obligations. The proper functioning of the system should not be undermined because the systemic concerns of some Members had not been addressed. Colombia warned WTO Members to understand the consequences of the prolonged blockage of the AB selection processes and believed that systemic concerns should be addressed on the basis of their own merit. In this regard, Colombia urged Members to find a solution to resolve this matter. Colombia asked the Chairperson to continue to seek a solution to this matter.

11.10. The representative of Chinese Taipei said that her delegation shared the concerns expressed by other colleagues regarding the current situation. The credibility and effectiveness of the Appellate Body was at the heart of the WTO. Chinese Taipei was open to ideas pertaining to reform the system. Chinese Taipei was of the view that the WTO Membership could benefit from

further discussions on the issues that had been raised. Chinese Taipei, however, failed to see the need to link the appointment of new Appellate Body members to the systemic issues that had been raised. The Appellate Body played a very important role in the WTO system and therefore the vacancies should be filled urgently. Chinese Taipei, once again, expressed its readiness to engage with others, in a pragmatic manner, to ensure a swift resolution of this matter, which would be in the interest of the entire WTO Membership.

11.11. The representative of Thailand said that her country thanked the Members who had submitted the joint proposal, and reiterated its support to launch the Appellate Body selection processes as soon as possible. Thailand also referred to its statements on this matter made at previous DSB meetings, and noted that Thailand continued to stand ready to engage constructively with all Members to find a prompt resolution of this matter.

11.12. The representative of Singapore said that his country reiterated its systemic concerns about the lengthy delays in launching the Appellate Body selection processes. Singapore had co-sponsored the joint proposal to launch the selection processes, since it had been first submitted at the November 2017 DSB meeting. The significant number of co-sponsors since then indicated the grave concerns that Members had over this impasse. There were only four out of seven Appellate Body positions filled, and the term of another Appellate Body member was due to expire in four months, i.e. on 30 September 2018. Singapore noted that the Chairperson would be making a statement under the following Agenda item on the possible reappointment of this Appellate Body member. Singapore called for constructive efforts in this regard. For as long as the vacancies were not filled as they arose, Singapore was moving even closer to an imminent paralysis of the Appellate Body. Given its heavy workload and significance, a fully-staffed Appellate Body was crucial to the proper functioning of the WTO dispute settlement mechanism, which, in turn, was an integral part of the rules-based multilateral trading system. The continued impasse adversely affected the credibility and functioning of the WTO, and it was essential that all current and future Appellate Body vacancies would be filled without any further delays. The systemic issues that had been raised could be discussed in a separate process. Singapore stood ready to engage constructively and work with other Members, as well as the Chairperson, to help resolve this impasse.

11.13. The representative of India said that his country referred to its previous statements on this matter. India was a co-sponsor of the proposal to start the Appellate Body selection processes on a priority basis. India recognized that the WTO dispute settlement system was a central pillar in providing security and predictability to the multilateral trading system. The wide use of the WTO dispute settlement system, in the 23 years since its existence, was a testament to Members' trust in the independence and effectiveness of the system. It would be a severe blow to the rules-based multilateral trading system, if one of its central pillars would become ineffective. India deeply regretted that the DSB had been unable to fulfil its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. This was a serious and urgent concern for the multilateral trading system and threatened to undermine WTO Members' rights and obligations. India, therefore, urged all Members to engage constructively to resolve this issue as soon as possible. India remained committed to work with other interested Members to find a way to allow the selection processes to start and to be completed as soon as possible.

11.14. The representative of Norway said that it was essential for her country to maintain a well functioned dispute settlement system. Norway continued to encourage all Members to support the joint proposal to launch the Appellate Body selection processes without further delay. It was imperative that all WTO Members worked together and showed flexibility and commitment to find solutions to surpass the current deadlock. As had been stated on previous occasions, Norway did not agree that the Appellate Body selection processes should be dependent on finding solutions to procedural issues related to the practice of the Appellate Body. Norway, however, reiterated its openness and willingness to listen seriously and engage constructively with all and any Member on their grievances with the system.

11.15. The representative of Pakistan said that his country referred to its previous statements on this matter made at previous regular DSB meetings. Pakistan expressed, once again, its concern about the current impasse. Pakistan agreed that the WTO dispute settlement system was not perfect and that there were issues that needed to be fixed. However, the current priority was to ensure a fully operational Appellate Body. A dysfunctional system would not serve the rules-based system in the present environment, which required, at present more than ever, certainty and

predictability. Pakistan supported the proposal that had been put forward at the present meeting by Mexico with regard to the Appellate Body selection processes. Pakistan was one of the co-sponsors and called on all Members to support the joint proposal.

11.16. The representative of the Russian Federation said that her country was deeply concerned about the continued US blockage with regard to the selection processes, and the fact that the United States linked the selection processes to the resolution of the problem. For the past half year, the United States had neither indicated the concrete problem, nor suggested possible means for a resolution. WTO Members were thus unable to engage in a meaningful discussion and to move towards a resolution of the issue that had been raised. Despite of having been taken under the pretence of complying with existing rules, unilateral actions, such as these, destroyed the trust in the multilateral process and contributed to chaos in the rules-based multilateral trading system. There was always scope for improvement, however, such improvement should not be contrary to the well-functioned WTO dispute settlement mechanism, and the multilateral trading system, as a whole. The Russian Federation called on the United States to either provide a clear picture of the problem at issue and possible solutions, or to stop the blockage.

11.17. The representative of Switzerland said that his country referred to its previous statements on this matter. In particular, Switzerland reiterated its deep systemic concerns about this ongoing deadlock and the threat that it posed to the functioning and effectiveness of the WTO dispute settlement mechanism. Switzerland noted a broad readiness across the WTO Membership to seek a workable way forward and called for urgent, constructive engagement by all interested Members, especially the Member that had, once again, expressed its concerns about the functioning of the Appellate Body.

11.18. The representative of Brazil said that, for the past 18 months, Members had been concerned about the unfilled vacancies in the Appellate Body. Brazil regretted that this serious crisis was bringing the WTO dispute settlement system very close to the risk of a paralysis. The current impasse undermined the rules-based multilateral trading system. One could not have a well-functioned rules-based system without a well-functioning and well-structured body that acted as the guarantor of the rules. The ongoing deadlock already resulted in nullification and impairment of the rights of Members under the DSU. Constant and longer delays were now a reality, and legal uncertainties arose that could affect Members' rights under Articles 16.4 and 17.4 of the DSU. Brazil wondered who would bear the costs of tangible and substantial damages incurred by Members if they could no longer count on this system to settle their trade disputes. Sixty-seven Members, including Brazil, had co-sponsored the joint proposal to immediately launch the Appellate Body selection processes, which Brazil considered a collective legal obligation. The DSU rules were clear in this regard, a reading of Articles 2 and 17.2 of the DSU demonstrated that a formal action or decision, on the part of the DSB, was not required to launch such a process. This task would seem to fall into the range of the Chairperson's regular duties of conducting DSB matters and the Agenda for DSB meetings. A formal decision was mandatory for the appointment or reappointment of a member to serve or to continue to serve on the Appellate Body. For example, the first sentence of Article 17.2 of the DSU provided that the "DSB shall appoint" persons to the Appellate Body, the latter part of that Article used the passive voice to indicate that "vacancies shall be filled as they arise", suggesting that the previous procedural steps to initiate or launch a selection or reappointment process would not require a DSB decision.

11.19. Like others, Brazil had consistently stated that it was ready to discuss, in a constructive manner, the concerns of any Member with regard to the functioning of the Appellate Body, including Rule 15. Although Members were willing to engage in substantive discussions, unfortunately no ideas or proposals on how to address these concerns were forthcoming. It was hard to see how Members would make any progress on this issue. Conceptual texts and proposals were needed in order for Members to exchange ideas and to permit distinct interpretative views to be put to test. This eventually could enable Members to reach a solution that would be acceptable to all Members. If not, Members would continue to go round in circles and would get no results. Brazil also strongly believed that linking the two issues, namely, the Appellate Body selection processes and the discussions on the functioning of the Appellate Body, was not helpful and lacked any merits. Finally, Brazil invited the Member who made this link to reconsider its position.

11.20. The representative of Korea said that his country supported the statement made by Mexico, on behalf of the co-sponsors of the joint proposal. As had been mentioned at the 27 April 2018 DSB meeting, it was not only the Appellate Body itself but the entire multilateral

trade system that had weakened due to the current deadlock. If there was any need to discuss systemic concerns surrounding the Appellate Body, Korea believed that this could be done separately, while proceeding with the Appellate Body selection processes in a swift manner. With this in mind, Korea stood ready to engage in the discussions and to show flexibilities so as to resolve the current situation.

11.21. The representative of Ukraine said that his country wished to be associated with the statement made by Mexico, on behalf of the co-sponsors of the joint proposal, and expressed its serious concern about the current situation regarding the Appellate Body selection processes. Ukraine reiterated that the proper functioning of the Appellate Body was of utmost importance, and remained fully committed to ensure the proper functioning of the Appellate Body. Ukraine regretted that, once again, the WTO Membership could not take a decision on this important issue. Ukraine was disappointed that the deadlock continued. The present situation gave rise to questions with regard to the predictability of the situation which the WTO Membership would face in September 2018. The only option was a constructive dialogue and comprehensive engagement. Ukraine invited Members to make all possible efforts to resolve this situation.

11.22. The representative of Hong Kong, China said that her delegation wished to refer to its statement made on this matter previously. Hong Kong, China was one of the co-sponsors of the joint proposal submitted by Mexico at the present meeting. Hong Kong, China encouraged other Members to support this proposal. Hong Kong, China reiterated its deep concern with the prolonged impasse over the Appellate Body selection processes. The present situation was threatening the effective functioning of the WTO dispute settlement system. Vacancies in the Appellate Body should be filled as quickly as possible without any delay. While Hong Kong, China took note that some procedural concerns had been raised by a Member, it did not see a linkage between the Appellate Body selection processes and a discussion to address the systemic concerns that had been raised. Hong Kong, China was prepared and committed to engage with all Members, in a constructive manner, to address these concerns. Hong Kong, China invited the concerned Members to submit concrete proposals to facilitate meaningful discussions.

11.23. The representative of China said that his country referred to its previous statements made on this matter and its statement made under Agenda items 8 and 9 at the present meeting. As China had stated at previous DSB meetings, the United States had an obligation to respect all rules, to which it had previously agreed, and to interpret those rules in good faith. Article 17.1 of the DSU provided that, "such rotation shall be determined in the working procedures of the Appellate Body". Rule 15 of the Working Procedures for Appellate Review was in line with the mandate of the Appellate Body under the DSU. China was well aware that its own understanding of this matter was different from that of the United States. In this regard, China believed that when Members' views on specific issues differed, discussions and negotiations were the only way forward. The WTO Membership could start such a discussion as soon as possible. However, given the US refusal to engage in meaningful discussions, China was skeptical about the US intentions in raising concerns regarding Rule 15.

11.24. The representative of Japan said that his country supported the joint proposal and referred to Japan's statements made on this matter at previous DSB meetings.

11.25. The representative of Honduras said that her country supported the statement made by Mexico, on behalf of the co-sponsors, as well as the statement made by Colombia, on behalf of the GRULAC. The WTO dispute settlement system was one of the key pillars of the WTO. Honduras was an active user of the system and, thus, reiterated its concern with regard to the present impasse, which challenged the entire pillar and, as a consequence, the entire rules-based multilateral trading system. Honduras encouraged all Members to show flexibility and their will to reach an outcome and a solution to overcome the present impasse, as this would be beneficial for every WTO Member.

11.26. The representative of Mexico, speaking on behalf of the 67 co-sponsors of the proposal, said that the proponents regretted that, for the eleventh time, the WTO Membership had not achieved consensus to start the Appellate Body selection processes and had, thus, failed to fulfil their duty as WTO Members. No discussion should prevent the Appellate Body from continuing to function fully and WTO Members should comply with their DSU obligations to fill the vacancies as they arose. By failing to act at the present meeting, the DSB would sustain the current situation,

which was seriously affecting the work of the Appellate Body against the best interest of its Members.

11.27. The representative of Uruguay said that her country referred to the statements made at previous DSB meetings on this matter. Uruguay was one of the 67 Members that supported the joint proposal, which had been introduced by Mexico at the present meeting. Uruguay also supported the statement made by Colombia, on behalf of the GRULAC.

11.28. The representative of Guatemala said that his country understood and shared the disappointment and concerns, which had been expressed by other Members. Guatemala had listened carefully to the statements made by all Members. It was encouraging to hear many expressions in favour of a constructive dialogue and readiness to address the concerns raised by the United States. In this regard, the present DSB meeting was not different from the previous DSB meetings. Until now, Members had not formally engaged in substantive conversations to resolve the current crisis. There was no clarity on whether a solution to the procedural issues identified by the United States would lead to its agreement to appoint new Appellate Body members. WTO Members needed clarity about the extent and the nature of the problem and the concerns that they should address, as well as the outcome, which could be expected, if Members would engage with the United States on this matter. Guatemala stood ready to work with the United States and all Members in finding solutions. On a related issue, it was Guatemala's view that the DSU did not provide for the adoption of Panel and Appellate Body reports by positive consensus. There were no rules in the DSU that would allow a Member to unilaterally qualify the legal nature or existence of an Appellate Body report.

11.29. The representative of Ecuador said that his country referred to its statement made at the previous DSB meeting. Ecuador reiterated its position that, pursuant to Article 17.2 of the DSU, vacancies should be filled as soon as they arose. In Ecuador's view, it was the prerogative of the Chairperson to make a decision to start the selection processes as soon as possible to fill the AB vacancies for the benefit of the dispute settlement system. Ecuador supported Brazil's position that it was not necessary to seek a decision on this matter and that the selection process could start without a formal DSB decision, as suggested by Brazil.

11.30. The representative of Turkey said that as a co-sponsor of the joint proposal, his country was, once again, deeply disappointed to see that the DSB had failed yet again to launch the Appellate Body selection processes. The concerns, which had been raised by the United States *vis-à-vis* the Working Procedures for Appellate Review should be dealt with separately and should not block the start of the selection processes. Turkey also urged the United States to table concrete proposals to facilitate the discussion. Turkey stood ready to work with the United States and other WTO Members.

11.31. The representative of Costa Rica said that his delegation echoed the concerns that had been raised with regard to this matter. Costa Rica supported the statements made by Mexico, on behalf of the co-sponsors of the joint proposal, as well as by Colombia, on behalf of the GRULAC. Costa Rica underscored the importance of maintaining an operational DSB, as well as the WTO Membership's compliance with Article 17.2 of the DSU by filling the Appellate Body vacancies as soon as possible. Costa Rica stood ready to address any systemic concerns and to consider any proposal to improve the WTO dispute settlement system. Such discussions, however, should not obstruct the designation of new Appellate Body members. The Appellate Body selection processes should start as soon as possible, as set out in the joint proposal.

11.32. The representative of New Zealand said that her country referred to its previous statements and reiterated its serious concern with regard to the ongoing impasse. New Zealand considered that the Appellate Body selection processes should be a routine matter and that the WTO Membership had to urgently launch a process to make Appellate Body appointments. As New Zealand had stated previously, delays in appointing Appellate Body members threatened the efficient and effective functioning of the WTO dispute settlement system, and had the potential to undermine the broader rules-based multilateral trading system. This should be of concern to all Members. New Zealand was pleased to co-sponsor, along with so many other Members, the joint proposal, which had been introduced by Mexico, to launch the Appellate Body selection processes. New Zealand encouraged other Members to join the proposal. As had been stated previously, while New Zealand did not agree with the linkages drawn, New Zealand once again wished to confirm its willingness to engage constructively with all Members and the Chairperson in order to address the

concerns that had been raised, so that the WTO Membership could move forward and fill the Appellate Body vacancies as soon as possible.

11.33. The Chairperson thanked all delegations for their statements and said that it was regrettable that the DSB was not in a position, at the present meeting, to agree to launch the selection processes to fill the Appellate Body vacancies. She noted that this matter required political engagement on the part of all Members. The Chairperson said that she was in the hands of Members and her door was open to any delegation wishing to share ideas or views on how to proceed with this matter. She then invited the delegations that had any views on this matter to contact her directly.

11.34. The DSB took note of the statements.

12 STATEMENT BY THE CHAIRPERSON REGARDING THE POSSIBLE REAPPOINTMENT OF ONE APPELLATE BODY MEMBER

12.1. The Chairperson said that, under this Agenda item, she would like to make a short statement concerning the issue of possible reappointment of one Appellate Body member. The first four-year term of office of Mr. Shree Baboo Chekitan Servansing would expire on 30 September 2018. Pursuant to Article 17.2 of the DSU, he was eligible for reappointment to a second and final term of office. In light of this, the Chairperson informed the WTO Membership that on 15 May 2018, she had received a letter from Mr. Servansing regarding this issue. In the mentioned letter, Mr. Servansing had indicated that, as envisaged in Article 17.2 of the DSU, he would like to convey his interest to the DSB to be considered for reappointment as an Appellate Body member. The Chairperson said that it was her intention to consult informally with delegations on the issue of possible reappointment of Mr. Servansing as well as on the process to be followed in this regard. She also invited any delegation with views on this matter to contact her directly, and said that she would report on her consultations at the next regular DSB meeting.

12.2. The representative of South Africa, speaking on behalf of the African Group, thanked the Chairperson for this Agenda item and for her proposal to initiate consultations with regard to Mr. Servansing's possible reappointment. The African Group was concerned with regard to the recent developments that could undermine the functioning of the WTO dispute settlement system, and could pose unprecedented systemic risks to the multilateral trading system. At the centre of this matter had been the prolonged impasse in initiating the Appellate Body selection processes to fill the three current vacancies. South Africa had heard the concerns, which had been raised with regard to the current functioning of the Appellate Body, and was of the view that, in an effort to address them, these concerns could be subject to engagement and discussions in good faith. In some cases, the concerns needed to be identified more clearly. South Africa was of the view that, all in all, some of the concerns appeared amenable for resolution in the short term, while some other concerns could require deeper discussion. In any case, South Africa would support an engagement on all the issues, which had been raised, with a degree of urgency. With regard to the question of Mr. Servansing's possible reappointment for a second term, South Africa understood that this would need to be resolved by September 2018. The Appellate Body member seeking re-appointment was from Africa. South Africa believed that the consultations had to begin instantly to ensure that the DSB would be in a position to take a decision by September 2018. Recent practices, which had been adopted by the DSB in this regard, could be followed. South Africa called on WTO Members to act in good faith. South Africa also supported the launch of the Appellate Body selection processes to fill the three current vacancies in the Appellate Body, and called on all Members to engage in a constructive discussion with regard to the concerns in question, with a view to improving the effective functioning of the Appellate Body.

12.3. The DSB took note of the statements.