WORLD TRADE ORGANIZATION

TN/DS/26

30 January 2015

(15-0676)

Page: 1/123

Dispute Settlement Body Special Session

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

REPORT BY THE CHAIRMAN, AMBASSADOR RONALD SABORÍO SOTO

1 INTRODUCTION

1.1. The objective of this report is to provide an overview of the work conducted since the issuance of my last detailed written report[1] and to present my assessment of the state-of-play and way forward towards concluding the negotiations.

1.2. Overall, my sense is that the very constructive work conducted recently provides a strong basis for a successful conclusion of the negotiations. Improvements and clarifications to the DSU can make a very meaningful contribution to the strengthening of the entire multilateral trading system. The building blocks are there. Now is the time to consolidate the work and reap the fruits of all the efforts made since the beginning of these negotiations, by achieving the successful and rapid conclusion that Ministers have mandated.

1.3. This opportunity for us to bring our work to fruition is timely. As the Director-General recently commented to the Dispute Settlement Body, dispute settlement activity has been intensifying, confirming the importance that Members attach to the settlement of their disputes through the DSU, and their reliance on these procedures as a central component of the functioning of the multilateral trading system. As the Director-General observed, two thirds of the Membership have participated in dispute settlement proceedings in one way or another.[2] Any improvements to these procedures will therefore make an important contribution to the functioning of the multilateral trading system as a whole.

1.4. As the Director-General also noted, this level of activity has recently led to certain pressures on the system. Not all of these reflect a need for improvement or clarification of the DSU itself. Nonetheless, to the extent that the work of the Special Session has revealed areas in which inefficiencies have arisen or may arise in the design of the procedures, a successful resolution of such issues can contribute to greater predictability and effectiveness in the processes, including by removing from litigation certain issues generated by limitations or a lack of clarity in the procedures themselves. This in turn will promote and facilitate the prompt settlement of disputes in accordance with the fundamental goals of the DSU.

2 GENERAL OVERVIEW

2.1. We had completed in 2012 a detailed text-based issue-by-issue discussion of all twelve issues under consideration in the negotiations. This intensive process had already led to significant progress. In some areas, the technical work had been essentially completed at that stage, including with the stabilization of draft legal text.[3] In other areas, this comprehensive exercise had allowed a detailed understanding of the proposals and of the respective positions of participants, but convergence was not achieved.[4]

---

[1] See TN/DS/25.

[2] See Statement by the Director-General regarding dispute settlement activities, 26 September 2014, at WT/DSB/M/350.

[3] See TN/DS/25.

[4] See the Chairman's summaries, reproduced hereafter as Annex 2. For summaries of work conducted between May 2010 and April 2011, see TN/DS/25, Appendix B.

2.2. Since June 2013, the work of the Special Session has been based on a "horizontal process" in which interested participants had the opportunity to explore together possible solutions in all areas under discussion, in parallel.[5] At the start of this process, I provided an assessment of the state of play across-the-board and identified specific areas for further work.[6] I invited participants to focus on solutions, by searching for flexibilities that would allow remaining gaps to be bridged. I urged them to be open to alternative ways of achieving their objectives, to take into account the views and concerns expressed by others and to reach out to proponents in areas where they had concerns.

2.3. In this phase, work has been based primarily on efforts driven by participants, with the goal of building convergence around approaches that would have the broadest possible base of support. This has involved informal consultations among interested participants, as well as periodic meetings in which conceptual elements of solution were presented and discussed, covering all 12 issues under discussion.[7] In areas where competing proposals existed, participants focused on seeking convergence towards a single approach. In other areas, participants expressed willingness to show flexibility on the means to address their needs and sought to explore possible avenues towards solutions that could attract greater convergence.[8]

2.4. Throughout this process, I have been very encouraged by the constructive spirit that characterized the work and by participants' readiness to show flexibility in order to achieve convergence. Participants have also stressed the constructive spirit in which work has been conducted and the important contribution made by certain participants in steering the process forward. Participants have also found that focusing on conceptual elements and principles across the board, rather than specific text, had been very helpful at this stage of the negotiations.

2.5. Not all issues are yet at the same level of progress, and the amount of work remaining to achieve convergence still varies significantly from issue to issue. The various elements of possible solutions identified in this phase do not, at this stage, reflect full convergence. Nor do all participants perceive these elements, taken together, as necessarily reflecting an adequate or acceptable overall balance of interests. Nonetheless, the work conducted in the context of this "horizontal process" has allowed the negotiation to move towards an exploration of realistic and achievable outcomes in all 12 areas under discussion. This is a very important step, which can pave the way for eventual agreement on outcomes reflecting the interests of all participants. This is the work that must now be completed.

2.6. A resolution of a number of the issues that have been under discussion in the negotiations would have the potential to significantly improve the effective conduct of dispute settlement procedures under the DSU, to the benefit of all Members alike. In this respect, it is important to bear in mind that all Members share a common interest in systemic improvements to the DSU that would increase the effectiveness of dispute settlement procedures, as a key instrument of predictability and security in the multilateral trading system. This is true for all Members alike, whether they have, to date, been frequent users of procedures under the DSU or not.

2.7. A number of Members have also emphasized that they face particular constraints in accessing dispute settlement procedures and defending their interests effectively through recourse to such procedures. While the means to address these concerns remain under discussion, it is widely acknowledged that a successful outcome needs to take due account of this dimension. In this respect, the work conducted in the context of the "horizontal process" has been especially constructive. This work has been based on the assumption that there should be flexibility on the part of all participants to take due account of each other's sensitivities and needs. This is the direction in which work should continue, in all areas of this negotiation.

[5] See TN/C/M/32, para. 1.22.

[6] See the Chairman's summary of issues raised, reproduced hereafter as Annex 1.

[7] See the Chairman's report to the TNC of 7 April 2014 at TN/C/M34, para. 2.28; see also the Chairman's report to the TNC of 25 June 2014 at JOB/TNC/39, Annex VIII and the Chairman's report to the TNC of 16 October 2014 at TN/C/M35, para. 2.23.

[8] See the Chairman's summary of the informal open-ended meeting of 21 November 2013 at JOB/DS/17; and the Chairman's report to the TNC of 25 June 2014 at JOB/TNC/39.

3 WAY FORWARD

3.1. I am persuaded that the horizontal process conducted since June 2013 and the elements presented in this context, combined with previously completed technical work and stabilized draft text, have the potential to greatly facilitate the development of meaningful and achievable improvements and clarifications to the DSU. It is understood that the elements recently presented constitute, at this stage, avenues for participants' consideration, drawing on the proposals tabled by participants in earlier phases of the work, and are without prejudice to the official positions of any participant. Participants need to continue to build on this work to confirm possible flexibilities and solutions across-the-board.

3.2. As described above, in certain areas, convergence of principle has been achieved and this is reflected in draft legal text.[9] In other areas, the elements that could form the basis of final outcomes will need to be confirmed, building on the work to date, and translated and expressed in legal text, in order to reach final outcomes. In this respect, we already have a very significant body of previous work to build on, including, in many areas, some very mature draft legal text.

3.3. In the conduct of this further work, participants should continue to be guided by the objective of seeking agreement on achievable, realistic and workable solutions reflecting the interests of all participants. The recent horizontal exercise has allowed flexibilities to be tested across, and not just within, the areas under discussion, and this has made it easier to visualize horizontal trade-offs and potential overall balances of outcomes. My impression at this stage is that engagement on outstanding issues should continue to advance in the same spirit, with a view to what the overall picture of potential improvements could look like. It may also be beneficial to envisage this overall picture from the perspective of the successive stages of the dispute settlement process, as recently discussed by participants. This could allow Members to explore how different concerns can be addressed on the whole through a combination of improvements at various stages of the process, and to consolidate the achievements of previous work within the framework of a final outcome.

3.4. Participants could also continue to be guided by the general considerations outlined at paragraphs 10 and 11 of my Report of 18 July 2008, including limiting changes to what is necessary to achieve the intended purpose, ensuring drafting consistency throughout the Understanding and bearing in mind the procedural coherence of the system as a whole.

_____

[9] See Annex 1 hereafter.

LIST OF ANNEXES

ANNEX 1

Contents	Page
Summary of issues raised in consultations, week of 10 June 2013	5

ANNEX 2

INFORMAL MEETINGS (MAY 2011 TO DECEMBER 2012): CHAIRMAN'S SUMMARIES OF WORK

	Contents	Page
1.	Weeks of 3-13 May 2011	11
2.	Week of 20 June 2011	19
3.	Week of 25 July 2011	26
4.	Week of 26 September 2011	33
5.	Week of 14 November 2011	43
6.	Week of 30 January 2012	51
7.	Week of 5 March 2012	60
8.	Week of 7 May 2012	71
9.	Week of 4 June 2012	83
10.	Week of 16 July 2012	96
11.	Week of 1 October 2012	102
12.	Week of 12 November 2012	109

ANNEX 1

SUMMARY OF ISSUES RAISED IN CONSULTATIONS, WEEK OF 10 JUNE 2013[1]

This summary is presented by the Chairman under his own responsibility and without prejudice to the views of any participant.

Meetings were held in the week of 10 June 2013 on all issues, except sequencing[2], where technical work has been completed, and mutually agreed solutions[3] and SCI[4], where limited issues remain to be addressed.

Remand

Convergence exists on some essential features expected of a remand referral mechanism, reflected in both proposals, namely:

- Remand would be available when the Appellate Body identifies that it cannot complete the analysis for lack of sufficient undisputed facts on the record or factual findings by the panel;
- The initiative of remand would be taken by a party to the dispute; and
- The original panel would be called upon to address the unresolved factual issues.

Further work should therefore focus on key remaining conceptual issues, namely:

- Which party may initiate remand (and how recommendations are formulated);
- Whether the remand panel completes the factual analysis only or also the legal analysis (and the role of new evidence in the remand procedure); and
- What happens to completed rulings while remand is on-going.

Two broad factors seem to affect overall positions on these issues: (i) timeframe implications (i.e. the time needed for the completion of remand procedures and/or the time gained through remand compared to the re-initiation of proceedings) and (ii) uncertainties relating to the operation of some proposed novel procedures or processes.

These two factors appear to be connected, to the extent that innovative procedural suggestions are driven by an effort to avoid undue delays in the procedure. Part of the challenge is therefore to determine an appropriate balance between an acceptable timeline and ensuring that the process does not generate procedural uncertainties or excessive complexities. Further work could therefore focus on exploring possible solutions to the unresolved issues, taking into account these broad parameters.

It was suggested that a workshop could be useful, to explore the practical operation and implications of different options, including a single report and single adoption, two reports and "double adoption" or other variations combining elements of either proposal. It was also suggested to explore the functioning of various options by applying them to the types of situations in which the Appellate Body had been unable to complete the analysis in cases to date.

Post-retaliation

Convergence exists at a conceptual level on a broad sequence of steps to address post-retaliation situations, namely:

[1] Previously issued as JOB/DS/15. Footnotes have been added for ease of reference.
[2] See draft legal text at JOB/DS/14, pp. 12-14.
[3] See draft legal text at JOB/DS/14, p. 2 and JOB/DS/3, para. 46 (reproduced hereafter in Annex 2 at para. 166); see also JOB/DS/4, paras. 77-79 and JOB/DS/2, p. 7.
[4] See draft legal text at JOB/DS/14, pp. 10 and 17-20.

1. The Member concerned must assert and substantiate its claim of compliance. That is, the Member concerned must come forward with some form of action that would explain what it has done to achieve compliance (without prejudice to the exact form or legal status of this announcement);

2. Once the Member concerned has taken this initial step, the next step is for the complainant to challenge the respondents' assertion of compliance, if it disagrees with that assertion (without prejudice to how exactly this is done);

3. If there is no disagreement that compliance has been achieved, the retaliation authorization will be terminated;

4. If there is a disagreement, compliance proceedings should take place to determine whether compliance has been achieved;

5. Where compliance proceedings take place, the existing retaliation authorization continues to be effective until their conclusion; and

6. Where compliance proceedings have taken place, if it is determined in these proceedings that compliance has been achieved, the authorization will be terminated. If it is determined that compliance has not been achieved, the level of retaliation authorized may be revised to reflect the current level of nullification or impairment.

These are strong building blocks. Further work could therefore focus on clarifying the exact procedural stages to achieve this sequence. The proponents have identified three key unresolved issues in this respect:

- The contents and legal status of the initial notification/statement to be made by the respondent to assert compliance;
- The process for initiation of compliance proceedings (i.e. initiated by the complainant or triggered by the respondent's declaration of compliance); and
- The allocation of burden of proof in these proceedings.

Proceedings in the "pre-retaliation" stages provide important context for proceedings in the "post-retaliation" phase. Two aspects in particular may have a bearing on the way forward: Article 21.5 compliance proceedings, taking into account the "sequencing" text, and Article 22 proceedings towards an authorization to retaliate. Parallelism with these procedures could therefore be explored.

Third party rights

With respect to third party rights in consultations, the shared objectives are clear: automatic acceptance of requests to be joined in consultations in the absence of a timely rejection notification by the defendant and transparency on all responses to such requests – whether negative or positive. Unless there are drafting concerns as to whether the most recent text achieves these objectives, no further work seems necessary.[5]

With respect to third party rights in panel proceedings, two aspects can be distinguished, i.e. (i) when interest must be expressed, and (ii) what the rights of third parties are in the proceedings.

With respect to the first issue, there is support for codifying the current practice of expressing interest within 10 days after panel establishment, but there is also interest in clarifying the conditions of admissibility of later expressions of interest. Consideration could be given to combining clarity in this respect with a degree of flexibility.

[5] See JOB/DS/14, p. 3; see also hereafter Annex 2, at para. 785.

This question should also be considered in light of the potential improvements in the standard rights to be granted to third parties at this stage of the proceedings. There is support for enhancing default third party rights in panel proceedings. Concerns have been expressed, however, in respect of allowing third parties to make an additional statement in the context of the second substantive meeting. Here also, consideration could be given to combining clarity and a degree of flexibility.

Some concern remains that allowing expressions of third party interest for the first time at the appellate stage could result in an increased workload for both the Appellate Body and the parties. Suggestions to address the balance between the rights of the parties, greater opportunity for third party participation and the workload of the Appellate Body could be explored further.

A consideration of overall balances to be achieved would also be useful, taking into account the possibly different balance of interests between parties and third parties at various stages of the proceedings. This issue could also usefully be considered in terms of the balance between the opportunity for interested Members to have their views heard by WTO adjudicators, including at the appellate stage, and a possible regulation of the conditions in which others, including non-Members, may be authorized to express views at the same stages of the proceedings. It has been noted in this respect that "transparency" proposals would also benefit Members themselves (see below the section on "Transparency and *amicus curiae* briefs").

With respect to consultations in compliance proceedings, the shared intention is clear, i.e. that (i) consultations should be possible but not required in compliance proceedings, (ii) if consultations are requested, they shall be conducted in accordance with Article 4 of the DSU and (iii) this implies that, where consultations are requested, third party participation should be possible in the same conditions as in original proceedings. It is unclear whether participants are ready to re-open the stabilized text achieved on this issue in the context of "sequencing", to better reflect these objectives.

In respect of third party participation in Article 22.6 arbitral proceedings, mixed views have been expressed on the extent to which such proceedings tend to involve factual issues primarily of concern to the parties or also legal determinations of potential interest to other Members. Here too, an approach that provides both clarity and a degree of flexibility could be explored.

Transparency and *amicus curiae* briefs

With respect to transparency, further work should address the concerns of those participants who are not persuaded that a systematic opening of proceedings is appropriate.

Here too, solutions could be envisaged against the context of an overall balance of interests, including between the participation rights of Members and access for non-Members. It has been noted that there is partial overlap between transparency proposals and enhanced access for Members, in that open hearings or publicity of submissions provide an opportunity also for Members other than parties and third parties to gain greater access to the proceedings. At the same time, to the extent that it is considered important that Members have a greater opportunity for access than non-Members, a greater level of access to meetings for all may need to be complemented by greater participation rights for interested Members.

In respect of open hearings, future work could explore solutions accommodating some flexibility rather than a systematic opening of all meetings.

With respect to access to submissions also, a range of modalities might be explored further, not limited to immediate and complete access to all documents or complete confidentiality of all submissions. It is also useful to bear in mind that Article 18 currently allows a Member to request a non-confidential version of a party's submissions, although no timeline is specified. Panel and Appellate Body reports also contain summaries of the arguments presented by parties and third parties. What is at stake is therefore mostly the moment and form in which information becomes available, more than the principle of making public information that would otherwise remain permanently confidential.

Not all Members have been equally comfortable with the manner in which unsolicited *amicus curiae* briefs have been handled by adjudicators, and there remain serious concerns for some over

the acceptance of such briefs. At the same time, there may be more common ground in the underlying assumptions of participants than is generally assumed:

- No participant has suggested that there should be a right for any entity other than a Member who is party or third party in the proceedings to file a submission, participate in the proceedings or have its views heard before adjudicators in proceedings under the DSU; more generally it seems understood that only WTO Members can have standing in WTO dispute settlement proceedings;

- All participants also seem to assume that, to the extent that any other entity is in fact heard, such as experts consulted under Article 13 of the DSU, this is to be decided by the adjudicator, in consultation with the parties.

- All participants share the concern that any request by an entity other than a party or third party to the dispute to present views to a WTO adjudicator, should not result in undue disruption in the conduct of the proceedings or unnecessary burdens on the parties to the dispute.

These elements may provide strong building blocks to explore the possibilities for bridging the gaps and to provide greater predictability on this issue, a consideration that inspires both proposals.

Timeframes

To date, discussions of timeframes have involved mostly a consideration of each individual proposal on its own merits. These discussions have shown that there is generally comfort with the two key objectives underlying proposals on timeframes, i.e. streamlining the process where possible, and at the same time ensuring that sufficient time is available for all Members, including those developing country Members facing significant resource constraints.

At the same time, these two objectives may not always be easy to account for within a single phase of the proceedings. The way forward on these issues could therefore involve a broader consideration of overall balances across various stages of the proceedings, to achieve an optimal combination of streamlining of the process where possible and assurances of sufficient time for all Members to defend their interests in the proceedings where needed.

Effective compliance

Proposals on effective compliance share a common goal of improving remedies, to promote prompt compliance. Some language has been tentatively agreed on notification of measures taken pursuant to an authorization to retaliate.[6] Beyond that, the broad question to be addressed is how remedies under the DSU could be improved, so that all Members have access to as effective a remedy as possible when necessary.

It has been noted, and is not disputed as such, that overall compliance levels have been high. It is also acknowledged that in practice, it is not often necessary to resort to retaliation. At the same time, a number of Members have expressed concern that compliance has not always been easily achieved, and that some may face particular challenges in this respect, in part because available remedies are not effective enough. For some Members who are not frequent users of the system, compliance concerns may represent a major proportion of their experience.

The proposals reflect different ways of addressing this concern. The way forward may require flexibility on the types of solutions that can contribute to promoting effective compliance, taking into account the sensitivities of participants. In this respect, it has been suggested that the systemic implications of various approaches are not the same. It has also been suggested that solutions that may potentially benefit all Members could generally be easier to accept.

A general question for consideration is the relative effectiveness of various remedies, in promoting prompt compliance. In this respect, it has been suggested that consideration be given

[6] See draft legal text at JOB/DS/14, p. 5, and JOB/DS/4, para. 34 (reproduced hereafter in Annex 2, at para. 203).

to promoting opportunities for compensation, as a possibly more effective means of achieving satisfaction for affected sectors than retaliation. This question could be further explored, taking into account the merits of flexibility for the parties to freely determine how to make best use of such compensation. With respect to administrative measures, an important issue for consideration appears to be whether such measures would provide helpful incentives for compliance or would rather risk disengaging the Member concerned, to the detriment of the initial objective.

Developing country interests

Proponents of developing country interests have identified third party rights, timeframes and effective compliance as areas of concern to them. Meaningful progress in these areas could therefore contribute to addressing a number of concerns expressed by proponents of developing country interests. This dimension should be taken into account in future work on these issues.

Specific aspects of these issues may also contribute to adequate access to dispute settlement procedures, also identified as an area of concern. For example, an opportunity to participate as a third party in various proceedings may enhance access and also contribute to capacity building. Similarly, ensuring that respondents are assured of sufficient time to prepare their arguments before adjudicators may contribute to due process and therefore effective access to the proceedings. Improved remedies may also strengthen effective access, if they increase the chances of achieving a resolution of the matter for the complainants.

As regards proposals for more direct support in the form of a Dispute Settlement Fund and litigation costs, the presentation of legal text has clarified some important aspects of the expected functioning of both mechanisms. At the same time, significant questions and concerns remain, including on budgetary implications and the operation of the mechanisms. It has also been noted that not all developing country Members, or even all developed country Members, are in the same situation in respect of relative expertise or resources to deal with WTO litigation. Also of concern has been the relationship between these proposed mechanisms and the functions of the ACWL, whose contribution to providing quality independent legal advice to beneficiary Members is widely recognized.

Some participants suggested that consideration be given to increased capacity building and trade-related technical assistance or to looking into possible ways of increasing the attractiveness of ACWL for Members with limited capacities, as means of addressing the capacity constraints identified. It has also been suggested that generally focusing on solutions that would not be tied directly to litigation of specific cases would help to move forward. These suggestions could be explored further.

Flexibility and Member-control

Proposals on flexibility and Member-control share a common goal of increasing the options available to Members, and to parties in particular, to achieve a successful resolution of their disputes. Here again, the proposals reflect different ways of achieving this, and the way forward may require flexibility on the types of solutions, taking into account the sensitivities of participants. It has been noted in this respect that positions on different aspects of the proposals may depend on the combination of solutions to be adopted.

On two elements of the proposal, the suspension of panel proceedings[7] upon the parties' agreement and expertise of panelists[8], some language is tentatively agreed.

In respect of partial deletion and partial adoption of reports, strong concerns remain. Partial deletion raised particular concern because portions of the adjudicators' reasoning and conclusions would be removed from the final reports and not seen by the Membership. Partial adoption, which involves the Membership acting by consensus, raised comparatively less systemic concerns. Further work could involve proponents continuing to explore with interested participants how the objectives of these proposals might be achieved, while respecting the sensitivities expressed.

[7] See draft legal text at JOB/DS/14, p. 7 and JOB/DS/1, p. 4 (reproduced hereafter in Annex 2, at para. 19).

[8] See draft legal text at JOB/DS/14, p. 4 and JOB/DS/7, paras. 22-23 (reproduced hereafter in Annex 2, at paras. 334 and 335).

On other aspects (suspension of appellate proceedings, interim review on appeal and guidelines for adjudicators), useful technical work might be pursued.

On suspension of appellate proceedings, concerns raised included the absence of a time-limit comparable to what is foreseen in respect of panel proceedings under Article 12.12, to avoid prolonged situations of uncertainty on the status of the pending panel report and in the planning of the Appellate body's work. Further work could focus on seeking to address these concerns, and on the status of unadopted panel reports in the event of a suspension of appellate proceedings, an issue that does not similarly arise at the panel stage.

In respect of interim review at the appellate stage, concerns remained, including in respect of potential impact on the Appellate Body's authority, the risk of withdrawal of an appeal in light of the interim appellate report and timeframes. There were also concerns with possibilities of leakage. Here too, further work could focus on seeking to provide clearer assurances that these concerns can be met. Rectification of factual errors was identified as an area in which interim review could enhance rather than detract from the quality and authority of reports.

With respect to the proposed guidelines for WTO adjudicators, avenues for work ahead have been identified and could guide the way forward. In particular, a review of the language of the draft guidelines on the basis of a more "principles-based approach", formulating the guidance in a general way, rather than on the basis of examples only, has been proposed. This could be the first objective of further work on this issue. The following elements might help in this context: identifying portions of the guidelines around which there is greater convergence on substance, including areas in which established Appellate Body rulings would be confirmed. Where the proposed guidance might modify rather than confirm current dispute settlement practice, this could also be clarified. In some areas, specific suggestions have already been made as to how the text might be restructured or revised. These could be explored further.

Panel composition

There is tentative agreement on language to clarify the expertise expected of panelists, under Article 8.2.[9] The remaining question is whether the efficiency of the panel selection process under Article 8 can be improved through a mechanism to achieve panel composition on the basis of a single list of names, be it by agreement of the parties or through DG composition.

The idea of the presentation of a single list by the Secretariat seems to be generally well received. Further work could focus primarily on addressing the key concern expressed that a linear ranking of potential panelists from this single list may not fully reflect the required balance of expertise within the panel, so that the chances of achieving an optimal composition on this basis may be reduced. The objective could be to maximize the chances that the default composition proposed based on the ranking would be balanced, so that the need to resort to additional flexibilities (such as a revised list or DG composition) is reduced.

With respect to DG composition, further work could focus on confirming adequate language to allow the Director-General some flexibility to depart from the list where necessary, to address concerns that recourse exclusively to the initial list may excessively limit the Director-General's ability to achieve a better outcome than the parties had been able to generate on the basis of that list. Further drafting improvements could also be considered, to reflect other suggestions or comments made on the draft text. Operational aspects, such as the timeline for the process, may also need to be clarified in due course.

_____

[9] See draft legal text at JOB/DS/14, p. 4, and JOB/DS/7, paras. 22-23 (reproduced hereafter in Annex 2, at paras. 334 and 335).

ANNEX 2

INFORMAL MEETINGS (MAY 2011 TO DECEMBER 2012): CHAIRMAN'S SUMMARIES OF WORK

The text below reflects the summaries of the work conducted in the DSU negotiations between May 2011 and December 2012, as presented by the Chairman at informal meetings of the DSB Special Session at the conclusion of each negotiating week. These summaries are presented by the Chairman under his own responsibility and without prejudice to the views of any participant.

1. WEEKS OF 3-13 MAY 2011[1]

Strictly Confidential Information (SCI)

1. This week, delegations first took a fresh look at the proposed procedures on Strictly Confidential Information (SCI). The draft text on SCI in the 2008 July Text[2] is based in large part on an earlier Canadian proposal, but is not limited to that proposal. Because SCI has linkages to transparency issues and to certain aspects of third party participation, the July Text highlights these linkages.

2. I have noted in the past that the concept and objectives of protecting SCI are relatively mature and generally accepted, but that a number of technical issues remain, including:

- the operational details of the procedures proposed;
- linkages and consistency between SCI and other relevant existing and proposed provisions in the DSU, in particular as regards transparency and third party rights; and
- the legal form of regulating SCI.

3. Last week, the proponent expressed its desire to revisit its proposal, based on experience since the proposal was originally made. The proponent observed that to date, parties at the panel stage have sought procedures for the protection of SCI on an *ad hoc* basis. However, these procedures are themselves incorporated into the working procedures that pertain to the particular dispute, and are not made public. In addition, the level of protection can vary from case to case.

4. Bearing the current realities in mind, the proponent set out what it considers important objectives. These are:

- to ensure that the DSU provides for additional SCI procedures to be adopted when a party requests them;
- to allow parties flexibility to design procedures that suit the specific needs of specific cases while recognizing that panels and the AB will have a say in the adoption of procedures; and
- to ensure that adopted procedures are made available to all WTO Members.

5. The proponent also noted that, in its view, these objectives would have certain implications, in particular, that:

- the level of protection afforded at the panel level should also be afforded at the appellate stage; and
- the information that is designated as confidential must be able to be subject to a "challenge".

---

[1] Previously circulated as JOB/DS/1.

[2] See document TN/DS/25, Appendix A, Article 18 at pp. A-12 to A-13, and Appendix 5 at pp. A-21 to A-24.

6. In this latter respect, the proponent expressed the view that, currently, the Appellate Body may determine on its own whether information should be designated as confidential or not, irrespective of the parties' views.

7. The proponent considered various ways in which these objectives might be met. It was suggested that some kind of document could be adopted by the DSB that illustrates procedures that have been used in the past. It was also suggested that an appendix could be incorporated into the DSU, which would contain suggested or illustrative provisions. It was submitted that this would provide a level of certainty and would enable Members to inform relevant industry or stakeholders on the kinds of procedures that may be available. In addition, proponents submitted that a definition of SCI could also be provided to give Members a common understanding.

8. Participants in the small group discussion expressed support for the objectives discussed by proponent, stating a clear preference for allowing flexibility in the type of procedures that might be adopted. In addition, participants indicated a desire that confidentiality procedures adopted in a dispute at the panel stage be retained at the appellate stage. Questions were also raised as to the involvement of third parties in the determination of SCI procedures.

9. In the meeting of the G40, further support was expressed for the objective of protecting SCI, and for keeping the procedures as simple as possible. The proponent also clarified a number of aspects. In situations in which parties cannot agree on the SCI procedures to be followed, the proponent envisioned that additional procedures for a party to request protection of SCI, which would then be adopted by the panel or the Appellate Body. This would depart from current practice, which leaves discretion to the adjudicators. The content of procedures would be adopted in consultation with parties. In most cases, the procedures would be simple. If there was a disagreement on the particular procedure, this parties and the adjudicator could hold discussions. In addition, there would be an adopted definition of SCI, under which parties have the power to designate information as strictly confidential.

10. With respect to the expected structure of the procedures, the proponent suggested that amendments would need to be made to Article 18 of the DSU, to clarify that procedures will be adopted where so requested, and that procedures will be adopted in consultation with parties based on needs of specific case. It would also be clarified that where procedures are adopted by a panel, then the same protection should be afforded at all stages of the process (including possible appeal). An Appendix would likely include a definition of SCI, though model procedures would not be included. Finally, the proponent envisioned that a DSB decision could direct the Secretariat to make such Working Procedures available on a website.

11. The proponent indicated that it expected to continue to work towards revised text between now and our next meetings.

Panel composition

12. The proponent presented an updated version of its text[3], reflecting some drafting suggestions from earlier discussions on this subject in 2009, with the aim of improving the procedure for the selection of panelists, in particular addressing transparency and predictability. The proposal directs the Secretariat to present a greater number of names, in a single list, based on selection criteria identified by the parties. With this list, the parties must rank the proposed names, and may exercise limited veto rights. The three names with the highest combined ratings among those that have not been vetoed by either party would be proposed as basis for the composition of the panel. The parties would then have the ability to agree or disagree with the resulting composition. If they cannot agree on a composition on that basis, then the possibility would remain, as under the current procedures, to request the Director-General to compose the panel. The Director-General would have to compose it from the same list, i.e. the names proposed by the Secretariat and ranked by the parties.

13. In an initial discussion of the proposal, support was expressed for the underlying rationale of the proposal; however, questions were asked in particular about the operation of the ranking process and the resulting proposal for the composition of the panel. In this context, delegations

[3] See also document TN/DS/25, Appendix A at pp. A-25 to A-26.

discussed both the vetoing and ranking of names by the parties, and what the Secretariat would do with these rankings in order to arrive at a proposed composition. With respect to veto rights, it was clarified that the list should, *a priori*, contain only names that are in principle suitable, so that there would be only a limited number of names that would not be acceptable to either party. Thus the veto opportunities should be limited.

14. A number of participants expressed interest in understanding how the ranking would operate in practice. This was clarified on the basis of a practical simulation exercise, under which delegations simulated a two-party ranking process. Hypothetical candidates were ranked in order of preference, with vetoes placed. The ranking was then translated into points that were allocated to each candidate. Vetoed candidates were not assigned points. The number of points achieved by each nominee was then calculated, to identify the three nominees with the highest combined number of points. These were proposed to serve as panelists. It was also clarified that flexibility remained to determine which panelist, among these three, should chair the panel. For instance, seniority and experience could play a role in the choice of chairperson. It was clarified that once the initial veto rights had been used, no further opportunity for a "veto" arose as such. However, if an individual ranked very low by one of the parties ended up being proposed as one of the three with the best combined preferences, the proponent submitted that the party uncomfortable with that nomination could object to the proposed composition.

15. A number of questions were asked in respect of the mathematical calculation of the composition of the panel based on the best combined rankings by the parties. Concern was expressed in particular at the fact that this ranking process does not take into account aspects relating to the balance of expertise and profiles within the *group* (for example, the need to have at least one economist, plus one WTO lawyer, and maybe also one panelist with an academic background, as well as a balance of nationalities and level of seniority). It was questioned whether, in light of this, a mathematical formula provides the best approach to identifying the optimal combination of individuals reflecting a combination of the selection criteria and the ranking. It was suggested that, if this mechanism was too rigid and would generally require subsequent adjustment, perhaps there could be better ways to reflect all the preferences of parties, for example, by allowing the Secretariat to propose an optimal combination among the non-vetoed individuals, taking into account various criteria.

16. Further clarification was sought also as to whether the names included in the Secretariat's initial list would have to meet "at least one criterion" from each party, in order to increase the chances that it would be acceptable to both. One delegation also expressed concern at the fact that the proposed procedure appeared to be mandatory by default.

17. In a meeting of the G40, delegations revisited the proposal, discussing the preamble and opening paragraphs of the proposed text. At the outset, the proponent recalled that its proposal is in the form of a DSB decision, and not modification of the text of the DSU. The proponent explained that it sought to create a self-standing set of rules or procedures that would be binding on Members, but could flexibly be withdrawn if it proved to be unsatisfactory with the Membership. The proponent explained that this decision seeks to build upon the principles set out in Article 8 of the DSU. Delegations also recognized the possibility exists for Members to request a review of the procedures set out in the decision in light of experiences gained.

18. The proponent noted that the inclusion of a preamble was consistent with the format of existing DSB decisions, but expressed flexibility in removing any introductory language if other participants considered it unnecessary. Delegations were not strongly opposed to keeping a preamble, but suggested the possibility of including additional language from the first two paragraphs into the preamble. Delegations also discussed whether it would be more appropriate to refer to language in the Decision as "rules" or "procedures". Interest was expressed in using "procedures". The proponent also clarified that the procedures set forth in the proposal could apply in the context of panelist selection for an Article 21.5 proceeding, if the need arose. In addition to discussion on language in the opening provisions, some delegations maintained reservations with respect to the ability to resort to alternative procedures, considering that such an option requires agreement between the parties.

Flexibility and Member-control

19. Delegations continued their discussion on flexibility and Member control, from April.[4] On the suspension of panel proceedings[5], questions had been raised last month in the meeting of the G40, about the draft text that had been considered in the smaller group discussions. This week, the G40 group reached agreement on the following wording for the suspension of panel proceedings under Article 12.12 of the DSU:

> "The Panel may suspend its work at any time at the request of the complaining party and where the panel has suspended its work, it shall resume its work at the request of the complaining party. The panel shall suspend its work where the parties to the dispute so agree, and shall resume its work at the request of either party to the dispute. In the event of a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, Article 20 and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 consecutive months, the authority for establishment of the panel shall lapse."

20. The intent of the most recent changes reflected in this text is to ensure parallel treatment of the duration of suspension and conditions of resumption, both in the event of a suspension at the request of the complainant (first sentence) and in the event of a suspension at the joint request of the parties (second sentence, introduced by the proposed text).

21. Delegations also continued, in the G40, discussion of the proposed suspension of Appellate Body proceedings.[6] Both the objective and the proposed modalities of such suspension were discussed. Some delegations indicated that they were still considering whether a suspension of proceedings at the Appellate stage was appropriate. In this respect, some participants highlighted that the situation at the appellate stage differed somewhat from that at the panel stage, in that rulings already existed in the panel report, which might be confirmed or not through the Appellate Body proceedings. Concern was expressed at the possibility of dilatory tactics.

22. Several participants, while they understood - and, for some, supported - the underlying rationale of the proposal, had concerns about the fact that it does not envisage any finite duration to the suspension, unlike what is foreseen at the panel stage under Article 12.12. In this respect, it was asked what the implications might be of a prolonged situation of uncertainty, whereby the panel report would remain unadopted without resolution of the matter. Concern was also expressed that it may be more difficult for the Appellate Body to accommodate such uncertainty in the planning of its work.

23. The proponents explained that the purpose of the proposal was to allow the parties an opportunity to negotiate a settlement of the dispute. They observed that the parties, including the complainant, would be able to define the terms of the suspension, and would retain the ability to resume the proceedings at any time if they no longer thought that it could serve its purpose of facilitating agreement on a solution to the dispute. In their view, it would not be necessary to provide for a specific duration for the suspension, and to force the parties to resume the proceedings, as long as they considered it useful to pursue their discussions.

24. In the small group discussions, we also addressed the proposal for an interim review at the Appellate Body Stage.[7] You will recall that, at our meeting last month and previously, the proponents suggested that interim review could help avoid errors of fact or law in the Appellate Body, and could also help provide clarifications on Appellate Body findings. Proponents expressed the view that an interim review would provide a much more favourable manner than the issuance of corrigendum to address potential mistakes or issues in Appellate Body reports.

---

[4] See document TN/DS/25, Article 12.7 at p. A-8, Article 12.12 at pp. A-8 to A-9, Article 16.4 at p. A-9, Article 17.5(b) at p. A-10, Article 17.5(c) at p A-10; Article 17.13 at p. A-11, pp. A-25, A-27 to A-32.

[5] See document TN/DS/25, Article 12.12 at pp. A-8 to A-9.

[6] See document TN/DS/25, Article 17.5(c) at p. A-10.

[7] See document TN/DS/25, Article 17.5(b) at p. A-10.

25. In general, delegations continued to express support for having high-quality Appellate Body reports. Some delegations indicated that the interim review works well at the panel stage and could prove useful in the appellate stage.

26. However, some delegations expressed concern that the inclusion of interim review at the appellate stage would undermine the integrity of appeals and the dispute settlement process. It was suggested that the potential benefit of correcting small errors would be outweighed by certain costs, including the extension of timeframes and the possibility for confidentiality leaks or other abuse. The question was raised as to how many corrigenda have in fact been required in the appellate context.

27. Delegations expressed the view that appellant parties could effectively preview the outcome on appeal at the interim review stage and opt to withdraw their appeal, were they dissatisfied with the conclusions on appeal. In their view, this would disrupt balance achieved in the system by requiring Members to weigh the costs and benefits of appealing. In this regard, proponents expressed the view that the Appellate Body could prevent such a possibility through modification of its working procedures, obviating the need to limit the possibility of withdrawal in the text of the DSU itself.

28. Delegations submitted that the primary focus and content of appellate reports concerned legal issues. The fear was expressed that parties would simply present additional argumentation to influence the outcome. Delegations also expressed the view that the legitimacy of AB reports could be brought into question. If an appeal is filed and results not seen, this could have a negative impact on the Appellate Body, by undermining its authority and impinging on its ability to discharge its mandate under the DSU. Delegations also referred to undue pressures could be placed on the Appellate Body.

29. Proponents noted, however, that legal issues are also reviewed by panels and discussed at the interim review stage by parties. It was also submitted that, were such review of legal arguments allowed, the Appellate Body would retain authority not to change its mind. It was further suggested that reflecting the interim process in the final Appellate Body report would help to preserve integrity. However, it was also noted that parties retain the possibility of appealing their case at the panel stage, and there is the incentive to pursue less intensely at that stage arguments on legal findings.

30. One proponent suggested that additional language could be incorporated into the proposal to define what would be the permissible scope of interim review at the Appellate stage, to avoid parties re-litigating their case. Proponents, however, questioned what would be the impact of more prescriptive language, suggesting that parties then might expend time arguing whether a case in fact is being re-litigated or not, further putting pressure on timeframes. It was also noted that there would then not be parallelism between the language in the DSU discussing interim review at the panel stage and at the appellate stage.

31. In addition, delegations considered the impact of this proposal on developing countries. Some delegations referred to the addition of another step, and additional costs on developing countries. Proponents referred to the possibility that further clarity in the findings could actually be of benefit to all Members, including developing countries, by helping to avoid issues arising in later stages in the process.

32. Delegations next turned to partial deletion and partial adoption of reports.[8] As has been the case in the past, participants appeared to view partial adoption as raising less systemic concerns than partial deletion, in that it would preserve the integrity of panel reports by requiring an agreement of the entire Membership. In contrast, delegations noted that partial deletion would result from agreement strictly by the parties prior to adoption.

33. Delegations expressed concern that, where an asymmetric relationship exists between parties, pressure could be brought to bear on a party to delete a finding, potentially against its wishes. Delegations also expressed concern that a non-legal rationale could provide a basis for deletion, or that parties could resort to bartering or horse-trading of unfavourable findings. Apart

[8] See document TN/DS/25, Article 12.7 at p. A-8, Article 16.4 at p. A-9, Article 17.13 at p. A-11, p A-25.

from providing a positive solution to the dispute, delegations expressed the view that panel and Appellate Body reports play an important role in enhancing predictability and security by clarifying WTO rules for all Members. The view was expressed that allowing partial deletion would "blur the line" between the parties and the adjudicators.

34. Delegations also enquired whether these proposals were alternative or a package that works together. Proponents indicated the proposals are intended to complement each other. For instance, proponents noted that parties may agree to delete certain aspects of a report at an interim review stage and not others, but may later reach agreement on partial adoption. This latter step could be influenced by discussion with non-parties.

35. In addition, several technical questions were posed, such as how the agreement of parties to partially delete or adopt would be reflected in the decision or the report, and what would be done to address potential breaks in the flow of the report, were deletions to be made. It was also asked whether these aspects of the proposal, in particular partial deletion, would be linked to other aspects, namely, interim review of Appellate Body proceedings. Proponents expressed the view that partial deletion would need to be linked with an interim review stage to work effectively.

36. Delegations did not have sufficient time to consider the remaining aspects of flexibility and Member-control, namely the proposed guidance to adjudicative bodies. We will revert to this next month.

Transparency and amicus curiae briefs

37. Finally, participants initiated this week a discussion on transparency and *amicus curiae* briefs. Transparency and *amicus curiae* briefs have been discussed extensively in the past. As has been highlighted previously, these are distinct issues, to the extent that transparency relates to providing a degree of access to information concerning the proceedings, while the question of *amicus curiae* briefs relates to the potential for active participation of non-parties, including non-Members, in the proceedings.

38. You will recall that convergence had been achieved in previous discussions on "timely access to panel reports". Participants agreed that the final reports of panels could be made available to the Membership in their original language at the time of their issuance to the parties, followed by circulation of reports in the three working languages of the WTO. Only upon circulation in the three languages would the DSU deadlines for adoption or appeal be triggered. In light of this agreement, delegations did not re-open this part of the discussion. Therefore, participants discussed the remaining issues, beginning with the publicity of submissions.

Publicity of submissions

39. Submissions to panels and the Appellate Body are currently treated as confidential, pursuant to Article 18.2 of the DSU. At the same time, Article 18 does not prevent a Member from disclosing statements of its own positions to the public. A number of Members in fact make their own submissions publicly available, either immediately upon their submission, or later in the course of the proceedings.

40. The proposal is to amend Article 18.2 to provide for the publicity of submissions to panels, the Appellate Body and arbitrators under the DSU.[9] The proposal also makes changes to the Working procedures for panels in Appendix 3.[10] Finally, a registry is proposed that the Secretariat would maintain, wherein submissions would be made available to the public. This is reflected in a draft Decision by the DSB.[11] The title of that draft decision is misstated in that document. It mistakenly reads "protection of strictly confidential information".

41. Some useful clarifications had emerged from past discussions. In particular, delegations clarified that the protection of strictly confidential information should be ensured, even if submissions were to be made public as a matter of principle. Also, it was clarified that the Member making the submission would not be required to take any particular steps to ensure the

[9] See document TN/DS/25, Article 18.2 at p. A-12.
[10] See document TN/DS/25, Appendix 3 at p. A-20.
[11] See document TN/DS/25, p. A-24.

publicity of its submission. Rather, this could be done through the central registry mechanism to be maintained by the Secretariat. Both of these clarifications were noted as possibly providing a certain level of comfort as to the terms on which submissions might be made public, and the limited burden that this would entail for the Members concerned.

42. It was also noted by some Members that the DSU already foresees in Article 18.2 the presentation, upon request of a Member, of a non-confidential version of the information contained in submissions to a panel or the Appellate Body. This means that the principle of access to a non-confidential version of submissions is already present in the DSU, even if there are no specific details in the text as to when and how such versions might be requested and obtained. It has further been noted that, among those Members who currently already make their own submissions public, the practice varies as to the exact timing and modalities of such access.

43. In meetings last week, participants returned to discussing a number of issues surrounding the proposals, including the timing at which submissions might be made available to the public. Participants expressed varying degrees of comfort with the very principle of this proposal.

44. It was indicated that the proposal was intended to cover documents that go to the panel, including written versions of oral statements, but that the proposal was not intended to apply to documents of an administrative nature, confidential materials, or any materials at the interim review stage. The timing of releasing submissions to the public was also discussed. Delegations currently releasing submissions to the public indicated that they either release them immediately or at the conclusion of the dispute. One participant indicated that it released it submissions as soon as the relevant portion of the dispute is over, but only upon request.

45. A number of delegations expressed support for the proposal, identifying a number of benefits that arise from this practice. Certain delegations noted the balance at present between confidentiality of information and exposure to the public, however, they also pointed to the need for the system to evolve. Importance was given to letting the public know how the result was reached in a dispute. It was felt that access to submissions could help maintain credibility and show the public that the system is effective. In addition, delegations revealed that access to submissions makes it easier to work with the relevant industry and stakeholders by giving access to information, and reduces the burden of addressing enquiries from the media and public. It was also noted that access to submissions could prove useful to Members that have an interest in certain disputes, but do not have the resources to participate in these disputes as third parties.

46. Proponents submit that a great deal of information in submissions is already made available to the public through the submission of executive summaries, and due to the nature of the descriptive part and findings sections of panel reports and of Appellate Body Reports.

47. Other delegations continued to express reservations with the proposal, though acknowledging the merits of transparency in the context of dispute settlement. In terms of the particular language of the proposal, some delegations took issue with the lack of flexibility, or the requirement to make all submissions publicly available. It was noted that it is not always clear what is confidential information, and that in some cases, there is information that, while technically not confidential, must be withheld. In this regard, one delegation referred to examples in from other international tribunals (on the law of the sea) where, as a general rule, submissions are made public, but a party may request the adjudicating panel to make exception from the rule.

48. Other delegations maintained their view that the dispute settlement process is between two Members, and is governmental in nature. In addition to problems with possibilities for the timing of release of information, or resource issues with translation for release, some delegations noted a difference in perspective on what is transparency and what is public information. It was noted that transparency has not been in place for some Members, and the timing was not right to shift approaches. In particular, it was noted that transparency would effectively lock governments into positions, and they are not comfortable with this. In addition, due to domestic systems, transparency is not always administratively possible.

49. In the face of these comments, proponents asked whether it would be possible or more convenient or palatable if the documents in question were made available by the WTO itself, so that that became part of WTO documents that became available.

50. It seemed that, differently from the past, delegations showed acceptance of the right of those who choose to make public their submissions, and have positive views regarding this practice. In the past, it seems some delegations had considered that Members did not have this right. The question was raised as to what would make sense as the first step – does society request access to information out of interest, or does interest by society arise from having knowledge of that which is at issue? Perhaps with more transparency, more interest would be expressed. Delegations were encouraged to continue their work on this issue.

Open hearings

51. The proposals for open panel and Appellate Body hearings are under Article 18.3.[12] This question is also reflected in a proposed amendment to the Working Procedures for panels in Appendix 3, with the deletion of paragraph 2.[13] The draft text foresees that panel meetings and Appellate Body hearings, as well as meetings of arbitrators, with the parties and with experts, would be open to the public.

52. On this issue also, some useful clarifications had been made in the course of past discussions. It was confirmed that the protection of strictly confidential information should be ensured, here too. It was also suggested that the practical modalities for opening would not necessarily involve physical presence of observers in the room. In fact, most open hearings to date have not involved physical presence of observers in the room, but rather a video link in a separate room.

53. The overview of this issue in the Chair's text[14] and discussions to date suggest that there may be a range of modalities that should be explored in more detail on this issue, not necessarily limited to systematic complete opening or entirely closed meetings. Recent practice under the current rules, where the agreement of the parties has been taken into account in deciding to open hearings in a variety of formats in specific cases, may also be informative in this respect.

54. Proponents this week referred to their own experiences in recent practice as evidence of the value and importance of open hearings, at both the panel and appellate stages, and also in arbitration proceedings. As discussed above, proponents indicated that open hearings help maintain credibility with the public, build confidence in the system and facilitate working with stakeholders, the media and public. Proponents also expressed the view that open hearings were possible and useful even in highly complex or sensitive cases.

55. One delegation expressed the view that open hearings actually encourage deeper involvement and engagement in the panel process by panelists and parties alike. Other delegations maintained their view that dispute settlement is an inter-governmental process, and that the DSU does not authorize open hearings, in particular at the appellate stage. It was also expressed that public hearings have not attracted great attention.

56. A number of delegations expressed a preference for keeping flexibility in the system for Members to decide whether to open hearings on a case-by-case basis. In this respect, it was suggested that governments should retain the ability to determine in each case whether there was an interest in opening the hearing, without prejudging their interest in a given case.

Amicus curiae briefs

57. Finally, participants considered the treatment of so-called "*amicus curiae*" briefs, in other words, unsolicited submissions to the adjudicative bodies. Two specific proposals in this respect are reflected in the July 2008 text.[15] Both of them propose to expressly disallow the submission of unsolicited briefs, at the panel and the Appellate Body stage. These proposals are under Articles 13 and 17.4 (e) respectively.

58. The proponents of transparency had suggested, building on an earlier proposal, that the submission of *amicus curiae* briefs be regulated. Proponents of such regulation were encouraged

[12] See document TN/DS/25, Article 18.3 at p. A-13.
[13] See document TN/DS/25, Appendix 3 at p. A-20.
[14] See document TN/DS/25, at pp. A-37 to A-38.
[15] See document TN/DS/25, Article 13 a p. A-9, Article 17.4(e) at p. A-10.

to present specific text if they want procedures to that effect to be agreed. In the consultations this week, it was proposed that this be discussed on the basis of the procedures adopted by the Appellate Body in *EC – Asbestos*. Other participants observed that this text was currently not before the group and sought clarification of whether the proponent intended to present it in the form of a proposal. The proponent was invited to present this text to the group if it wished it to be considered in the context of our ongoing work.

59. Several participants reiterated their support for a regulation of *amicus curiae* briefs along these lines, while others reiterated their support for the proposals that would outlaw the submission of *amicus* briefs, as being incompatible with the inter-governmental nature of WTO dispute settlement procedures. It was clear that this issue continues to be perceived differently by different participants, in that some see it as an aspect of transparency, while others see a difference in nature between transparency in the form of "passive" access to the proceedings (through open hearings or access to submissions) and "active" participation of non-WTO Members in proceedings.

60. It was suggested that a regulation of *amicus* briefs would provide predictability in their consideration by adjudicators and limit their potential adverse impact, by limiting their acceptability, length and timing. It was observed in response that the proposal to outlaw consideration by adjudicators of such briefs equally provided predictability and clear rules for their treatment. It was further suggested that greater clarity could be provided if the proposed text in this respect was placed in Article 12 rather than Article 13, and without the initial part of the sentence linking it to the Panel's right to seek information. The proponent seemed to view this proposal positively.

61. Some participants observed that they saw the need to strike a balance between the call for openness and the intergovernmental nature of the process, but were as of yet unsure where exactly this balance should be struck. The relevance of the views of the parties and of the potential relevance of the briefs was noted in this context.

62. The different groups were encouraged to continue to work together towards a bridging of their respective views, and to take advantage of the opportunity to bring greater clarity to this issue.

Stocktaking

63. In addition to discussion on the above topics, delegations took stock of progress in our work in the areas of effective compliance, post retaliation and third party participation.

64. Proponents of the various proposals under the banner of effective compliance provided new documents for the delegations to consider for upcoming discussions, including questions for which responses and input was sought.

65. Proponents of recent proposals on third party participation indicated that they had met with a number of delegations and made adjustments to their proposal. They also indicated they would submit their revised proposal as an informal document and intend to hold further meetings with delegations.

66. Finally, proponents of the two separate proposals on post-retaliation indicated they had consulted internally as well as worked with each other, and were attempting to address some of the concerns expressed by delegations. Proponents stated their intention to update delegations after addressing these issues.

2. WEEK OF 20 JUNE 2011[16]

67. This week, discussions continued on flexibility and Member control, panel composition, Strictly Confidential Information (SCI), transparency and amicus curiae submissions, and mutually agreed solutions.

[16] Previously circulated as JOB/DS/2.

Flexibility & Member control

68. This week we continued consultations on the joint proposals on flexibility and Member control. Overall, these proposals address suspension of panel and appellate proceedings, interim review at the appellate stage, partial deletion and partial adoption of reports, panelists' expertise, and finally, interpretative guidance parameters. In the meeting of the G40 this week, we continued our discussion of suspension of appellate proceedings, and opened discussions on interim review at the appellate stage. In small group consultations, we also continued discussions on partial adoption and deletion.

Suspension of appellate proceedings

69. On the suspension of appellate proceedings, participants continued to discuss both the objective and proposed modalities behind this proposal. The proponents reiterated that the primary purpose of the proposal was to allow the parties an opportunity to negotiate a settlement of the dispute.

70. Various participants recalled their main concerns about the absence of any limit to the duration of a suspension, the fact that a suspension at the appellate stage would place the status of an unadopted panel report in limbo, and the potential negative impact on the ability of the Appellate Body to plan its work around suspensions of an indefinite duration. One delegation felt that parties had sufficient time to resolve the matter during and after consultations and during the panel process, and it would not make sense to provide additional opportunity at the appellate stage. Due to differences in the nature of proceedings, it was felt that allowing for suspension at the appellate stage would undermine the effectiveness and credibility of the system.

71. Various views were expressed concerning the length of suspension that should be permitted. One participant advocated for a length that would be proportionate to the overall length of appellate proceedings. Other delegations felt that a concrete length to a suspension might not make sense because it might be unclear how long a suspension would be needed to reach a settlement, in certain cases. In addition, the Appellate Body might need flexibility to re-incorporate suspended appeals into its workload, were such appeals to resume. Proponents expressed confidence that the Appellate Body would be able to manage its workload around suspended proceedings, noting that the Appellate Body has recently shown flexibility in handling variable workloads.

72. The proposal was discussed in the context of the possibility of withdrawal in appellate proceedings. In particular, without a hard limitation on the length of a suspension, the view was expressed that parties may be dissuaded from achieving a mutually agreed solution, because it would remove the pressure to reach an agreement within the constraints of an appeal. Proponents emphasized their focus was on the possibility for settlement and recalled that mutually agreed solutions are the preferred manner in which to resolve disputes. Proponents consider that the possibility of suspending proceedings gives another opportunity to negotiate, with the possibility to eventually withdraw were they successful.

73. The question was raised as to why a panel report would be declared void and of no legal effect, in the case a suspension were agreed to and a settlement were reached. It was asked whether a report could not ultimately be adopted, regardless of a settlement, and whether that report could have relevance to WTO jurisprudence.

74. Proponents expressed that this approach is necessary to have parallelism in the appellate stage with the panel phase. That is, were a settlement reached during panel proceedings, there would not be a report. Proponents consider this language would be necessary because, in the case of a suspension on appeal, a panel report would already have been circulated. In addition, proponents noted that the particular status of an unadopted panel report is primarily the concern of the parties to a dispute, rather than to the Membership broadly.

75. I took note of the discussions and proposed that delegations continue their work to address the points raised this week.

Interim review at the appellate stage

76. We next discussed interim review at the appellate stage. This proposal is addressed in Article 17.5(a) and (b) on page 10 of the 2008 Chairman's Text. As in past meetings, proponents suggested that interim review at the appellate stage would be beneficial in a number of respects. These include helping correct typographical errors, but also addressing errors in fact or law, or to allow parties to review findings reached by the Appellate Body that had not been presented previously, such as in instances where the Appellate Body completes the analysis after reversing a panel. Proponents submit that interim review is a more favourable avenue to address these types of error, than requiring issuance of corrigendum.

77. Delegations in the G40 raised a number of concerns with this proposal. Broadly, delegations felt that the inclusion of interim review at the appellate stage could undermine the integrity of appeals and allow for undue pressures to be directed at the Appellate Body. Delegations expressed concern that interim review would give parties the opportunity to preview the outcome, which could allow a party to withdraw its appeal to avoid an unfavourable outcome. It was felt that the legitimacy of appellate reports could be brought into question, were an appeal withdrawn unseen.

78. Delegations further questioned whether the desire for interim review would be simply to have another opportunity for parties to present their case through additional argumentation. Delegations also raised the issue of a heightened possibility of appellate body reports being leaked prior to issuance. Finally, delegations took issue with effects on time savings, and certain delegations felt that the additional financial and other costs that would result from interim review as an extra step in the process, would place a higher burden on developing countries.

79. To address some of these concerns, delegations suggested a time-limit could be imposed, or a limit to the scope of review. For a number of delegations, these drawbacks far outweighed potential benefits. For some, the current practice of issuing corrigenda is sufficient.

80. Proponents noted that both factual and legal issues are reviewed by panels and discussed at the interim review stage by parties, and that interim review in this context has generally been useful. Proponents felt that the Appellate Body could modify its working procedures, avoiding the possibility of withdrawal of an appeal at an interim stage, to avoid concerns in this respect. While noting the issue with time savings, proponents stressed the value of taking the necessary steps to have a high quality report.

81. I suggested we return to this topic next time as delegations were unable to conclude discussions.

Partial deletion and partial adoption of reports

82. As I mentioned, we continued discussions on partial deletion and partial adoption of reports this week in small group consultations. Partial deletion of reports by panels is addressed in Article 12.7 on page 8 of the July Text. Partial deletion of Appellate Body reports is addressed in Article 17.13 on page 11. In addition, page 25 reproduces a draft DSB decision to address the practical aspects of notifying requests for partial adoption to the DSB. Proponents have indicated in the past that the proposals are intended to complement each other.

83. Delegations once again expressed a greater degree of support for partial adoption than for partial deletion, due to the fact that partial adoption would require agreement and be within the purview of the entire Membership.

84. Delegations enquired as to what would be the status of unadopted findings under these proposals, and what effect, if any, unadopted findings would have on implementation or possible Article 21.5 proceedings. Proponents submitted that unadopted findings would play a role much the same as when the Appellate Body reverses a finding by the panel and is subsequently unable to complete the analysis.

85. Delegations also enquired what is envisaged as subject to partial deletion or adoption under the proposal. In particular, delegations asked whether, it would be possible for parties to agree to

delete certain rationale that forms part of an overall finding while nevertheless retaining the overall finding. If not, in the alternative, then delegations asked whether it would only be possible for parties to agree to delete a finding in its entirety, including the underlying rationale. Proponents indicated their view that both scenarios would be possible under the proposal as it is currently drafted.

86. In response, delegations expressed concern that in a number of situations, it would not likely be possible to separate out a discrete rationale for deletion, without calling into question the related finding. The view was taken that allowing parties to agree to delete certain rationales that form part of an overall finding while nevertheless retaining the overall finding would amount to stepping into the shoes of the adjudicators, and would blur the line between parties and adjudicator, be it a panel or the Appellate Body. Moreover, delegations pointed out that a decision to partially adopt or delete could be politically motivated, rather than based in law.

87. Bearing these concerns in mind, a number of delegations indicated that they would be agreeable to a proposal that would allow for partial adoption or deletion, were parties or members required to agree that the entirety of a finding, including all aspects of the underlying rationale, be deleted. However, delegations appeared to oppose allowing for partial deletion or adoption of certain rationale while allowing an overall finding to be retained. In this regard, it was argued that Article 12.7 of the DSU refers to "rationale" and "findings" as a package, not as separate and distinct elements.

88. Delegations also continued to express concern that, where an asymmetric relationship exists between parties, pressure could inappropriately be brought to bear on a party to delete a finding. Delegations also expressed concern that parties might resort to bartering or horse-trading of unfavourable findings under this proposal.

89. Finally, delegations enquired whether sufficient time exists in the current working procedures to allow parties and Members to adequately consider the implications that may result were an aspect of a final report proposed for partial deletion or adoption. Proponents contended that this should not be a concern. Because consensus would be needed in either the case of partial adoption or deletion, in their view, sufficient safeguards are built in that would protect against any unwanted results.

90. I took note of the overall discussion, including both conceptual and technical aspects, and encouraged delegations to continue their work towards achieving a positive outcome.

Panel composition

91. This week delegations continued their discussion in the G40 on the European Union's updated version of its text panel composition. The proposal is in the form of a DSB decision.

92. Under the proposal, the WTO Secretariat is asked to present a single list of candidate names for panelists, based on selection criteria identified by the parties. The parties are then asked to rank the candidates in terms of preference. Parties may also exercise limited veto rights. The three names with the highest combined ratings among those that have not been vetoed by either party would be proposed as basis for the composition of the panel. The parties have the ability to agree or disagree with the resulting composition. If they cannot agree on a composition, then, as is the case under the current procedures, parties may request the Director-General to compose the panel. The Director-General would compose a panel from the same list provided by the Secretariat.

93. Delegations expressed interest in addressing the proposal at a conceptual level before examining the text. Many delegations expressed support for the idea of having the Secretariat provide all of the possible candidates' names at the outset of the process. However, delegations enquired whether it might prove difficult for the Secretariat to provide up to 20 names up front. It was noted that the balance in the initial selection by the Secretariat would be important. Further, bearing in mind the possibility for parties to reject candidates for "compelling reasons", some delegations wondered whether it would be appropriate to place a hard limit on the number of rejections.

94. The European Union indicated that its proposal is not targeted at the role of the Secretariat in identifying and screening candidates, but rather the way in which names are presented to parties. Nevertheless, the European Union felt that the Secretariat would be capable of identifying the appropriate names. The European Union clarified however that parties would not be permitted to submit their own names under the proposal, an approach it felt is in accordance with Article 8 of the DSU. The European Union felt that its proposal to allow a limited number of rejections was consistent with and effective at giving meaning to the term compelling reasons.

95. Overall, delegations were concerned that the use of ranking and selection of panelists based on a linear ranking of the combined highest preferences would not be able to take into account the relevant criteria, including expertise, experience, nationality, and other elements. One delegation expressed doubt that this process would improve on what currently exists. In their view, an iterative process provides a better way to learn about what parties are seeking, and to see what adjustments might be needed. Several delegations questioned whether this approach could ever be feasible without human intervention. In this vein, it was suggested that the Secretariat could consult with parties on criteria, after an initial ranking, and then come up with a tentative proposal. It was also suggested that the Secretariat could generate separate lists, based on different criteria, and then parties could rank candidate in each list. Only after this, could a selection be made.

96. Delegations also expressed concern with the role ascribed to the Director-General to compose the panel under the proposal. If selection through ranking was supposed to provide the most optimal solution, it was asked whether a selection by the Director-General would not necessarily be less optimal based on the fact that it would deviate from the selection based on the highest scoring candidates. The concern was that the Director-General would have to decide in some manner that was biased in favor of a given party.

97. The European Union emphasized that it would be unlikely that the Director-General would act against interest of parties, because he or she would not be limited to the results of the ranking, except for not taking into account candidates that were initially vetoed. The European Union emphasized overall that the proposal provides flexibility. First, the European Union recalled that, within paragraph 3 of its proposal, parties may agree to a selection process of their choosing, instead of the proposed ranking system. In addition, the option to seek composition from the Director-General provides yet another avenue.

98. I suggested we return to this topic next time as delegations were unable to conclude discussions.

SCI

99. On Strictly Confidential Information (SCI), you will recall that Canada previously announced their intention to revisit the text of their proposal in light of recent experience and comments received from other participants. This week, Canada reported that it had continued to have constructive discussions with other participants, in particular frequent users of SCI, and expected to present a revised text for our next meetings next month.

Transparency and *amicus curiae*

100. In the G40, we returned to a discussion of transparency and *amicus curiae* briefs. As you will recall, we had already had extensive discussions of most aspects of transparency at our last set of meetings. However we had not completed a discussion of *amicus curiae* briefs, so we focused on this issue.

101. You will recall that we have two proposals before us to clarify that panels and the Appellate Body would not be entitled to receive unsolicited *amicus curiae* briefs, and the suggestion had also been made to adopt procedures to regulate the submission of such briefs. You may also recall that I had invited the proponents of such regulation to submit specific draft legal text to that effect. Yesterday, the United States presented to the group a non-paper addressing this issue.

102. The non-paper proposes a decision by the DSB, containing procedures for the use of WTO adjudicators to handle the submission of *amicus curiae* briefs. The United States explained that

these procedures are inspired by those adopted by the Appellate Body in *EC – Asbestos,* and by earlier discussions in these negotiations. The procedures foresee a two-step process, whereby any person other than a party or third party interested in making a submission to a WTO adjudicator would have to apply for leave to file a submission, in other words seek the adjudicator's authorization to submit a brief, explaining its interest and what it seeks to bring to the proceedings. The adjudicator, after giving an opportunity to the parties to comment, would decide whether to accept or deny the request, in part or in whole. It would therefore decide whether it wished to receive a submission and what the submission may address. If leave is granted, that is, if the submission is authorized, it would have to be presented in a certain timeframe and would be subject to a maximum number of pages. The procedure would be applicable in all proceedings, subject to any modifications by the adjudicator in a given case after consultation with the parties.

103. The discussion focused primarily on the question of whether it was desirable to regulate unsolicited submissions to adjudicator in such a manner. A number of participants expressed support for such procedures, as a means of improving the management of unsolicited briefs by bringing greater discipline and predictability to their presentation and treatment. Some participants, however, considered that the submission of unsolicited briefs by non-Members is not properly part of WTO dispute settlement procedures, and expressed systemic concerns with this notion.

104. In the view of these participants, WTO disputes are between WTO Members and all interests should be channelled through the governments concerned. In this context, the submission of amicus briefs is not, in their view, and should not be part of the dispute settlement procedures. From that perspective, the elaboration of specific procedures to handle such briefs may be seen as an undue invitation or endorsement given to the filing of such unsolicited briefs. It was observed in this respect that the fact that such briefs exist in reality was not a sufficient justification for their endorsement.

105. Other participants observed that the current reality is that such briefs are submitted but also that, as *per* the Appellate Body's rulings to date under the existing DSU provisions, they may be accepted by adjudicators. Yet there is no limitation or regulation on the manner or moment at which they may be presented, and no clarity as to how they might be handled in a given case by the adjudicator.

106. From that perspective, it was observed that the introduction of procedures to regulate the manner in which such briefs may be submitted would introduce new limitations on their presentation, by imposing time- and page-limits, and a two-step process whereby the adjudicator would have an opportunity to control what briefs are submitted to it and on what subjects. It was suggested that this would assist the parties and the adjudicator, rather than those wishing to submit briefs, by providing greater predictability in the process, allowing the adjudicator to decide whether it wished to receive a brief or not, and ensuring respect for the due process rights of the parties. One participant observed that from the perspective of a developing country with limited resources, such regulation would have three benefits limiting the issues that can be raised in such briefs, limiting the length of submissions, and controlling the timing of the process.

107. Comparisons were made with domestic procedures, in which a distinction is made between those who have "standing" to appear before the Court, and other participants. Reference was also made to other international jurisdictions, where procedures have been devised to handle such submissions.

108. In light of this discussion, I observed that participants approached this issue from very different standpoints and I sought to explore whether there was any manner in which the two positions could be bridged. Some participants suggested that the proposed procedures went in the direction of bridging the two positions, by ensuring that any amicus briefs would be submitted only upon authorization by the adjudicator. In that sense, submissions that are filed pursuant to a leave granted under the proposed procedures would be "solicited", and no "unsolicited" briefs would be accepted.

109. I invited participants to consider the possible inclusion of additional language in the proposed procedures, to clarify:

(1) that only the parties and third parties have a "right" to make submissions to the adjudicators (in other words, other persons have no standing *a priori* in the proceedings, and will need to follow the procedures and receive an authorization from the adjudicator in order to possibly gain the right to file a document); and

(2) that the adjudicators would not accept any submissions from such other persons, other than those filed in accordance with the procedures (in other words, no "unsolicited", i.e. unapproved, brief may be submitted, and only briefs that have been authorized by the adjudicator through the procedures can be filed).

Mutually Agreed Solutions

110. In the small group discussions on mutually agreed solutions, convergence was found around the following language for Article 3.6 of the DSU:

> "Where the parties to a dispute reach a mutually agreed solution with respect to a matter raised under the dispute settlement provisions of the covered agreements, each party shall notify the solution to the DSB and relevant Councils and Committees. Each party shall submit the notification in writing within 14 days after reaching the solution and shall set out in detail the terms of the solution. Any Member may raise any point relating to the solution in the DSB and the relevant Councils and Committees."

111. This language is intended to improve the notification obligation already contained in this provision, by clarifying what should be notified and the timeframe for notification.

112. In the discussions leading to convergence on this language, it was clarified that the expression "each party" is intended to ensure that each party has an obligation to notify a mutually agreed solution, but that this does not preclude the parties having reached such solution from complying with this requirement through a joint notification. Indeed, it was suggested that this could be the preferable solution in practice, but the text would also not preclude separate notifications. There was also some discussion of the timing of the notification, including with respect to the question of what moment exactly might be considered as the date when the solution has been "reached", in light of the potential diversity of situations involved. It was observed in this respect that the parties themselves would be in the best position to assess when they have reached a mutually agreed solution to their dispute. The timeframe of 14 days was considered to allow the parties to prepare the notification after having reached the solution while not unduly delaying the transmission of the information to the membership once a solution has been reached.

113. Subsequently, in the G40, a number of delegations expressed hesitation with the reference to "each party", asking whether the current drafting clearly conveys the possibility to notify a mutually agreed solution jointly. Although the view was expressed that the text permitted the possibility of notifying a mutually agreed solution either individually or jointly, delegations sought to provide further clarity. Delegations initially converged on the idea of adding a footnote to specify a preference to notify such solutions jointly. Ultimately, however, delegations sought to state this preference in the main text, by adding the following sentence: "A notification made jointly by the parties to the dispute is preferred." as the penultimate sentence in the text approved by the small group. At least one delegation expressed an interest in retaining the current text in Article 3.6 of the DSU.

114. Some delegations additionally enquired as to why the proposed text did not refer expressly to "consultation" provisions in addition to "dispute settlement" provisions, as is in the case elsewhere in the DSU. It was suggested that the DSU is currently inconsistent, referring to "consultation and dispute settlement provisions", at times, but other times, only referring to "dispute settlement provisions". Delegations agreed to return to this issue at a later time, in an effort to harmonize references throughout the DSU.

115. Finally, one delegation suggested that the proposed text should not refer to "*a* matter", but instead, should refer to "*the* matter", as the term is used in other contexts. Delegations similarly agreed to return to discussion on this matter next time.

116. I encouraged delegations to hold further discussions in advance of our next meeting, in the interest of working out our differences.

Stocktaking

117. In addition to our discussion on the above topics, we took stock of progress in our work in the areas of effective compliance, post retaliation and third party participation.

118. Proponents on the various proposals under the banner of **effective compliance** presented documentation reflecting recent discussions held on the usefulness of retaliation measures to achieving compliance and rebalancing of concessions. Proponents invited additional delegations to participate in the discussion. Text was additionally submitted updating the proposal on notification of retaliatory measures. Proponents indicated that they would be ready to discuss these matters in the ensuing G40 meetings.

119. Proponents of recent proposals on **third party participation** indicated that they have met with several delegations and are in the process of revising their non-paper to submit as a job document in the near future.

120. Finally, proponents of the two separate proposals on **post-retaliation** indicated that they have continued discussions and believe that conversations are maturing.

3. WEEK OF 25 JULY 2011[17]

Strictly confidential information (SCI)

121. This week, Canada presented a revised version of its proposal on the protection of strictly confidential information (SCI)[18], following recent work with a group of interested delegations. Canada explained that the revised proposal was intended to reflect three objectives:

– ensuring that panels and the Appellate Body will adopt procedures for the protection of SCI if requested;

– ensuring the ability to tailor the procedures to the needs of the dispute in question;

– providing the information-holder comfort that information that constitutes SCI as defined in the proposal will be protected throughout the proceedings.

122. In pursuance of these objectives, the proposal envisages amendments to the text of DSU Article 18, as well as an appendix and a proposed decision by the DSB. In Article 18, a new paragraph would make it clear that, upon request of a party, a panel would be required to adopt procedures for the protection of SCI, after consulting with the parties. The level of protection afforded by these procedures would be maintained throughout the various stages of the proceedings (including the appellate stage) for the remainder of the dispute. The initial responsibility of identifying information as SCI would rest on the party seeking the protection. A challenge procedure is foreseen, to allow this designation to be verified by the adjudicator, in the event of a disagreement about the SCI designation. The proposal foresees that the procedures would apply to panel proceedings as well as arbitrations under Articles 22.6 and 25.

123. Participants expressed support for the objectives pursed by the proposal and welcomed the revised text as a step forward and a good basis for further discussion.

124. Canada clarified that the procedures would apply to all panel proceedings, including compliance panels. The question was raised as to whether arbitral proceedings for the determination of the implementation period (under Article 21.3(c)) and appellate proceedings should also be covered. It was also suggested that in both cases, it was unlikely that SCI would need to be presented. It was also clarified that the proposal did not prejudge the moment at

[17] Previously circulated as JOB/DS/3.

[18] See document TN/DS/25, Appendix A, Article 18 at pp. A-12 to A-13, and Appendix 5 at pp. A-21 to A-24.

which the presentation of information designated as SCI could take place. However, information already submitted to the panel could not be designated as SCI at a later stage in the proceedings. Rather, the information should be designated as SCI at the time of its initial submission.

125. Clarification was also sought as to the manner in which the procedures intended to address information gathered in the context of a procedure under Annex V of the SCM Agreement, in light of the fact that footnote 67 of that agreement already addresses the confidentiality of such information. Canada clarified that the intention was not to address the treatment of this information in the course of the information-gathering procedure under Annex V, but rather the subsequent treatment of this information by adjudicators.

126. It was also clarified that the consultation foreseen with the parties in the context of the adoption of the procedures relates to the detail of the procedures, rather than the principle of their adoption. In other words, the panel would not be at liberty not to adopt procedures if requested to do so by one of the parties to the dispute, but it would have the discretion to determine, in consultation with the parties, what type of procedures would provide an adequate level of protection in the circumstances of the case.

127. It was clarified that third parties would not be prevented from seeking the adoption by a panel of procedures for the protection of SCI, but that the panel would then have the discretion to adopt or not adopt such procedures, taking into account the interests at issue. It was also observed that the evidentiary burden on third parties was different from that borne by the parties to the dispute, and that in cases where SCI were relevant, the parties themselves would be likely to have sought the adoption of SCI procedures, which third parties would be able also to take advantage of if needed. More generally, Canada indicated that it would review the overall consistency of references to third parties throughout the text.

128. With respect to the duration of the protection, is was asked when the dispute should be considered to have ended, and was questioned whether it was appropriate to limit the protection to the duration of the dispute, since the need to protect the confidentiality of the information may persist beyond the end of the dispute.

129. The relationship between the provision of a "non-confidential summary of the information" contained in written submissions under Article 18.2 of the DSU and the treatment of SCI was discussed. It was observed that there was a difference between a summary of the information contained in a submission (as foreseen in Article 18.2) and a redacted version of a document containing SCI. In the first case, the intent was to summarize certain information, while in the second, the object was to remove from the document any references to confidential information. The difference between these two situations was acknowledged, but it was also questioned whether it was necessary to make such a distinction in the context of Article 18.2, since any "non-confidential summary" provided pursuant to this provision would, by definition, not contain any sort of confidential information, SCI or otherwise.

130. It was observed in this context that the provision of non-confidential summaries under Article 18.2 is useful, in practice, in order to allow the party having submitted any confidential information to formulate in a manner acceptable to it a summary that can be made available publicly, thus avoiding the risk of mishandling of such confidential information. Potential linkages were acknowledged between this part of the proposed text and aspects of the proposals on transparency. It was also acknowledged that the proposal did not intend to prejudge such aspects.

131. A number of additional questions were raised, which we did not have the time to address and will need to return to at our next meetings. These relate to the operation of the challenge procedure, the manner in which continuity in the level of protection would be ensured throughout the duration of the proceedings, the need to distinguish between the holder of the information and the party seeking protection for it (which may not always be the same), drafting consistency and the distribution of text addressing protection of SCI between Article 18 and the Appendix.

Panel composition[19]

132. We continued the paragraph-by-paragraph discussion in the G40 where we left off in May, taking into account the more conceptual issues addressed in June.

133. We focused on the bracketed language in paragraphs 3 and 4 of the revised proposal informally circulated by the European Union in May. In relation to paragraph 3, there was a discussions of the use of the words "ability" or "right". In paragraph 4, some participants suggested deleting the bracketed language addressing the updating of CVs of candidate panelists, and the bracketed language dealing with how the Secretariat identifies or gets to know candidates before proposing them to the parties. The European Union expressed flexibility with respect to the exact terms to be used in these paragraphs.

134. The discussion on the draft language of paragraphs 3 and 4 also raised some conceptual issues. The European Union confirmed that one of the objectives of its proposal was to reduce vetoes by parties, and to reduce the use of objections to situations where the reasons for objection were truly compelling.

135. Some delegations advocated for the possibility of the parties proposing names. In response, the European Union explained that the proposal is not supposed to amend Article 8.6 of the DSU, which provides that the names should be proposed by the Secretariat. At the same time, the European Union considered that in its list of proposed nominations under the proposal, the Secretariat could probably fully take into account any preference for specific persons expressed by the parties.

136. As regards selection criteria, there were questions about how the Secretariat would handle conflicting criteria. Further, one delegation expressed the concern that the parenthesised language in paragraph 4 of the proposal ("(such as qualifications or experience)") might open the door for parties expressing inappropriate selection criteria unrelated to the dispute at issue. The European Union responded that the proposal uses the word "wish" for parties' expressing selection criteria. Therefore, while the Secretariat would need to do its best to take all selection criteria into account, it would not have an obligation to act upon criteria that turned out to be infeasible. We also discussed whether each individual on the Secretariat's proposed list of panelists should fulfil all of the selection criteria indicated by the parties, or whether individual candidates could fulfil only some of these criteria, with the totality of names on the Secretariat's proposed list fulfilling all of the criteria.

137. The European Union also explained that parties could agree to derogate from the proposed procedures, in whole or in part, to the extent that this does not conflict with relevant DSU provisions. Furthermore, the Secretariat would not need to indicate in its list which candidate panelist fulfilled which of the selection criteria. Nor would the Secretariat need to check the availability of candidates when drawing up its list of names, but only at a later stage. The European Union also explained that it saw no need to address in the proposal whether the parties would continue sharing their selection criteria with each other.

138. Finally, in response to questions, the Secretariat explained that as of June 2011, 94 out of 157 panels have been composed – in whole or in part – by the Director-General. The Secretariat also explained that it was difficult to say how easy or difficult it would be for the Secretariat to provide 12 to 20 names in a given case, as this would depend on how long and unusual the list of required characteristics might be. Also, when many parties (and third parties) are involved, less potential panelists would be available.

139. I encouraged delegations to work together in the same constructive spirit until our next week of meetings.

[19] See document TN/DS/25, Appendix A at pp. A-25 to A-26.

Flexibility and Member-control[20]

Interim review at the appellate stage

140. In the G40, we returned to a discussion of the proposal to introduce interim review at the appellate stage. In light of the views expressed last month, I invited participants to focus on the potential benefits vs. the potential costs of the proposed procedures, so that we can have a clear basis to weigh the various aspects against each other.

141. So, first, I sought confirmation of what the potential benefits of an interim review process at the appellate stage might be. Based on previous discussions, I identified the following: (i) provide an opportunity to rectify any factual errors in the report, (ii) provide an opportunity to comment on, and possibly obtain rectification of, legal determinations that would be problematic, and (iii) as a result, improve the quality of the final report and hence the outcome of the dispute and its value in clarifying certain legal issues. The proponents further identified potential benefits in terms of clarifying the basis for adverse findings and hence promoting a better understanding of implementation requirements, and ensuring sufficient transparency in the report as to the appellate process (for example with respect to the timeline for completion of the appellate process).

142. There was some discussion of the differences and similarities between panel and Appellate Body processes that could affect the relative usefulness of interim review at both stages. It was observed that, to the extent that the focus was intended to be on the correction of factual errors, this was less relevant at the appellate stage, given the limited scope of appellate review of factual matters. It was also observed that in practice, interim review at the panel stage tended to be limited to factual issues. In response, it was observed that issues relating to factual determinations could also arise at the appellate stage, including in situations where the Appellate Body would complete the analysis of issues not addressed by the panel. In such situations, factual as well as legal determinations might be made. It was also observed that the opportunity to correct errors was arguably more important at the appellate stage, given the absence of any further opportunity to review the legal or factual determinations prior to adoption of the reports.

143. As far as potential costs are concerned, some participants reiterated their concerns with respect to the integrity of the reports and the independence of the Appellate Body. Concerns in this respect related to pressure being exercised on the Appellate Body by parties questioning the validity of its reasoning, as well as risks of the interim versions of reports being leaked. In response, it was suggested that similar observations might be made in relation to panel proceedings, and yet their integrity and independence was not in question.

144. Questions were also raised about the timeframe implications of the proposal. It was clarified that the proposal envisaged an additional 30 days in the duration of appellate proceedings for the completion of an interim review. It was observed that, in proportion to the total length of the proceedings, this appeared quite significant, and the potential benefits should also be weighed against this cost.

145. In considering how potential negative impacts of the procedure might be addressed, it was suggested that providing for additional interaction between the parties and the Appellate Body at earlier stages of the proceeding, for example through a second substantive meeting with the parties, may resolve some of the concerns relating to the novelty of certain determinations at the appellate stage, while avoiding the perceived downsides of an interim review.

146. Some participants suggested that there may be a greater level of comfort with a review limited to factual issues. It was also observed that the current practice of issuing corrigenda to rectify factual errors left uncertain the legal status of such corrigenda when these are issued after the adoption of the report. They thus did not provide an optimal solution. However, it was also suggested that a review limited to factual issues may not justify the additional time required.

[20] See document TN/DS/25, Article 12.7 at p. A-8, Article 12.12 at pp. A-8 to A-9, Article 16.4 at p. A-9, Article 17.5(b) at p. A-10, Article 17.5(c) at p A-10; Article 17.13 at p. A-11, pp. A-25, A-27 to A-32.

Guidance to adjudicative bodies

147. In the small group, we started a discussion of the proposal for guidance to be provided to WTO adjudicators. As indicated previously, the purpose of this proposal is to clarify, through DSB decisions, the manner in which WTO adjudicators should address three issues, i.e. the use of public international law, the notion of measures under review, and interpretative approaches.

148. The United States reported that it had had useful consultations with other Members on this issue, which had confirmed that the issues continue to be live and that it would be useful for Members to discuss how to move the system forward on them. It also indicated that it was flexible with respect to format and particular content of the proposed guidance.

149. In light of the questions raised in past discussions, I first sought the general views of participants on the provision of guidance to adjudicators. Some observed that they had doubts of a general nature as to the appropriateness of the legislative body providing guidance to adjudicators and wondered if this might shift the focus of the discussion before the adjudicatory body but not actually resolve the issues. There were also questions with respect to the substance of some of the actual guidance proposed. However, participants remained open to a discussion of these issues, also to better understand the underlying concerns being addressed.

150. One delegation observed that it may be useful for the Membership to provide guidance on some of these issues, but that discussion might be facilitated if such guidance were expressed in a more principled and concise manner, based on the identification of the key principles intended to be conveyed though the guidance. Without prejudice to their views concerning the specific guidance reflected in the various areas of the proposal, other participants agreed that this could provide a helpful way to approach the discussion.

151. With these general considerations in mind, we turned to a discussion of the draft parameters on "measures under review".

"Measures under review"

152. We considered the paragraphs under the heading "Order of analysis". It was observed that this section in fact covered various issues not necessarily related to the "order of analysis", including advisory opinions (or *obiter dicta*), the completion of analysis and expired measures. The United States agreed that the headings under this section could be clarified.

153. With respect to the initial paragraphs of this section, the United States explained that their purpose was to clarify, with reference to the role of adjudicators as defined in the DSU, that it would not be appropriate for them to offer advisory opinions beyond the determinations that are necessary to the resolution of the dispute. Such opinions were unhelpful both for the resolution of the dispute and for the system as a whole. In this respect, the objective of ensuring that adjudicators exercised adequate judicial restraint served to protect the distinction between the roles of the adjudicative and legislative functions of the organization.

154. It was suggested that, in the perspective of drawing out the principles at issue, it may be helpful to clarify this issue with reference primarily to the relevant provisions of the DSU defining the role of adjudicators, rather than through detailed explanatory text or examples. There was some discussion of the provisions of the DSU that may be considered relevant, including, in addition to Article 3.4, Articles 3.2, 11 and 7. There was some discussion of the exact role of adjudicators in light of the definition of their terms of reference as well as their role in assisting the DSB in discharging its functions.

155. It was also suggested that the reference to "advisory opinions" may be misleading, to the extent that what appeared to be at issue was rather the question of *obiter dicta* statements by panels and the Appellate Body, i.e. statements that were not part of the *ratio decidendi* for the decision. Some participants observed that they did not consider the existence of some *obiter dicta* statements as necessarily detrimental, since they could be distinguished from the *ratio decidendi*, and would not have the same legal value. It was also observed however that, despite their absence of legally binding or precedential authority, such statements are in practice referred to by litigants as expressions of the state of the law.

156. Different types of situations were discussed with a view to clarifying the nature and extent of the concern being addressed. The proponent identified situations in which a ruling would be made in relation to a claim not presented to the panel, or views would be offered with respect to a hypothetical measure not before the panel. A difference was acknowledged between legitimate statements of the adjudicator made as part of its reasoning, including as part of the interpretative process, and statements addressing issues not before the adjudicator.

157. In this respect, other participants agreed that rulings on claims or measures not presented to the adjudicator would fall outside the terms of reference of a panel, but it was questioned whether statements relating to hypothetical scenarios would always be inappropriate if they served to clarify the reasoning of the adjudicator with respect to an issue properly before it. A distinction was also suggested between a situation in which a panel would rule on a claim not presented to it, and a situation in which it would choose to continue its analysis of a claim properly submitted to it beyond an initial determination that one of the conditions for demonstrating the claim had not been met. It was suggested that in the latter scenario, it may be appropriate for the adjudicator to pursue the analysis in the interest of arriving at a proper resolution of the matter before it. It was also suggested, however, that it was important for the adjudicator to exercise a degree of restraint in determining the findings to be made in order to avoid going beyond what is necessary and unduly delaying the resolution of the dispute.

158. We also considered the part of the proposal relating to expired measures and the date of existence of a measure. The United States explained that the purpose of this part of the guidance was to clarify the date as of which the existence of the measure at issue should be assessed by adjudicators. Potentially, a range of dates might be referred to (such as the date of the request for consultations, the date of the panel request, or the date of the panel rulings). In order to provide clarity and avoid creating a moving target, the proposal is for the date of the consultation request to be used as basis for the assessment. The proponent also clarified that situations in which the action or behaviour at issue existed as of the date of the request for consultations and continued beyond that date would be covered.

159. It was asked how the proposal intended to treat situations in which a measure may still be producing effects, while no longer giving rise to action by the Member, for example in the case of subsidies. The United States acknowledged the potential complexity of some situations in terms of identifying exactly the date of expiry of certain measures, but suggested that this proposal did not seek to resolve such questions but rather sought to clarify as of when the existence of the measure should be assessed. It was suggested that the drafting did not make clear that this was the primary object of the text, as it seemed to address when a measure should be considered to have expired.

160. It was also asked whether and how the proposed guidance would apply to compliance panels, considering that a request for consultations may not be required and that the (in)existence of a measure might be the very object of the disagreement.

Transparency and *amicus curiae* briefs[21]

161. We continued our discussion of *amicus curiae* briefs, focusing on the detail of the procedure proposed under the non-paper circulated by the United States in June.[22] The proposal envisages that the adjudicator would set out a deadline for filing an application to submit an amicus brief, taking into consideration *inter alia* the need not to cause disruption in the proceedings. This deadline would be posted on the WTO website, and applicants interested in filing an amicus brief would have to provide information about themselves, including their sources of financing, and the nature of the contribution that they envisaged making to the case. The adjudicator would then decide whether to accept or reject any such requests, the parties having had an opportunity to comment.

162. Clarification was sought as to what role the information provided by the applicant would play in the adjudicator's decision to accept or not accept the filing of a brief. The United States clarified that the procedures addressed the process for the management of *amicus* briefs, rather than the basis on which adjudicators would decide, in a given case, to accept or reject a brief. It could be

[21] See document TN/DS/25, Article 13 at p. A-9, Article 17.4(e) at p. A-10.
[22] See Job/DS/2, at p. 5.

expected that the adjudicator would base its determination on its perception of the usefulness of the proposed brief.

163. Clarifications were also sought in relation to the manner in which the relevance of the contribution that could be made to the process by the brief could be assessed, in light of the fact that the arguments of the parties would not have been fully exchanged and would be confidential. In response it was suggested that the adjudicator would have access to the submissions already exchanged and could assess the relevance on that basis.

164. A distinction was suggested between the proposed posting on the website of a deadline for applications to be filed, and the notion of regulation of amicus briefs *per se*. In particular, it was suggested that the publicity given to the deadline appeared to present an open invitation for briefs to be submitted, thus providing an active endorsement of this practice, rather than only a regulation of it. In this respect, several participants reiterated their concern with the notion of "regulating" such briefs in a systematic manner. It was suggested that consideration be given to developing procedures that could be adopted on a case-by-case basis in the event of an agreement of the parties, rather than a generally applicable procedure.

165. I encouraged interested delegations to continue to work together and to seek ways of bridging their differences.

Mutually agreed solutions[23]

166. It will be recalled that last month, convergence was emerging around language for Article 3.6 of the DSU, to improve the terms of the obligation to notify mutually agreed solutions. This week, we focused on resolving the last remaining substantive issue left open in the discussion of last month. This concerned whether the notification could be made by the parties individually as well as jointly, and whether a preference should be expressed for joint notification. Convergence was found around the following language:

> "The parties shall submit jointly or, if a party so prefers, separately, the notification in writing within 14 days after reaching the solution and shall set out in detail the terms of the solution. Any Member may raise any point relating to the solution in the DSB and the relevant Councils and Committees."

167. This language would be for the second sentence of Article 3.6, the rest of the text remaining as discussed in June. However, one delegation indicated that it had concerns with a part of the text on which convergence had previously been achieved, i.e. the reference to notifying "in detail" the terms of the solution. That delegation expressed concern at the level of detail being required to be notified. The proponents observed that this language did not prescribe any particular level of detail and left it for the Members concerned to determine what level of detail would be sufficient to meet the requirement of the provision. I recalled in this respect that convergence had emerged around this formulation after extensive discussion, and that this formulation reflected efforts by the proponents and other participants to come to a common understanding and strike the right balance between the need for an effective notification and the ability of the Members concerned to determine the exact contents of the notification. I invited the delegation having raised this concern to review this matter further, taking into account also the convergence found around the rest of the text on this issue.

168. With respect to the other two issues raised in June concerning the first sentence, that is, the reference to "consultations" in addition to "dispute settlement" provisions and the proposed reference to "*the* matter", rather than "*a* matter", it was agreed that these would be considered in the context of overall harmonization rather than as a substantive issue in this discussion. One delegation observed that the latter may also have substantive implications.

[23] See document TN/DS/25, Article 3 at p. A-5.

4. WEEK OF 26 SEPTEMBER 2011[24]

169. This week, we returned to discussion of remand. We also continued our discussions on flexibility and Member control, strictly confidential information, mutually agreed solutions and some aspects of effective compliance.

Remand

170. Remand is addressed at Article 17.12, subparagraphs (a) to (d), and Article 17*bis* in the draft legal text.[25] We returned to this issue this week for the first time since the end of 2009.

171. In starting the consultations this week, I noted that from our earlier discussions, it appeared that there was significant interest in introducing a remand mechanism. At the same time, it seemed clear from these earlier discussions that this was considered a technically complex proposal, and that careful drafting would be required to ensure that the mechanism works smoothly and does not unduly hinder the progress of the dispute resolution process on other issues. My sense from earlier discussion was that for some delegations, an endorsement of the introduction of remand still depended on finding the right mechanism and the right *expression* of this mechanism, to ensure that the expected benefits are secured and that potential adverse impacts are successfully addressed.

172. I also recalled that our most recent work had focused on a number of issues that the proponents had identified as the key areas requiring future work. These were grouped around two categories:

- A first group of issues was considered to be essentially "technical", in the sense that there was broad convergence as to the substance but some discussion was still needed on the proper formulation. Three issues were identified in this category:

  a. the definition of issues for remand, or scope of the referral - there was convergence on the intention here, which is that remand should be available in situations in which the Appellate Body has found itself unable to "complete the analysis" of a claim because it does not have at its disposal the sufficient factual elements to do so.

  b. the question of new evidence, that is, what evidence the remand panel would be able to consider, in the remand process. There was agreement, in this context, that the intention was not to allow a reopening of the whole evidentiary process but simply to complete an analysis that had not been carried out earlier. In that context, any new evidence would be that sought by the remand panel for the purposes of carrying out that analysis.

  c. finally, the question of logistics was identified also as a primarily technical issue.

- In a second category, two "conceptual" issues had been identified, which required further discussion to develop convergence on the substance.

  a. the first was the question of who initiates remand. Past discussions suggested that there was agreement on the general notion that it should be possible for the party that has a legitimate interest in having the remanded issue resolved to seek remand, but the uncertainty revolved around the question of how this should work in the scenario where the unresolved issue was a defense raised by the respondent. In that case, it remained unclear what the implications were in terms of who would have an interest in the remand, depending on the manner in which the Appellate Body formulates its findings and recommendations.

  b. the second unresolved "conceptual" issue was what should happen to those findings that have been completed and that are not directly affected by the remand. In that context, there was an interest in seeing such rulings moving forward to adoption and

[24] Previously circulated as JOB/DS/4.
[25] See TN/DS/25, pp. A-10 to A-12.

implementation without delay, but there was also concern as to whether it was always possible to clearly dissociate the completed and uncompleted findings, for the purposes of implementation.

173. Participants agreed with this initial description of the issues for consideration. The proponents submitted that the introduction of remand in the DSU would represent a fundamental improvement to make the system fairer and enhance its efficiency. They considered that the July 2008 text, which largely reflects the text put forward by the proponents, still provided a very good basis for discussion, and expressed hope that it would be possible to address the outstanding issues. Some participants identified further questions for consideration, including the possible implications of remand on the operation of Articles 19, 21 and 22 of the DSU, as well as the manner in which remand would function in the context of an appeal based on Article 11 of the DSU.

174. We then considered the two "conceptual" issues.

175. With respect to who should initiate remand, I noted that, based on past discussions, it is understood that the remand referral, if it is to take place, would be initiated by parties, rather than the Appellate Body itself. The remaining question to be resolved was then which of the parties should have the initiative. It was clear that where the issue that remains incomplete is a *claim*, the complainant would have an interest in initiating remand. There was more difficulty was in identifying which party should be able to initiate remand, where the outstanding issue was a *defense*. This is why two options are reflected in the text, i.e. either the complainant always initiates remand, or the party that submitted the claim or defense at issue.

176. My perception from earlier discussions was that the different views on this issue in part reflected different assumptions being made as to what the Appellate Body would do, if it found an initial violation (for example, a violation of Article XI of GATT 1994), but was unable to complete the analysis on a defense that would potentially justify the initial violation (for example an Article XX defense). Different scenarios might be identified:

- possibility 1: if it is assumed that the Appellate Body would make a finding of inconsistency with Article XI but would not make a recommendation to bring the measures into conformity with the Agreement because the analysis of the defense is still pending (and therefore, overall consistency or inconsistency with the Agreement remains unclear), then the complainant would have an interest in pursuing remand, if completion of the Article XX analysis is the only way to obtain a recommendation on the claim;

- possibility 2: if it is assumed that the Appellate Body would make a recommendation to bring the measures into conformity with the GATT 1994 on the basis of the finding of violation of Article XI, despite the fact that the defense remains unaddressed, then the respondent would have an interest in remand, if that is the only way to ensure a full consideration of its defense and possibly reverse the recommendation.

- Possibility 3: if it is unclear what the Appellate Body would do, then potentially either party might have an interest in remand, depending on which scenario materializes.

177. In the consultations this week, the proponents reiterated that they favoured allowing either party to initiate remand, to allow situations involving unresolved defenses to be addressed by having the defendant initiate the remand. Support was expressed for this view, on the basis that if remand was introduced, the party advancing the claim or defense should have the ability to initiate it, because it has a legitimate interest in doing so and is also in the best position to decide whether to expend the resources. This would preserve the allocation of the respective burdens on the parties, for efficiency and fairness' sake.

178. Some participants reiterated their view that, as a starting point, the complainant should be initiator.

179. At the same time, it was recognized that this may depend on the premise upon which the discussion is based, as to how the Appellate Body would approach the relationship between claims and defenses. In this respect, some discussion arose as to the likelihood of the first or second

scenario identified by the Chairman arising. Some delegations considered that the second scenario was most likely, i.e. that the Appellate Body would make a recommendation for the Member concerned to bring its measures into conformity, given the existence of a violation finding, while others expressed doubt as to whether the adjudicator would, in such a situation, consider that there was a sufficient basis for such a recommendation, given the relationship between the various provisions within the Agreement at issue (GATT 1994).

180. Beyond these specific scenarios, several participants explained that their general underlying concern was that there should be no possibility of a party (specifically, a defendant) abusing the system by seeking remand simply to delay the procedure, in a situation where the complainant itself did not see merit in pursuing the remand. It was further suggested that there appeared to be no strong reason to deny the respondent the possibility of imitating remand, but that it may be necessary to consider whether access can be limited so as to prevent undue delays.

181. In response, it was suggested that if the concern related to potential abusive recourse to remand, it may be most useful to focus on identifying and addressing the specific situations in which this could arise. One participant suggested that there could be ways to reduce the possibility of misuse, for example by defining the situations in which the defendant would be considered to have a legitimate interest in pursuing remand, as suggested in an earlier proposal. It was also suggested that, in order to address such concerns, the focus should be on ensuring that the situations in which the Appellate Body identifies a need for remand are carefully identified rather than on the question of which party should initiate it. In this respect, it was observed that the possibility of invoking remand, and thus the potential for a party abusing it, was in fact very circumscribed, since it would always be a prerequisite to any recourse to remand by a party, that the Appellate Body would have previously identified a situation in which it was unable to complete the analysis.

182. It was also asked whether defining access to remand for the defendant with reference to the "defenses" that it has invoked implied that an argument in defense had to be expressly identified as an affirmative defense in order to form the basis of a request for remand by the defendant, and whether this was something that the Appellate Body would have to address expressly.

183. In the course of the discussion, it was observed that the need for remand could arise in a variety of situations, including where the panel has exercised judicial economy on certain claims, but also in situations where the Appellate Body's legal interpretations bring into play aspects that have not been discussed or addressed before the panel. References were made to the *Canada – Dairy* and *US – Hot-Rolled Steel* cases as examples of instances in which the Appellate Body has been unable to complete the analysis.

184. In conclusion, I observed that a number of participants appeared to support the possibility for both parties having the right to initiate remand in specific circumstances. I also noted that all participants appeared to be committed to avoiding abuses in exercising the right to remand. Against this background, I encouraged participants to continue to discuss this question to find language that would address the concerns expressed.

185. We then turned to the second conceptual issue, the <u>adoption of completed findings</u> (i.e. those findings that do not require remand). The Chairman's text envisages that there would be adoption of the Appellate Body report. Past discussions had suggested that there was support for adopting and implementing without delay completed findings and recommendations, but that this could in practice become complicated, where there are in fact connections between the different findings, and where a partial implementation may be difficult in practice to carry out, because they concern the same measure.

186. In our discussions this week, the proponents indicated that, as reflected in the Chairman's text, it was not their intention to delay the adoption of the Appellate Body report. This approach would directly contribute to discouraging the types of dilatory tactics discussed previously.

187. Several participants indicated that they remained concerned at the implications of an immediate adoption of the report and the associated consequences. These concerns included procedural questions on the relationship between the initial dispute and rulings and the remanded issues and the potential complexities of a double-adoption procedure, such as whether there would

be two separate RPTs, two separate subsequent compliance or retaliation arbitration procedures, and whether multiple remand was possible and what this implied. The concerns expressed also related to the implications for the Member concerned in terms of implementation, including the possible need to go twice to legislative bodies to seek approval of successive implementation measures for the same dispute and more generally the risk of added inefficiencies and burdens as a result of the "double-adoption" procedure.

188. It was also asked what the implications of the "double-adoption" procedures would be in the event that the Appellate Body made a recommendation in relation to a violation in respect of which a defense is still pending (second scenario identified earlier) and whether the Member concerned would be required to implement such recommendation despite the parallel existence of a remand procedure that may ultimately invalidate it.

189. Some participants considered the concerns that were raised to be speculative and suggested that the overall benefits would outweigh potential uncertainties and complications. It was observed in response that experience to date suggested the existence of linkages between different issues in a dispute, and that while it may be possible to successfully address the concerns relating to "double-adoption", they should not be underestimated and the systemic procedural implications needed to be addressed.

190. It was observed that the proposed text seeks to address this issue in Article 17.12(c), by referring to the Appellate Body making "appropriate findings" and "securing prompt and effective resolution" of the dispute. Hence, the Appellate Body might not make a recommendation for implementation, in a situation where the issue requiring remand is critical to the resolution of the dispute. The question then arising may be whether this should be for the Appellate Body or for Members to determine.

191. In conclusion, proponents acknowledged the concerns that were raised, including the linkages to some of the questions discussed earlier. They were encouraged by the willingness of participants to work towards their resolution, in light of the important benefits that the introduction of remand would bring to the resolution of disputes.

192. I took note of the views expressed, including the reiteration of proponents' support for double-adoption as an important element of avoiding abuse or delay, while recognizing that number of aspects have been identified that need further discussion. I took note also of the readiness expressed to continue discussion and examine possible solutions. I encouraged participants to continue to work on this and report at the next set of meetings on this and any other further work to be conducted in the meantime on remand.

193. In the G40, I reported on this discussion and invited interested delegations to approach the proponents if they had an interest in contributing to this work. We will return to remand in our next meetings, and I hope that delegations will be able to report progress on these two issues by then.

Effective compliance

194. I met with a group of delegations to discuss the state of progress of the various proposals relating to effective compliance. Proposals under this heading include:

- the proposal on retaliation by a group of Members on behalf of a prevailing developing country complainant;[26]

- the proposal on facilitated cross-retaliation for developing countries;[27]

- proposals on the calculation of the level of nullification or impairment for developing country complainants;[28]

[26] See TN/DS/25, p. A-16 (Article 22.6, subparagraphs (b) and (c)).
[27] See TN/DS/25, p. A-15 (Article 22.3*bis)*.
[28] See TN/DS/25, pp. A-16 and B-11 (para. 69).

- a proposal to introduce a reference period for calculating the level of nullification or impairment;[29]

- the proposed notification of measures taken pursuant to an authorization to suspend concessions or other obligations;[30]

- the negotiation of compensation, including the relationship between compensation and retaliation;[31] and

- a proposal on disputes that have been under DSB surveillance for more than 5 years after the expiration date of the last reasonable period granted.[32]

195. I noted that in January, we had discussed group retaliation, cross retaliation, and the calculation of the level of nullification or impairment for developing country complainants. While a degree of sympathy was expressed for the rationale underlying these proposals, and some useful suggestions were made, delegations were not able to agree on precise elements of a solution.[33]

196. In March and April of this year, proponents of these issues indicated that they planned to continue to work together to develop common views that could be reflected in a joint textual contribution, with the possibility of releasing modalities papers in the future.[34]

197. In April, Korea introduced a proposal on instances where a Member might achieve full compliance prior to the authorization of the suspension of concessions or the actual suspension of concessions. Under Korea's proposal to amend Article 22.7, nullification or impairment would be counted for the purposes of the level of retaliation from the end of the RPT onwards. If compliance were achieved and accepted by the complaining party prior to the suspension of concessions, then concessions would not be suspended. The proposal sought to maintain the importance of the reasonable period of time for implementation, as a time for Members to have a chance to implement the DSB's recommendations and rulings.[35]

198. In May, proponents expressed interest in holding a conceptual discussion to understand the position of specific Members on compliance issues. In this context, proponents submitted a questionnaire and indicated their intention to discuss the issues with other delegations.[36] In addition, Mexico submitted a new proposed text on notification of measures taken pursuant to an authorization to suspend concessions or other obligations.[37] In this version, Mexico sought to clarify the notion of the designation of the type of measure that would be subject to a notification requirement.

199. In June, proponents indicated that they had held a number of discussions with delegations to assess whether retaliation has proven useful to the system. Proponents indicated that they did not find many cases where retaliation was partially helping compliance or rebalancing concessions. Also at this time, Mexico submitted a revised proposed text on notification of measures, that had been discussed in May, for further discussions.

200. In light of these earlier discussions, this week I asked where proponents are in terms of their work together and how they would like to proceed on discussions.

201. Proponents indicated that they have been working together, holding consultations with other delegations, and trying to understand specific concerns with the proposals. Delegations also indicated plans to expand discussions to more delegations among the G40.

---

[29] See TN/DS/25, p. B-12 (paras. 70 and 73) and p. B-17 (para. 102).
[30] See TN/DS/25, p. A-19, B-12 (para. 74), B-17 (para. 102), B-23 (paras. 138 and 139) and p. 6 of this document below.
[31] See TN/DS/25, pp. A-14 and A-15 (Article 22, paragraphs 1 to 2*bis)*.
[32] This proposal was submitted as a non-paper.
[33] See TN/DS/25, p. B-11 (paras. 65 to 69).
[34] See TN/DS/25, pp. B-17 (para. 101) and B-22 (para. 132).
[35] See TN/DS/25, p. B-22 (paras. 133 to 136).
[36] See JOB/DS/1, p. 10 and JOB/DS/2, p. 8.
[37] See JOB/DS/2, p. 8.

202. We next turned to discuss Mexico's proposal on notification to the DSB of measures taken pursuant to an authorization to suspend concession or other obligations. Participants expressed support for the most recent text presented in May, suggesting only limited modifications to it. In addition, delegations took note that it may be necessary to make minor modifications depending on changes made elsewhere to the text of the DSU. One delegation indicated that it would need to evaluate whether the proposal is compatible with its domestic legal system, but would respond in the coming weeks.

203. We returned to this text in the G40 later in the week. In that meeting, convergence was found around the following text, to be inserted at Article 22.7 of the DSU, *in fine*:

> "The authorized Member shall notify the DSB of any measure taken pursuant to the authorization granted by the DSB and any amendment or termination of the measure. The Member shall submit the notification, including any relevant information, in writing no later than 28 days after the date on which the measure, its amendment or termination takes effect."

204. In the small group, I also invited delegations to discuss the questionnaire circulated by proponents to delegations in May. This questionnaire sought to determine the positions of participants in respect of key elements concerning the effectiveness of suspension of concessions, compensation, and mutually agreed solutions in inducing compliance.

205. A number of participants in attendance indicated that compliance issues were important for them. However, while expressing sympathy for developing country concerns, these participants continued to express reservations with the current proposals, including on a conceptual level.

206. While compliance has not always been effective, it was noted that Members may be willing to comply for other reasons, including notably, belief in the rule of law. In cases where compliance is not achieved it may be for external reasons rather than a particular fault with the current system.

207. A number of delegations felt a more fruitful discussion could be held if proposals were viewed more horizontally, and were not limited to exclusively benefit developing countries. It was noted that small economy developed country Members consider that they face similar asymmetries, and may also wish to benefit from concepts embodied in these proposals. Were proposals to be generalized rather than presented as special and differential treatment, delegations felt they would nevertheless provide great benefit to developing country Members, and likely be used predominantly by those Members. Some delegations felt the current system worked satisfactorily.

208. I took note of the divergent views and encouraged delegations to look for the best way forward. In particular, I raised the question of whether special and differential treatment must be a prerequisite for every solution related to compliance. I also encouraged delegations to enter into technical discussions so that they might find the basis for an agreement.

Flexibility and Member control

209. I held consultations on these issues both in a small group setting and among the G40, to continue previous discussions.

Partial deletion and partial adoption of panel reports

210. In the G40, delegations turned their attention to the proposals on partial deletion and partial adoption of panel reports, which had been discussed previously in a small group. Partial deletion of reports by panels is addressed in Article 12.7 of the July 2008 text, and partial deletion of Appellate Body reports is addressed in Article 17.13. Partial adoption is addressed at Articles 16.4 and 17.14. A draft DSB decision would address the practical aspects of requests for partial adoption.[38]

[38] See TN/DS/25, pp. A-8, A-9, A-11 and A-25.

211. In previous small group discussions, as reported in my earlier summary[39], delegations appeared to express a greater degree of comfort with the notion of partial adoption of reports than partial deletion of reports, due to the fact that partial adoption would not affect the contents of the reports themselves and would be undertaken by the entire Membership.

212. In the G40, participants echoed a similar level of concern with partial deletion, in particular with the fact that parties alone could decide to delete aspects of a panel or Appellate Body report. Proponents submitted that this would be necessary as a panel report is not yet circulated at the time when partial deletion would occur. Participants in turn asked why partial deletion must occur at an interim stage and not after circulation. Delegations felt that deletion in absence of broader approval in the DSB would threaten the integrity and the security and predictability of the system.

213. Participants also sought clarifications on the legal value to be attributed to findings that would not be adopted and to findings that would have been deleted following agreement by the parties to a dispute, and whether the legal value attributable in each instance would be different. In the view of various delegations, it is unclear whether a deleted portion or non-adopted portion of report could provide guidance for future cases.

214. Overall, participants identified a number of what they described as systemic concerns with the proposals. Some participants feared that the coherence of reports would be disrupted through partial deletion or non-adoption. Some worried about the systemic implications of partially deleting or not adopting portions of reports on the discretion of panels or the Appellate Body.

215. Delegations also felt that allowing for either partial adoption or partial deletion could shift the bargaining equation in favour of larger participants. Concern was also expressed that third party participation could be unduly affected through the ability to discard portions of the report containing their input. Proponents noted that mechanisms already in place under the current system, such as the ability to settle a dispute before a report is adopted, or the ability to reach a mutually agreed solution, effectively create the same circumstances as would partial deletion or adoption. It was also asked whether smaller Members may actually gain additional leverage from having the possibility for partial deletion or adoption.

216. In response to concerns with the discretion and function of panels and the Appellate Body, proponents asked what the goal of the dispute settlement system is - to resolve the dispute for Members concerned in the dispute at hand, or to provide guidance for other Members in other disputes. Proponents submitted that the Membership broadly may benefit from the opportunity to limit the aspects of a report up for adoption, on a systemic level. Other delegations felt, however, felt that the power to limit adoption, in particular through partial deletion as agreed to by the parties, could cut the other way, removing findings that the larger Membership would find beneficial or consider valuable to the system. In essence, these participants expressed discomfort with the notion of parties deciding what is necessary the resolution of a dispute and important for the system. It was noted that both parties, while having divergent views on a particular interpretation of a provision, may nevertheless disagree with the conclusion reached by the panel or Appellate Body and seek to delete such an outcome. Delegations felt that this created a great risk for the system.

217. Participants discussed concerns with various scenarios that may result in incoherence, in particular cases where a panel may set out one or more findings that are then modified or reversed on appeal, and thereafter, parties agree to the partial deletion of the Appellate Body's findings, or a DSB decision is reached not to adopt certain of the Appellate Body's findings. Participants felt that the predictability of outcomes and credibility of the system would be called into question, in particular in questions of implementation.

218. Finally, delegations expressed concern with how these proposals would operate in light of timing considerations for the adoption of panel and Appellate Body reports. In this last respect, proponents offered that delegations should not be additionally burdened under the proposal. It was also noted that concurrent proposals that would allow for circulation of a report prior to translation may actually provide more time for Members to consider the implications in scenarios where partial adoption was of interest.

[39] See JOB/DS/2, p. 3.

219. I took note of the discussion, emphasizing that proponents and other participants appear divided on distinguishing the value of findings to the parties in a particular dispute or to the system as a whole. I asked delegations to continue to work towards a possible middle ground.

Parameters on measures under review: the distinction between mandatory and discretionary measures

220. In small group discussions, we also considered the proposed draft parameters on guidance to adjudicators, in particular, the distinction between mandatory and discretionary measures.[40]

221. The proponent opened the discussion by recalling the origin of the distinction. Under this distinction, if a measure is not mandatory, it would not be appropriate to assume that a Member would act in a WTO-inconsistent manner, and therefore, it would not be appropriate to find the measure itself WTO-inconsistent. Accordingly, the proponent submits, a Member could only challenge such a measure once it was applied in some fashion. The proponent considers that it would be useful to capture this distinction which has been interpreted in practice under the current text of the DSU.

222. Participants questioned both the form and essence of the proposal. In terms of the proposed language, delegates noted that no precise definition of "mandatory" or "discretionary" measures was provided. One delegation also noted that while the first sentence seems to incorporate an expression of good faith, the second sentence could be viewed as including an irrebuttable presumption against certain claims involving discretionary measures. This language was considered to be too strong.

223. Delegations also asked what the result of the proposal would be on a panel or Appellate Body ruling that determined that the application of a measure was WTO-inconsistent. Delegations noted that Members often make "as such" challenges so that a complaining party would not be required to challenge each and every application of a measure. Rather, they would challenge the measure itself, the consequence being that a finding could invalidate the measure. Delegations also asked about the relevance of the proposal to measures that, while discretionary on their face, would nevertheless lead to a breach of the WTO agreement were they ever to be applied.

224. Participants also took note of the possible disruptive effect on trade and economic operators of discretionary measures that allow for WTO-inconsistent action. It was felt that any uncertainty in the possibility of applying the measure could result in nullification or impairment of benefits.

225. The proponent sought to distinguish the determination of whether a measure is mandatory or discretionary, from the question of whether a challenge is made to a measure "as such" or "as applied". It also noted that it would not always be possible to eliminate discretion from all measures, and panels should not need to undertake overly hypothetical analyses in assessing the possible outcomes. In their view, nor would it be appropriate to strike down discretionary measures, even if they could result in inconsistency whenever applied, because it would not be sensible to maintain different laws for WTO Members and non-Members. Finally, the proponent indicated that the proposal is not intended to address implementation where a measure is repeatedly applied in a WTO-inconsistent fashion.

226. Through the overall discussion of various examples, some delegations felt the value of the proposal was itself called into question by the difficulty in understanding the distinction between mandatory and discretionary measures, and therefore the difficulty in understanding how the proposal would be applied. Delegations also questioned whether the proposal fails to reflect more recent developments from WTO jurisprudence.

Parameters on interpretive approaches in WTO dispute settlement

227. We then discussed the proposed parameters on interpretive approaches in WTO dispute settlement. This aspect of the proposal covers four sections entitled: (i) WTO adjudicative bodies are constrained from adding to or diminishing the covered agreements; (ii) the covered

[40] See TN/DS/25, p. A-32.

agreements reflect differing negotiating objectives and positions; (iii) the covered agreements embody constructive ambiguity; and (iv) gap-filling.[41]

228. The proponent explained that Article 3.2 DSU serves as starting point. The proposal seeks to avoid adding to DSU obligations. The purpose of the proposal is to recognize situations of ambiguity, whether constructive or unintentional, appearing in the covered agreement and provide guidance on how to deal with this.

229. In the past, delegations had questioned whether the proposal seems to assume that no other interpretative rule than Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (hereafter *Vienna Convention*) may apply to resolve the ambiguity, and whether these provisions represent the complete universe of interpretative rules. The view was expressed that interpretation is an "iterative" and organic process.

230. The proponent offered that it is well-accepted that text can be ambiguous and that this is sometimes intentional. Due to the requirement under the DSU not to add to or diminish obligations, it offered that there is a need to respect this ambiguity, namely not to foreclose the possibility of any particular interpretation of a given provision that might arise. This was viewed as relevant to avoid creating any obligations or defences that might reduce the rights and obligations of Members.

231. Some participants felt they could accept certain aspects of this proposal in principle, if the form of the proposal were modified to follow a more principles-based approach, to avoid a new language itself becoming a matter for interpretation.

232. Other participants asked whether, in cases of ambiguity, the proposal would require an adjudicator to decline to make findings, thereby somehow subtracting from intended obligations. Some felt that Articles 3.2 and 19.2 of the DSU already provide the necessary guidance for addressing interpretative issues, and that any additions to the DSU could lead to changing rights and obligations. In addition, it was asked whether this proposal took proper account of the intent of negotiators to incorporate constructive ambiguity into the agreement, and whether it would not also be relevant to analyse that intent when interpreting the meaning of a provision. Some participants expressed the view that the interpretative rules of the *Vienna Convention* reflected this need through the requirement to assess the object and purpose of an agreement when considering the meaning of a particular provision. By ignoring the intent behind an ambiguity, delegations felt that the rights of a member could effectively be diminished.

233. The proponent submitted that it is not necessary to assess the *intent* to include such ambiguity, but only the existence of such ambiguity. In its view, text could still be found ambiguous even after applying the rules of interpretation of the *Vienna Convention*. The proponent submits that its proposal aims to guide adjudicators on how to proceed in cases where ambiguity exists. In essence, this would amount to declining to determine a violation, or declining to uphold the applicability of a particular defence, if the sole basis of doing so was determined by such ambiguity. It noted that a violation or defence could potentially be upheld on other grounds.

234. Delegations asked whether it would be useful to look at specific instances where two parties or all Members would agree there is an ambiguity in the text, and think about how this proposal might apply to that situation.

235. I took note of the comments and discussion, and suggested that delegations continue to work among themselves and that we return to this discussion at our next session.

Strictly confidential information (SCI)

236. In July, broad support was expressed for the overall approach reflected in the new text presented by Canada, which we had started to consider.[42] We had concluded the meeting leaving some questions unanswered and having not fully explored the detail of the proposed mechanism. So this is what we focused on this week.

[41] See TN/DS/25, pp. A-28 to A-30.
[42] See JOB/DS/3, pp. 1 and 2.

237. We first considered the functioning of the "challenge procedure" in Appendix V, which the proponent explained is an important part of the effort to strike balance between having the opportunity to seek protection for confidential information, while keeping the use of the mechanism to the minimum necessary. It would therefore not be sufficient for a party to simply designate information as SCI. There needs to be an opportunity for a party to verify that the information meets certain requirements identified in the definition, to be granted protection as SCI. The draft language was intended to ensure that a rebuttable presumption was created that the information required protection, subject to the possibility of successful challenge.

238. There was some discussion of the proposed definition of SCI, including questions about the relationship between the first components in (i) and the second component in (ii) of the definition, including whether efforts to preserve the confidentiality of the information had to have been successful in preventing the information from becoming "generally known". It was clarified in this respect that the basis of the protection should be that the legitimate holder of the information has made efforts to protect its confidentiality, even if circumstances beyond their control may have prevented confidentiality from being fully maintained. The proponent expressed readiness to review this language for clarity, and to review also the references to the "entity" or "person" holding the information, to ensure consistency. In respect of the definition, it was also asked what the notion of "essential interests" of the holder of the information meant. The proponent observed in response that the interests at issue should have a certain level of significance to the holder of the information, and that it was open to drafting suggestions as to how to best express this.

239. It was also suggested that the reference to "efforts made to protect" the secrecy of the information in paragraph 5 be deleted, to avoid the impression that this was an additional requirement beyond those set out in the definition. It was further asked whether the reference in Appendix V to "good faith" and "due restraint" implied that this would be something that the panel had to take into account in addition to the definition of SCI, in order to determine whether to grant the protection. The proponent clarified that the intent was to signal that the protection should not be invoked in a frivolous manner, rather than to give specific legal weight to these concepts.

240. There was detailed discussion of whether the panel's determination under the challenge procedure could be subject to appeal. In this context, there was some uncertainty as to what would happen in the event that the Appellate Body overruled the panel. It was suggested that in cases where the panel had *accepted* the designation as SCI, the proposed text of Article 18.5 implied that nonetheless the information should continue to be protected throughout the proceedings as per the panel's determination, and the Appellate Body's ruling would serve primarily to clarify the interpretation of the rules for future cases. In that event, however, the Appellate Body's determination may appear to be in the nature of an advisory opinion, which led some participants to ask whether it would then be preferable to exclude determinations under the challenge procedure from appeal. It was observed that this may require amendments to other provisions in the DSU that set out the scope of appeals.

241. In the event that the panel had *declined* to afford the protection requested, the party concerned would have the option to either maintain the information but forfeit its protection, or withdraw the information from the proceedings. It was asked whether this could prejudice the interests of that party and unduly affect its ability to present its case, and what the consequences would be in such a situation if the Appellate Body later determined that the information should have been granted protection as SCI. It was asked whether, in that situation, a violation of Article 11 of the DSU may be invoked. It was also asked whether a party might seek to misuse the procedure in order to avoid providing information that is not favourable to it.

242. With respect to the duration of protection, the proponent acknowledged that the proposed formulation, which was to grant protection until the end of the dispute, may give rise to concerns, both in terms of how this is to be defined and in terms of its sufficiency. The proponent suggested that the protection be afforded instead "until the party seeking it withdraws it". There was support for this suggestion.

243. It was also clarified that the practical modalities and extent of the protection to be afforded would be left for the panel to determine on a case-by-case basis in consultation with the parties. This includes how access to the information would be controlled, whether a party may re-file or modify its submissions to the panel if it has been denied access to SCI protection under the

challenge procedure, or the timeframe within which the challenge procedure can be invoked before the panel.

244. Questions were also asked concerning access to the challenge procedure by third parties, and whether it was appropriate to include in the text of the DSU references to elements of other agreements (the Annex V process in the SCM Agreement).

245. In closing, I noted that there still appeared to be a high level of support for the proposal, notwithstanding the need to review some aspects of the draft text. I took note of the proponent's readiness to review the text of their proposal in light of the comments heard, and to reflect further on some of the points raised in the discussion. I suggested that we take up this item again in our next meetings.

Mutually Agreed Solutions

246. As described in my last summary, tentative convergence had been reached in July on a text to improve the notification of mutually agreed solutions under Article 3.6, but one delegation had expressed reservations on part of the text. I had invited them to reflect on their position in light of the tentative convergence achieved on a text.[43] So this week we returned to this issue.

247. The delegation concerned indicated that it still had reservations concerning the level of detail required of the notification in the proposed text and feared that it may hinder parties in reaching a mutually agreed solutions in some cases. It was agreed that further consultations among interested delegations would be required to review this language.

248. In addition, another delegation expressed concern with the formulation of the obligation as a joint obligation rather than as an individual obligation on each party. With respect to this point, there was convergence on the objective (i.e. that the notification obligation falls on each party, and may be satisfied through a joint or individual notification). The only remaining question was how best to reflect this in the text. So this draft language may also require further improvement.

Stocktaking

249. In addition, the proponents of developing country interests, including special and differential treatment, indicated that they were working towards a revision of their proposals, to be presented in November. So we will revert to that issue at that time. I expressed support to these delegations in their effort to work together and also encouraged them to consult with other delegations, including those that had previously expressed concerns with some aspects of their proposals.

5. WEEK OF 14 NOVEMBER 2011[44]

250. This week, we continued our discussions on remand, flexibility and Member control, strictly confidential information and panel composition. We also took stock of some aspects of effective compliance.

Effective compliance and developing country interests

251. On Monday, I held a short stock-taking consultation to hear updates of on-going work among delegations on effective compliance and on developing country interests, including special and differential treatment.

252. On effective compliance, a group of delegations informed participants that they would be organizing a symposium at which they would invite legal practitioners to comment and share their views on a number of issues primarily reflecting proposals under consideration in the negotiations. They explained that this would be an independent exercise, though complementary to the negotiations. This session took place on Thursday afternoon.

[43] See JOB/DS/3, para. 47.
[44] Previously circulated as JOB/DS/5.

253. Also, it was confirmed that the text reflected in my previous summary on the notification of retaliatory measures[45] was now acceptable also to the delegation that had previously indicated the need to confirm this. This confirms the convergence reached on the wording of that text.

254. On developing country interests, the proponents informed participants that they had been meeting with a large number of delegations and were still working on a revision of their text. They hoped to resolve bottlenecks and drafting issues, so as to present revised text.

Flexibility and Member-control

255. Discussions continued this week on flexibility and Member-control, both in the small group and the G40. In the small group setting, we returned to the discussion on guidance to adjudicative bodies, in particular the topic of gap-filling, the final issue that is addressed within the topic of interpretative approaches in WTO dispute settlement.[46]

256. The proponents reiterated their view that it is not the role of the dispute settlement mechanism to fill gaps that might be determined to exist within the covered agreements as a way to balance the rights and obligations of Members.

257. Participants sought clarification on the format of this proposal - as a DSB Decision - and the merit of including a limited number of examples of what might constitute gap filling. Broadly, delegations asked how guidance documents would operate and what effect they would likely have on adjudicators, whether panels or the Appellate Body. In this context, it was asked whether it would not be similarly or more effective if Members were rather to voice their disagreement with a panel or Appellate Body report before the DSB. Participants referred to the past decision of the Appellate Body to consider unsolicited *amicus* briefs and the ensuing reaction of Members as an example of this. Participants felt this approach was effective at addressing the particular matter. It was also noted how it enabled Members to comment on a specific problem rather than offering abstract guidance. Moreover, in such instances, it was noted that Members could agree not to adopt a particular report.

258. The question was raised whether a guidance document would enable adjudicators to differentiate, for instance, between what objectively could be understood to be a gap in an agreement, versus occasions where parties maintain different views on an aspect of agreement, but an actual "gap" does not exist. Rather than guidance, delegations expressed the view that customary rules properly served the purpose of addressing what is covered by the WTO agreements and how to apply them. In this vein, it was asked whether it would be helpful to provide further examples to understand how the problem might differ from what is addressed through the customary rules of interpretation. One delegation asked on how many occasions adjudicators have undertaken gap-filling, to merit providing guidance.

259. It was suggested that it might be useful to restate principles already identified in Article 3.2 of the DSU and the focus under the dispute settlement mechanism on resolving disputes between Members, without the need to include additional language that might have been helpful during initial discussions on the proposal. Some participants also suggested that previous statements by the Appellate Body in this respect might provide indications of how to formulate the proposal. However, other participants questioned whether the particular objective of this proposal was not already adequately addressed under Articles 3.2 and 19.2 of the DSU.

260. The proponents confirmed that the examples provided are not an exhaustive list, and agreed to look into suggestions to formulate the proposal in a more principles-based way. It was noted that the proposal grew in an effort to reflect views garnered from discussions held with other delegations. In general, proponents felt that a general view exists that it is not appropriate for panels or the Appellate Body to engage in gap-filling. Proponents referred to delegations' own use of this term as well as statements by others on the existence of the phenomenon, including in efforts by the Appellate Body to "complete the analysis" and its decision to open hearings to the public. The proponents maintained that neither Article 3.2 nor 19.2 of the DSU in their own right fully addressed the perceived problem of gap-filling. Proponents also expressed the view that providing criticism to a particular panel or the Appellate Body after the issuance of the report

[45] See Job/DS/4, paras. 77-78.
[46] See the summary of the previous discussion in Job/DS/4, paras. 58-66.

would not offer the same benefits as providing guidance ahead of time for adjudicating bodies to consider.

261. I took note of the discussions and suggested that delegations continue the discussion next time, with a focus on all the elements of the proposal and the linkage between them. I also took note of the potential effectiveness of Members' comments before the DSB on the Appellate Body decision to accept unsolicited *amicus* briefs. Though recognizing the language of Article 3.2 of the DSU, I also asked delegations to consider whether this provision has in fact prevented the Appellate Body from undertaking to fill gaps in the text in the past.

262. Delegations also considered parameters on guidance to adjudicators in a meeting of the G40 this week. This week we opened the discussion on parameters on measures under review, in particular the aspect on "order of analysis".[47] In the thematic part of the July report, I had noted that the section entitled "order of analysis" appeared to deal with "advisory opinions". In recent small group meetings, delegations again discussed advisory opinions or *obiter dicta*, completion of analysis and expired measures in relation to the topic of "order of analysis".

263. The proponents explained that it would not be appropriate for adjudicators to offer advisory opinions or *obiter dicta* beyond the determinations that are necessary to the resolution of the dispute, and beyond a panel's terms of reference. Rather, adjudicators should exercise adequate judicial restraint to protect the distinction between the roles of the adjudicative and legislative functions. The proponents suggested there have been a number of instances where panels have been found to go beyond their mandate and therefore, further clarity would be helpful.

264. Participants suggested that it would be helpful if the proposal referred primarily to the relevant provisions of the DSU defining the role of adjudicators - namely Articles 3.4, Articles 3.2, 11 and 7 - rather than employing detailed explanatory text and examples. It was asked whether any guidance was actually needed beyond these provisions in order to establish a general rule, and what would be the legal status of such guidance in the form of a DSB decision.

265. Participants expressed doubt as to whether it would always be inappropriate to include statements of *obiter dicta* or to rule on statements relating to hypothetical scenarios, if their inclusion could serve to clarify the reasoning of the adjudicator with respect to an issue properly before it. It was further suggested that it may be appropriate for the adjudicator to include such analysis in the interest of achieving a proper resolution of the matter before it.

266. Participants also asked how severe a problem existed in this respect. In instances where a panel were to exceed its mandate, it was noted that appeal would exist as an option. If the Appellate Body were to exceed its mandate, delegations offered that there still may be ways to deal with this problem, for instance through statements against aspects of the reports at a DSB meeting. If a large number of members were to comment, guidance in this form may be taken on in future disputes.

267. The proponents indicated that it would reconsider the format of the proposal. However, they felt that the principle embodied in the proposal remains important to avoid a panel or the Appellate Body making a finding that might prejudice a Member or other Members who are not parties to the dispute. Non-parties would not be able to express its views on the matter but may be affected by the propositions. In addition, the proponents identified value in providing guidance by the Membership as a whole in advance, not strictly by a single Member or limited number of Members in the form of a DSB statement at the conclusion of a dispute.

268. In discussions this week, the issue of expired measures was also addressed. The proponents referred to instances where a measure expires at any point after consultations were held, arguing there would be value to allowing for findings on this, so that measures would not simply evade review, with the potential to appear at a later point.

269. In conclusions, I asked the proponent to seek to identify ways to revise its proposal bearing in mind the comments made, in an effort to reach convergence.

[47] See TN/DS/25, pp. A-30 to A-32.

Remand

270. Following up on discussions of remand in September, New Zealand presented a non-paper reflecting the proponents' further consideration of the issues and concerns raised.

271. Specifically, the proponents expressed interest in examining on the basis of practical examples the incentives for remand and how this might impact upon use of a remand mechanism and the adoption/implementation of findings and recommendations.

272. With respect to the feasibility or desirability of split implementation, the proponents reiterated their view that remand should not hold up adoption of findings on resolved issues, or permit remand to be misused as means for overall delay. They also acknowledged that this raises a number of practical questions around the process of adoption of reports and implementation. The proponents expressed interest in consulting further with interested Members and preparing some analysis of the kinds of situations where remand could be sought, and where split recommendations might be possible. They also intended to prepare an outline of how a remand procedure as currently drafted would fit within existing timeframes.

273. The proponents further acknowledged that for some Members, the question of whether split implementation is possible or desirable hinges on the linkages between individual findings and recommendations, and that further work is required to understand the situations in which this might occur and how the Appellate Body might frame its findings to account for this.

274. The proponents noted that concerns have also been raised about the possibility of multiple remands. They asked how realistic the prospect of a never-ending cycle of remand is, and whether Members see merit in making more explicit in the text that once an issue has been remanded once and the AB has been unable to find on it a second time for lack of factual information, it simply does not make a finding.

275. On the question of who can remand, the proponents suggested that earlier discussion saw general recognition (with some reservations) that there may be merit in enabling either party to request remand where they may have a legitimate interest, and that the Chair's "three scenarios" are all possible. Their impression was that if sufficient comfort can be achieved on timing and implementation issues, this question should be more easily resolved. Concerning the suggestion to try and delimit the Appellate Body's use of remand to avoid the possibility of this being used as an excuse not to come to a decision, the proponents believed that it might be useful to shift focus from the question of who initiates to the manner in which the Appellate Body frames the factual vacuum (paragraph 12 (b)).

276. Proponents also clarified that, while they continued to consider that their existing proposed text provided a solid basis for addressing the concerns raised, they were open to further discussion as described in the non-paper, and were prepared to show flexibility in light of such discussion.

277. Participants welcomed the effort of proponents in presenting this non-paper, and their acknowledgement of the concerns raised in relation to the functioning of remand under their proposal. Support was also expressed for the proposal to base further discussions on an examination of practical scenarios.

278. It was also suggested that further consideration be given to the question of whether additional amendments to other provisions of the DSU might be required in order to fully reflect the "split implementation" or "double adoption" procedure.

279. With respect to the split implementation procedure, some participants reiterated their concern that it may not be realistic to expect the implementing agencies in the Member concerned to be in a position to "catch up" with the implementation procedures arising from the initial report. In response, the proponents suggested that in most cases, the time required for the completion of the remand procedure would not exceed the duration of the initial RPT, thus making this possible. The proponents also reiterated that the purpose of the double implementation procedure was to avoid abuses and considered that the benefits of early implementation would outweigh any risks. To the extent that a burden arose, this should be borne by the implementing Member. In response, it was suggested that to the extent that the concern being addressed by split

implementation was the risk of abuse, this could be addressed in other manners. It was further asked whether, if the remand process is expected to be quite rapid in most cases, it was worth creating the uncertainties associated with split implementation.

280. Korea, recalling its long-standing interest in these issues, presented a textual contribution proposing amendments to the proposed remand procedure.

281. Korea suggested that both parties should have the ability to initiate remand, because they both have an interest in securing a positive solution to a dispute, but observed that there appeared to be some convergence around the need to introduce limitations to prevent abuses. Korea thus proposed that the complainant be entitled to seek remand of an issue only if the scope of the Appellate Body's recommendations could be enlarged as a result of remand, and a responding party only if the scope of the recommendations could be reduced as a result of the remand.

282. With respect to the adoption of the rulings and recommendations, Korea believed that adoption of a single Appellate Body report at the conclusion of the remand procedure would prevent unnecessary extension of the overall timeframe of a dispute. Under this approach, the remand procedure would be completed before the Appellate Body circulates any report, and the panel's role in the remand procedure would be limited to making the factual findings required for the completion of the analysis. The existence of a single report would allow the ensuing implementation and remedies phases to follow smoothly without the implications of multiple adoption.

283. Several participants observed that there were benefits to the proposed single adoption procedure, and it was suggested that it may provide a solution to the questions attached to the split adoption and implementation procedure. Clarifications were sought as to why the panel would be limited to making the factual findings required and not also the related legal findings, since panels are not only triers of fact and also address legal issues. It was asked whether this would not effectively turn the Appellate Body into a panel. In response, the proponent suggested that since the Appellate Body would have identified the question in the course of its analysis, it should be the one to complete this analysis. At the same time, the proponent expressed willingness to discuss this further in light of practical examples.

284. The proponent also clarified that the timeframe for the remand procedure was proposed to be left for the Appellate Body to determine on a case-by-case basis. It agreed to reflect on the question of whether the panel would have access to the Appellate Body report in order to assist it in carrying out the factual analysis.

285. Questions were also asked about the notion of the scope of recommendations being "enlarged" or "reduced" as a basis for determining who may initiate remand, including how this would be assessed and whether this would be determined by the parties concerned or by the Appellate Body. In response, the proponent explained that the purpose of this distinction was to prevent abuses. It remained open to discussion, but suggested that this matter could be in the first instance for the parties to determine, and that any differences could possibly be addressed by the Appellate Body.

286. In conclusion, it was suggested that a systematic approach based on practical scenarios, as suggested in the non-paper by New Zealand, would be useful, to organize further discussion and consider the merits of both approaches. My sense from the discussion was that participants in the discussion also found this to be a sound approach. So I proposed that the small group continue it work on this issue in the New Year, based on a consideration of practical situations and an examination of how each approach would function in practice.

Panel composition

287. This week we also returned to our discussion on panel composition, from three previous discussions held earlier this year. In our early meetings, we had discussed the proposal at a general conceptual level. Subsequently, we began a paragraph by paragraph discussion of the proposed text. At our last meeting, we focused on the bracketed language in paragraphs 3 and 4

of the revised proposal informally circulated by the proponent. The proponent had expressed flexibility with respect to the exact terms to be used in these paragraphs.[48]

288. This week, we turned to paragraph 5 of the draft text. Under the proposal, a complete list of candidates would be provided at the outset of the composition process. Paragraph 5 provides for limited veto possibility and the ranking of the remaining potential panelists by the parties. The proponent recalled its objective with this aspect of the proposal, namely to reduce the time it takes to conclude panel composition and to lessen the number of incidences where composition by the Director-General is required. It was estimated that in approximately 60 per cent of disputes, the Director-General is ultimately called upon to compose a panel.

289. The proponent considers that the main reason that panels take so long to be composed, and in many cases require the Director General to compose them, is that parties are provided with a limited list of panelist candidates in separate slates, or rounds, of the composition proceedings. Parties are asked to state preferences, as well as veto candidates on these lists during these rounds until agreement is reached. The proponents assert that tactics are often employed to counter preferences of the opposing party, not knowing the precise candidates that will later be proposed.

290. The proponent described paragraph 5 as having two sections, with the first portion addressing the allocation of vetoes based on the total number of candidates that are presented. Beyond a finite number of vetoes, the proponent emphasized that parties may only otherwise object to a candidate under the Rules of Conduct for reason of a conflict of interest of a particular candidate. Such an objection would need to be substantiated with evidence. The proponents stressed the goal of controlling the ability of parties to reject candidates.

291. Delegations asked why the proposal allows for the Secretariat to consider and ultimately provide decisions on objections under the Rules of Conduct at the time of composition, and whether this was not more properly addressed under the DSB's authority. In addition, delegations asked why only the question of a conflict of interest would be addressed, and no other issues arising under the Rules of Conduct, such as the question of the independence of a candidate. It was also asked whether parties would be permitted to agree to panelists having the nationality of third parties, or otherwise object to such candidates at this stage, or not. The question was raised as to whether this affected the current requirements found under Article 8 of the DSU.

292. The proponent explained that, in addressing questions of conflict of interest at this stage, it was not intended as a formal adjudication or to assume the authority of the DSB, but rather, to seek to avoid possible objections by parties at later stages in panel proceedings, to avoid future problems between parties. The proponent offered that it would be possible to determine upfront whether a conflict of interest existed, but that questions of the independence of a panelist could only necessarily be addressed after the proceedings commenced. The proponent offered that objections to candidates of third party nationality would be considered as objection of another nature within the meaning of paragraph 5 of the proposal. Overall, the proponent expressed flexibility in addressing these two issues, including the possibility of modifications to paragraph 4 to address *ex ante* the issue of third party nationality. It was offered that the proposal was not intended to limit or alter the rights contained in Article 8 of the DSU.

293. A number of participants, however, remained critical of what they described as the inability of the ranking and veto mechanisms to properly take into account parties' interests in obtaining panelists that meet various criteria, or in selecting candidates that possess different types of expertise. Specifically, concern was expressed that the ranking process might result in the selection of candidates that do not meet the desired criteria, and that there would not be sufficient vetoes to prevent this outcome. It was asked whether it would not be simpler and more straightforward to limit the proposal to requiring the Secretariat to provide a complete list of candidates upfront, and then proceed under the current practice without employing a ranking mechanism.

294. The proponent expressed doubt as to whether parties would be able to achieve an outcome were they simply presented with a full list upfront, without a ranking mechanism and vetoes in place. It was recalled that under the current practice, parties reject numerous candidates for what

[48] See Job/DS/3, paras. 12-19.

are alleged to be "compelling reasons". The proponent recalled that, beyond the straightforward use of vetoes, parties could also state preferences by choosing to give either a high or low ranking to a particular candidate or candidates. Further, in the event that parties were not satisfied with the result, they could request that the Director General compose the panel, under paragraph 9 of the proposal. When this is done, the proponent offered that the Director General would likely take into consideration the interests of the parties when selecting candidates from the same initial list, where possible. Thus, it was suggested that paragraph 9 provides an additional opportunity for flexibility for the parties.

295. Delegations also asked what elements would be taken into consideration in deciding the total number of candidates to be presented on the list. The proponent indicated that parties could state their preference for a total number of candidates to the Secretariat, in addition to stating their desired criteria for selecting candidates. It was noted, however, that the Secretariat's ability to present candidates might be constrained depending on the complexity of selection criteria requested by parties. In practice, the proponent pointed out that the Secretariat would most likely be unable to present a list of more than 20 candidates; accordingly, it was felt that a maximum number of three vetoes was appropriate.

296. Overall, participants asked whether the proposal would make parties better off than by continuing with the current practice, particularly in light of the number of objections that parties currently make. One delegation offered that the object of panel composition is to identify individuals that are accepted by both parties. Placing more constraints on the ability of parties to express their views and preferences would seem to run contrary to this objective. A preference was expressed for allowing parties to react to particular candidates simultaneously. The proponent asked whether being required to select candidates without knowing the complete list of names at the outset does not in fact constrain selection.

297. Finally, one delegation asked the proponents to consider the possibility for parties to present candidates to include in the final list of proposed candidates.

298. Having heard delegations' views, I noted that there does not seem to be disagreement that parties frequently object to candidates under the current practice. However, I noted that the Secretariat must often present lists of candidates based on extensive criteria, which may present difficulties in presenting a full list of candidates up front. I also took note of disagreement with what was described as the "mechanical" or "mechanistic" nature of the proposal. I asked the proponent to consider closely the comments made in proceeding forward.

Strictly Confidential Information

299. Canada had introduced a revised draft text in July, proposing a simplified approach based on an amendment to certain provisions of the DSU and the introduction of a new Appendix containing further detail including a definition of SCI.[49] This week, Canada presented a further revised text, aiming to address some of the questions and concerns raised in our recent discussions.

300. In introducing its revised text, Canada explained that the changes fell into three categories:

- with respect to third parties, it was clarified that, while it was expected that the need for third parties to present SCI be infrequent, they would be able to seek the designation of information as SCI, but not have access to the challenge mechanism. This was intended to reflect an appropriate balance between the rights of third parties and those of the parties to the dispute.

- with respect to the duration of the protection, the text was modified to reflect a suggestion made at the last meeting, so that the protection would remain until the party having submitted the information would withdraw its designation as SCI.

- the definition of SCI had been cleaned up, to avoid inconsistencies and to refer to "individuals" or "entities" rather than natural and legal persons. The definition continued to reflect cumulative criteria for protection, including a reference to efforts having been made

[49] See JOB/DS/3, para. 1. See also the discussion reflected in JOB/DS/4, starting at para. 67.

to keep the information secret, in order to avoid situations in which no such effort has been made falling within the scope of the definition simply because it happens not to be in the public domain. The notion of "essential interest" was also retained, in order to ensure a higher threshold than simply "any" interest, although the interpretation of this notion would be left open. The proponent also explained that it was satisfied that the definition should remain in the Appendix rather than in the working procedures.

301. Canada also explained that certain aspects had not been changed, in particular the treatment of appeals. It suggested that that there would not be a need for a separate administrative challenge in respect of the designation of information as SCI, beyond normal appeal possibilities. Canada recalled in this respect that this question would only arise where the panel had been required to rule on the designation under the challenge procedure. This would be rare, and if the issue arose it would also be rare that it would be worthy of an appeal, except if it had a fundamental impact on the party's ability to defend itself. The likelihood of appeals under Article 11 of the DSU would depend on the importance of the information at issue to the panel's determinations. Also, if evidence were submitted at the Appellate stage, Article 18.4 allowed for its protection as BCI.

302. Finally, Canada confirmed that under the proposal, the core elements would be in Article 18 and the Appendix, while the detail concerning the manner in which protection would be afforded in a given case would remain in working procedures to be adopted by adjudicators, as had been the case for panels to date. As reflected in working procedures adopted by panels to date, this could include details on:

- who can access the information;

- labelling of submissions to make clear that he material is subject to protection;

- storage and access measures;

- timelines for challenges and resubmission;

- timelines for review of the information;

- protection measures during hearings.

303. We first considered the proposed changes concerning Article 18.4, including the treatment of third party access to the procedures. In this respect, several delegations welcomed the additional reference to third parties in this part of the text, and the balance that the text sought to achieve in this respect. It was clarified that third parties would not be prevented from seeking the adoption of SCI procedures, but that they would not have the benefit to the right foreseen for parties in this respect under the first sentence of the proposed Article 18.4.

304. There was some discussion of whether the reference to the information-gathering procedure under Annex V of the SCM Agreement was appropriate, in light of the timing of this process prior to the start of the panel's work and of the fact that the DSU did not make a cross-reference to a specific provision of another covered agreement elsewhere. It was further asked how the protection afforded under the proposed SCI procedures was intended to relate to that provided for under Annex V and whether it was intended to override it. In this respect, it was observed that the information-gathering process would precede the panel's work, but also that the information gathered under Annex V of the SCM Agreement may require additional protection during the panel proceedings, through BCI procedures. There appeared to be a need to reflect further on these issues.

305. It was observed that it was unclear what was implied by the reference, in the final sentence of the proposed Article 18.4, to the application of the procedures "*mutatis mutandis*" to appellate proceedings. Several participants observed that if this implied an endorsement of the notion that new evidence could be presented before the Appellate Body, it would not be appropriate. There had been discussions of this issue before the Appellate Body in past cases. One participant cautioned however that there may be instances in which information might be presented before the Appellate Body in a role other than evidentiary.

306. The proponent indicated that the purpose of this reference was to ensure that protection was available at all stages of the proceedings, and expressed willingness to consider redrafts that would clarify this, such as relocating the reference in the first sentence of the paragraph. One participant suggested that if this was the intent, it may be best addressed through a general sentence indicating that the procedures shall apply to proceedings before panels, the appellate Body and arbitrators under Articles 22.6 and 25. It was also suggested that if the intent was to indicate that it was unnecessary to seek protection anew at the Appellate stage once it had been granted at the panel stage, which had been acknowledged as an important objective of the proposal, it may be simpler to clearly state that where information has been presented and protected at the panel stage, it need not be re-argued before the Appellate Body that it should be protected.

307. With respect to Article 18.5, questions were asked concerning the proposed re-wording of the duration of the protection, and what process was foreseen for the "withdrawal" of the designation after proceedings have ended. In response, it was suggested that where information is subsequently made public by its right-holder, then it would in effect have fallen in the public domain and could be referred to on that basis. An alternative approach was also proposed, whereby it would be stated that the information could only be used for the purposes of the proceedings. This would circumscribe the permitted use of the information in a manner that would avoid any discussion of a time limit to the designation. The proponent welcomed the suggestion, though noting that this approach changed somewhat the focus of the text, away from its original intention which was to address the duration of the protection. It was observed in this respect that the text in this paragraph seemed to aim at two distinct issues, namely the duration of the protection and its continuity throughout the various stages of dispute settlement proceedings.

308. It was also observed that the text of Article 18.5 did not reflect the fact that the designation of the information as SCI may be successfully challenged, in which case protection would no longer be afforded.

309. The proponent expressed willingness to consider further the comments heard on the drafting of paragraphs 4 and 5 of Article 18, and to seek to propose revised language to address them for our next meetings.

310. Clarification was sought also on the relationship between the text contained in Article 18, the Appendix and the *ad-hoc* working procedures. It was clarified in this respect that the text of the Appendix, including the definition of SCI, would be of general application, while the working procedures would detail on a case-by-case basis the exact level and modalities of the protection to be afforded. It was suggested that the requirement for the various actors in proceedings to protect the confidentiality of the information could usefully be set out in the text of the Appendix, since Article 18.2 only addressed the obligation of Members to protect confidential information and the obligation to protect the information was not otherwise set out.

Stock-taking

311. Finally, the Friends of third parties introduced a non-paper[50], with the request that it be circulated informally for discussion at a forthcoming meeting.

6. WEEK OF 30 JANUARY 2012[51]

312. This week, I held consultations on Member-control and flexibility, strictly confidential information (SCI), panel composition and third-party rights. We also took stock of ongoing work on remand, developing country interests, including S and D, and effective compliance.

Flexibility and Member-control

313. On flexibility and Member-control, we concluded the discussions in the small group and continued the discussions in the bigger group.

[50] See JOB/DS/6.
[51] Previously circulated as JOB/DS/7.

314. In the small group, I first recalled what I understood to be the main outcomes of our previous discussion on the draft parameters on "Interpretive approaches to be used in dispute settlement", and a possible way forward.

315. First, the discussions had confirmed the interest of participants in a more "principles-based" approach to these issues and my understanding is that the United States expressed willingness to move forward in that direction. So I suggested that this should be the next phase of the work, on this issue and on all the "guidance" parameters more generally.

316. Secondly, with respect to "gap-filling" specifically, the discussion seemed to have clarified some important aspects. First, as I understand it, there was general acknowledgement of the important role played by Article 3.2 of the DSU in addressing the risk that the United States seeks to avert. The relevance of Article 19.2 of the DSU was also mentioned. A question arises in this respect as to what *more* than what is already contained in these provisions the proposal seeks to address. It did not seem entirely clear from the discussion whether the notion of "gap-filling" had some content *additional* to the requirement of not going beyond the rights and obligations in the existing agreements, or whether Articles 3.2 and 19.2 of the DSU already imply that there should be no "gap-filling". It was clarified however that the proponent did not intend to modify the applicable rules of interpretation, including the role of context and object and purpose in the interpretive process under the Vienna Convention.

317. I suggested that these considerations could inform how the issue might be addressed. In particular, I suggested that to the extent that the objective of the proposal is to *reaffirm* the importance that Members attach to certain basic principles already contained in the DSU, rather than to bring in new concepts, then it could be fruitful to explore the suggestions made in the discussion to express the guidance with reference to relevant existing provisions of the DSU (including perhaps a reference to a relevant citation of a past Appellate Body report).

318. I understand that for some delegations, it is still not clear to what extent additional guidance to adjudicators is needed on this issue. But focusing on the core message, we would be able to have a much clearer sense of what might be possible. So I encouraged the proponent and other interested delegations to think further about the way forward and start working on revised text in that direction.

Draft parameters on the use of public international law

319. We then had a constructive discussion of the draft parameters on the use of public international law in dispute settlement.

320. The United States recalled that the object of this part of the proposal was to clarify the relationship between WTO dispute settlement and public international law, which is not clearly set out in the DSU, and to provide guidance to adjudicators on what would or would not be an appropriate role for public international law in WTO dispute settlement proceedings.

321. A number of participants observed that many of the statements contained in this text were not controversial in themselves. At the same time, it was suggested that they could be expressed with more precision and clarity. In this respect, the merits of a more principled-based approach were again highlighted and several participants expressed willingness to work with the proponent towards improving the text on that basis.

322. Some participants emphasized that in order to be of benefit, any guidance given to adjudicators should provide clarity on the expected approach. It was suggested in this respect that the text as drafted did not have the required level of clarity. It was also suggested that it would be helpful for the text to be presented in a manner that would make clear that the guidance did not call into questions the allocation of responsibilities between the DSB and the adjudicative bodies.

323. It was asked what exactly the added value of the proposed guidance was intended to be, and how it would in practice assist adjudicators, if it contained mostly non-controversial statements rather than clarifications of aspects that are unclear. A clarification was also sought as

to whether the proposed guidance was intended to essentially confirm or modify determinations made to date by adjudicators.

324. One participant expressed concern that the purpose of the proposed guidance should not be to tell adjudicators, including the Appellate Body, that they had erred in past determinations. In response, it was clarified that the purpose was not to call into question past determinations, in respect of which any future guidance would in any event be of no effect, but to assist adjudicators in future determinations by making clear to them what the common intention of the Membership is in respect of certain issues not expressly addressed by the DSU. This could avoid unnecessary litigation of such issues. The relevant question, it was suggested, was whether there was a common view among Members as to how the issues should be addressed, rather than how they had been addressed in the past.

325. With respect to the detail of the proposed text, it was asked what purpose was served by the initial assertion that WTO law is itself public international law. This statement, the proponent explained, was intended to make clear at the outset that WTO law is part of, and not outside the realm of, public international law. It was further asked what this reference was intended to imply and whether it was assumed that the nature of public international law differed depending on the type of instrument at issue. It was observed in response that four sources of public international law are identified in the Statute of the international Court of Justice (ICJ): treaties, customary law, general principles of law and the writings of jurists. Although the exact nature of some of the sources other than treaties as more or less "soft" law may be discussed, it was suggested that in the case of WTO law, it was clear that it fell within the first category, i.e. treaty law.

326. One participant observed that, as the text is currently drafted, there appeared to be a contradiction between this initial assertion and the subsequent guidance, that appeared to assume that recourse to public international law was not seen favourably by the Members. Concern was also expressed that references to statements dating back to 1966 may not be appropriate as evidence of the current contents of customary law given the evolutionary nature of such law. It was further suggested that any guidance with respect to the principles of treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") should not be such that it may give rise to debate. In this respect, caution was urged in respect of pronouncements that may lead to questioning common understandings of the relevant principles beyond the WTO context.

327. One participant observed that it was not clear that any consistent rule had been applied by adjudicators in addressing the extent to which Members can rely on (and adjudicators may accept) arguments based on public international law in WTO dispute settlement proceedings. The same participant suggested that the structure of the text could be improved to provide clear guidance to the effect that rules of public international law could be relevant to the extent that they assist in interpreting the WTO Agreements, as "relevant rules of international law applicable in the relations between the parties" as referred to in Article 31.3(c) of the Vienna Convention. The elements of such an approach, it suggested, were already in the text, but not clearly structured.

328. It was suggested that the text could start with the uncontroversial assertion that WTO dispute settlement serves to resolve matters relating to rights and obligations under the WTO Agreements. The key question then is, as expressed in the current text of the proposal, what the role of public international law can be, in interpreting these rights and obligations. In this respect, the reference in the DSU to customary rules of interpretation is relevant and, through this reference, Articles 31 to 33 of the Vienna Convention are also relevant. In turn, Article 31.3(c) of the Vienna Convention refers to "other rules of international law applicable between the parties" being taken into account.

329. Then, it was suggested, a further question is what these "relevant rules" may be. It was suggested that it is not controversial that they could potentially include customary law or general principles of law. Yet a further question is what these may consist of. For example, it may be accepted that reliance on the work of the International Law Commission (ILC) is appropriate, to the extent that it reflects customary law. In this respect, it was suggested that the Appellate Body sometimes falls short of explaining the basis for reliance on such elements. It could therefore be clarified that, if such elements are relied upon, the question of what they constitute and why must be explored. Another question was whether the "relevant rules" to be taken into

account could include rules other than customary law or general principles of law. This would also be a question to be answered.

330. The United States welcomed participants' acknowledgement that many of the statements contained in the proposed guidance were not in themselves controversial and the suggestions made. It expressed readiness to work with other delegations towards improving the presentation of the concepts in light of the observations heard and in light also of discussions to come in the bigger group (G40).

Expertise of panelists

331. There was also some discussion of the final aspect of the proposal on Member-control and flexibility, concerning the expertise of panelists.

332. In the spring of 2009, we had discussed this issue together with panel composition. In these discussions, it had been observed that this proposal seeks to ensure that panel members have the right kind of expertise for the case at hand, and that this consideration was already in practice an integral part of panel composition.

333. With this in mind, my sense at the time had been that there was no conceptual difficulty with the underlying objective of the proposal. The question that remained was essentially how best to reflect this in Article 8.2 of the DSU.

334. In these earlier discussions, the United States had proposed the following revised language:

> "Panelists should be selected with a view to ensuring their independence, [and that the panel as a whole contains] expertise to examine the kind of matter at issue in the dispute, a sufficiently diverse background and a wide spectrum of relevant experience."

335. The discussion this week confirmed that this revised language helped to clarify that the requirements in terms of expertise, diversity of background and wide spectrum of experience related to the composition of the panel as a whole rather than each individual panelist. In light of this, it was proposed that the square bracketed language be retained (and the square brackets removed).

336. The relationship between this and the separate proposal on panel composition, also discussed this week, was noted.[52] It was suggested that although the proposals were related, they did not seem to have exactly the same objective: this proposal sought to describe the qualities expected of the panel, while the other proposal under discussion sought to establish a mechanism for achieving the desired composition. Each proposal could therefore be discussed on its own merits. At the same time, consistency between the two should be ensured.

337. It was asked whether the parties would have the flexibility to depart, by mutual agreement, from the requirements set forth in this provision (as the use of the term "should" suggested) and how this would impact on any procedure for panel selection by the Director-General. It was suggested in response that the situation would probably remain essentially as it currently stands, i.e. it could be expected that, in composing the panel, the Director-General would seek to accommodate the preferences expressed by parties.

"Measures under review"

338. In the G40, we continued a discussion of the draft parameters concerning "measures under review" in WTO dispute settlement. In this context, we addressed the section entitled "Definition of a measure".[53]

339. The proponent explained that, instead of trying to define the term "measure", it found it more useful to provide an illustrative, negative list of what is *not* a measure.[54] This list comprises

[52] See para. 360 below.
[53] See TN/DS/25, pp. A-31 and A-32.

three elements but, given the flexibility of the guidance, others could be added in light of developments in WTO dispute settlement. A way of thinking about this list is that normally a measure should be withdrawn if it is found WTO-inconsistent. The proponents explained that the three items on the list are difficult or impossible to withdraw in practice; hence, they provide good illustrations of what might not constitute measures for purposes of WTO dispute settlement.

340. Several delegations questioned the need for such guidance or its usefulness. One delegation pointed out that no dispute so far had determined that the items on the list constituted measures. Some delegations asked whether it was possible to define in advance what is not a measure without creating loopholes for Members or preventing a necessary case-by-case analysis by WTO adjudicators. Further, some delegations questioned the need for an illustrative list instead of merely stating that anything that does not produce a legal effect is not a measure.

341. In response, the proponent explained that its objective is to provide non-exhaustive guidance on issues that have not been settled in WTO dispute settlement so far. Although there have been no findings stating that the three items on the proposed list do not constitute measures, several Members have raised these matters in previous WTO disputes. The proponent added that the definition certainly does not serve to prevent WTO adjudicators from continuing to assess the issue of measures on a case-by-case basis. A continued case-by-case assessment and the qualifications to the negative list would help to avoid any loopholes or any abuse of the guidance.

342. As regards the need for an illustrative list, the proponent explained that too general a definition of what is not a measure would probably trigger requests for examples. The proponent added that it has not heard any delegation argue that the specific items on the list should be considered as measures *per se*.

343. In response, one delegation noted that it would be important not to prevent or complicate Members' right to challenge a set of different elements as a measure, even if none of these elements in themselves might qualify as a measure. Another delegation wondered how, for example, a statement of a high-ranking party official or Member of Parliament providing political guidance for banning the importation of a specific product might be challenged under the proposal.

344. The proponent responded that the proposal does not intend to prevent Members from challenging a set of elements as a measure. As for the example of a statement by a high-ranking party official and Member of Parliament, it might serve primarily as evidence of the existence of a discriminatory import policy, which would manifest itself in specific WTO-inconsistent measures by a Member's customs authorities. It is this policy or these measures that the complainant would challenge, rather than the statement.

345. In response to concerns by several delegations, the proponent recognized that in assessing what a measure is, WTO adjudicators need to take into account the legal cultures of each Member. What constitutes a measure is primarily a question under WTO rules; however, the proposal does not intend to prevent WTO adjudicators from carrying out this assessment by also taking into account the relevant Member's municipal law. This is a factual issue, which requires a factual assessment. The proponent also clarified that nothing prevents the items on the list from being used as evidence in WTO dispute settlement. In fact, footnote (jj) recognizes that the items could also be used as a basis for interpretation. The items could even be identified in a request for panel establishment.

346. One delegation asked whether the proposed guidance would change the manner in which parties and WTO adjudicators would assess what might constitute a measure, including whether a complainant would need to assess the effects of an alleged measure before drafting its panel request, and whether adjudicators would need to address this as a preliminary issue. In response, the proponent stated that this is already very much the case today.

347. Further, in response to questions about Article 6.2 of the DSU and expired measures, the proponent stated that these issues are somewhat different from guidance on what is a measure reviewable under WTO dispute settlement.

[54] See TN/DS/25, p. A-32.

348. At the end of the discussion, I asked the proponent if it could consider inserting the word "legal" into the definition of the second item of the proposed negative list ("statements without legal effect, for example …") as proposed by a participant. The proponent expressed its readiness to consider this idea. One delegation, however, believed that the term "legal" could result in making the definition of the second item too restrictive.

349. In conclusion, I noted that despite the useful clarifications, important differences remain among delegations with regard to the proposed guidance on measures. We would therefore revert to these issues at our next meetings, when we will also address the final element of this proposed guidance, the issue of "mandatory v. discretionary measures".

Strictly confidential information (SCI)

350. We continued this week the discussion of Canada's revised paper, focusing this time mostly on the proposed definition of "SCI" in Appendix V.

351. Canada explained that in its revision of this part of the text, it had retained the three cumulative and mutually supportive elements in paragraph 1 of Appendix V (that the information is not in the public domain, that reasonable efforts have been made to keep it secret, and that its disclosure would cause or threaten to cause serious harm to an essential interest of the holder of the information). There should be, Canada explained, a "success test" to be met by the information for which protection is sought.

352. It was asked how "reasonable efforts" or "serious harm to an essential interest" could be demonstrated. It was suggested in response that it was difficult to say in advance how each of the terms would be interpreted. For example, what constituted "reasonable efforts" to keep the information secret might depend on the circumstances, including the type of information at issue and the potential consequences of its becoming public. The intent was to provide a threshold that would be more than minimal, while accommodating a wide range of potential situations. At the same time, the threshold should not be so high as to discourage recourse to the procedures, since their very purpose was to provide an assurance that adequate protection was available for sensitive information that its holders might not otherwise be willing to allow into the proceedings.

353. It was acknowledged that the situation of "leaked" information, where the information might no longer be secret despite reasonable efforts having been made to keep it so, was delicate. If such information had effectively fallen into the public domain, and the harm associated with the disclosure had already occurred, it would probably no longer qualify for protection under the definition.

354. It was also clarified that the expression "SCI" was intended to cover both Business Confidential Information ("BCI") and other types of strictly confidential information, and that the terms "individual and entity" were intended to cover any entity (including government or business) or individual (natural person) that may be the holder of information deserving protection. It was observed that comparable terms ("individual, body or authorities") appear in Article 13.1 in a similar context. This raised the question whether the same terms should not be used in this context also, and how the scope of the term "entity" in the proposal differed from this existing language. It was observed in response that the intention was to cover as wide as possible a range of right-holders of SCI, including non-governmental entities.

355. It was also asked to what extent parties would be free to reach agreement to designate information as SCI, so that it would benefit from SCI protection, even if it did not meet the requirements of the definition. It was suggested that, while it would not be possible, under the proposal, for parties to decide on an alternative, less demanding, definition of what constitutes SCI or not, it would be possible for a party to designate information as SCI, that did not meet the requirements of the definition, and that this designation would not be challenged by the other party. In such a situation, no determination would be made as to whether the information met or did not meet the criteria for protection and, in the absence of a challenge, the panel would not have the discretion to deny the protection. It was discussed in this context whether this created a risk of the parties abusing this possibility by agreeing, for example, to designate the entirety of their submissions as SCI and thus making it impossible for the panel to motivate its rulings in a meaningful way. It was suggested in response that, in practice, there would most likely be only

very limited incentive for disputing parties to agree on such an approach. The possibility of challenge, combined with the requirements of good faith and due restraint (in paragraph 2 of Appendix 5), should provide sufficient checks and balances to ensure that this situation would not arise.

356. It was also observed that other provisions in the DSU provided a basis for distinguishing between information, which may qualify for protection as SCI, and arguments of the parties, which do not. In particular, it was observed that the panel has an obligation to provide in its report the basic rationale for its findings, which may not be possible without reference to the arguments of the parties.

357. It was asked what exact role was served by the requirements to act in good faith and exercise due restraint in seeking SCI protection and whether a designation could be challenged on the basis that it was not made in good faith or that the designating party did not exercise due restraint, even if the information met the requirements to qualify as SCI. If not, and if a successful challenge could only rest on a determination as to whether the information qualified as SCI under the definition, then it was asked whether these additional elements were necessary, in light also of the fact that the expectation of good faith applied with respect to recourse to dispute settlement generally.

358. A clarification was sought as to the different levels of confidentiality that would exist within the proceedings under this proposal. It was clarified that there were effectively three possible levels of confidentiality of information: first, information that would be publicly available, as addressed in the transparency proposals, secondly, information that is confidential, including, under the current rules, the submissions of parties, and, thirdly, SCI, which would be subject to additional protection. It was also observed that there would be no need, as a general matter, to try to define *in abstracto* the exact contours between "confidential" and "strictly confidential" information, since the question of determining whether a specific piece of information constituted SCI would only arise in the event that a party designated it as such.

359. In closing, Canada informed the group that it hoped to work towards further improvements of its text, including on Article 18.4 and 18.5, which had been discussed in November. Other Members committed to contributing to this work.

Panel composition

360. In the G40, we continued our discussion of panel composition, from paragraph 6 of the text.

361. The proponent explained that paragraph 6 now reflects the idea that the Secretariat should check the availability of candidates not at the beginning of the composition process but rather at a later stage. Some delegations suggested that, although the Secretariat should ideally check the availability of all panelists upfront, with 12-20 candidates this might be simply too burdensome. One delegation considered that availability should be checked only after three persons have been selected – to avoid any embarrassment. For the proponent and another delegation, this was an issue of efficiency and timesaving: if candidates' availability is checked too late in the process, some steps might need to be repeated.

362. Several delegations asked how the agreement of parties to the three names resulting from the ranking process (in paragraph 6) would work in practice. The proponent explained that the question of ranking is distinct from the issue of chairmanship. At the time of expressing their selection criteria under paragraph 4 of the proposal, the parties should also express their preferences for the chairperson's qualities. Once the Secretariat has presented the outcome of the ranking, it should obtain the parties' agreement to the set of three names as well as which one of the panelists would chair the panel. According to the proponent, in any event, if the parties do not agree, they could request the Director-General to compose the panel under paragraph 9, or request a new slate of names under paragraph 7.

363. One delegation sought clarification as to what happens if two candidates have equal combined preference and the same degree of divergence in ranking. According to the proponent, this would only be an issue if it concerned, for instance, two candidates with the third highest combined preference. In such a case, the second sentence of footnote "u" applies: the

Secretariat should select one of these two candidates by drawing by lot. If, however, the two candidates in question both have the highest combined preference, there would be no need for a drawing by lot. Both candidates would form part of the three names presented to the parties by the Secretariat.

364. It was also asked whether Article 8.7 of the DSU would prevent panel composition by the Director-General where the parties disagree only on which of the three candidates presented by the Secretariat should serve as panel chair. According to the proponent, this situation may occur already today: if the parties agree to three names proposed by the Secretariat but not to which one should chair the panel, the panel is not composed and either party may request panel composition by the Director-General.

365. One delegation wondered whether there might be a price to be paid for the automaticity of the panel composition process under the proposal. For instance, if the parties agree on the three individual names resulting from the ranking process but not on the resulting group as a panel, how could one move from paragraph 6 to paragraphs 7 or 9? Was there a risk of composition – and thus dispute settlement – being blocked? According to the proponent, there is no such risk as any party may request panel composition by the Director-General under paragraph 9.

366. One delegation asked why paragraph 6 does not explain how the Secretariat contacts the parties for their agreement to the outcome of the ranking process. According to the proponent, there is no need to do so; paragraph 6 clearly states that the Secretariat needs to conduct the ranking process and then "verify" that the parties agree to the outcome of that process. Even the current DSU does not regulate each and every aspect of the Secretariat's involvement in panel composition. Beyond the basic elements, it is useful to have some flexibility.

367. Several delegation expressed doubts as to the need for ranking. According to one delegation, if there are 12-20 names proposed by the Secretariat upfront, the parties could simply agree on three of those candidates. In response, the proponent explained that this would be ideal but, when that does not happen, having an automatic process would add value – even if the parties would retain the freedom not to agree to the outcome of that process. According to the proponent, there would certainly be major improvements over the current panel composition process, where tactical vetoes "burn" good candidates and where the parties can never be sure that they have the best possible candidates in front of them. The proposal would allow parties to know all names upfront, and this would improve transparency.

368. Another delegation questioned the need for ranking if the parties might anyway request composition by the Director-General, who might not necessarily rely on the ranking. According to the proponent, however, it would be useful to go through the ranking even if the parties see the names upfront and end up requesting composition by the Director-General.

369. One delegation agreed that parties' expressing preferences instead of placing vetoes is a clear improvement under the proposal. However, another delegation believed that by limiting the number of vetoes, the proposal would prevent parties from vetoing candidates even for genuinely compelling reasons. According to the proponent, the proposal does not prevent parties from ranking such candidates very low, and parties could also reiterate their reasons against the candidate(s) during any composition process by the Director-General.

370. One delegation expressed the concern that paragraph 9 of the proposal circumscribes the Director-General's role without formally amending Article 8.7 of the DSU. The same delegation wondered how meaningful the involvement of chairpersons of the relevant Councils and Committees would be if the list of candidates is limited to 20 names. Also, could the Director-General compose a panel of persons who ranked low, and would that be well-received by the parties?

371. In response, the proponent explained that the Director-General would need to look at the overall outcome of the ranking process, and consult with the parties. The top three candidates under the ranking process would certainly not be considered as vetoed. The Director-General would compose the panel of the candidates whom he considers "most appropriate" in line with Article 8.7 of the DSU.

372. At the end of the session, the proponent explained the changes introduced to the revised version of paragraphs 7-9 of the proposal.

373. According to the proponent, paragraph 7 introduces flexibility but remains bracketed, as it would prefer not to include this in the final text. The first phrase inserted into paragraph 7 reflects the possibility of having a new slate if the first slate did not contain a sufficient number of available candidates. The second insertion into paragraph 7 clarifies that the Secretariat has no discretion to decide whether or not it prepares a new slate of names – this depends exclusively on the parties' agreement.

374. As for paragraph 8, the proponent explained that the first insertion reflects that this is the point in the process when the Secretariat could still meaningfully take into account a request for having candidates from developing countries. The other changes to paragraph 8 serve to streamline its language.

375. Finally, the proponent explained that the revised version of paragraph 9 includes two bracketed phrases on the fourth line to allow more flexibility for the Director-General. A third bracketed phrase in the same paragraph reflects that the availability of candidates might need to be verified at this stage.

376. We could not address all outstanding paragraphs. Accordingly, we will continue discussing this proposal at our next meetings.

Third party rights

377. In a small group and in the G40, we started a discussion of the revised paper on third party rights presented by a group of participants (circulated as JOB/DS/6).

378. In these discussions, convergence emerged around the approach proposed under the first item in the document, i.e. third party rights in consultations. Under this approach, Members having expressed substantial trade interest in consultations initiated under Article XXII of GATT 1994 would be automatically joined in such consultations, unless the Member to which the request is addressed notifies the applicant Member and the DSB within 7 days of receiving the request that it considers the claim not to be well-founded. In addition, the proposed text would, through a new footnote, make clear that Members to which such requests are addressed should give sympathetic consideration to representations made by applicant Members with respect to the reasons for their request. It was considered that this solution provided an adequate balance between the interests of disputing parties and interested Members, without prejudging the types of considerations that might form the basis for a "substantial trade interest" in being joined in consultations.

379. A number of drafting suggestions were made to improve the manner in which the text would be expressed. The following potential improvements were considered in the small group meeting:

> 11. (b) Such Member shall be joined in the consultations unless the Member to which the request for consultations was addressed **considers that the claim of substantial trade interest is not well-founded**[5] **and [so] notifies the applicant Member and the DSB in writing within 7 days after the date of receipt of the request to be joined in consultations [of its view as to whether the claim of substantial trade interest is not well-founded].**
>
> [5] In considering whetehr the request is [not] well-founded, **The Member to which the request for consultations was addressed undertakes to accord sympathetic consideration to any representation made by any applicant Member concerning its reasons for desiring to be joined in consultations**.

380. Further possible drafting improvements were considered in the G40. In particular, it was discussed whether the footnote might be relocated, for example between paragraphs (a) and (b), to reflect more accurately the sequence of events from the request to be joined, to its consideration by the responding Member and the notification of the decision.

381. There was also a discussion of whether a notification would be useful not only in cases where the request is denied (in which case a timely notification would always be required) but also when the request has not been denied. In that situation, it was observed that acceptance being automatic, there may be no need for positive action to be taken in the form of a notification. At the same time, transparency about both acceptances and refusals may be beneficial. One participant highlighted that while for the applicant Member, it was essential to be informed promptly of the outcome of its request in order to prepare its participation in the consultations, the same urgency may not be required for information to the DSB.

382. The proponents undertook to continue to improve the draft text, taking into account the comments and drafting suggestions made, with a view to presenting a revised text on the basis of this emerging consensus by our next meetings.

Developing country interests and Effective compliance

383. The proponents of developing country interests and effective compliance informed the group that they have been continuing to work with various delegations and to reflect on possible ways of promoting effective compliance. They recalled in this respect the symposium that they had organized at the end of last year on proposals to improve effective compliance and emphasized the importance they attach to this objective in the negotiations. They indicated that they would welcome also suggestions from other delegations as to how to develop effective tools for that purpose. They would continue to work on these issues with the objective of presenting revised text in time for the next meetings. I encouraged other interested delegations also to approach the proponents with any concerns or suggestions they may have.

Remand

384. The proponents of remand sought more time to prepare some additional material on timelines and practical examples to guide future discussion. We will therefore return to remand at our next meetings. I also encouraged delegations who have an interest in this issue to approach the proponents, to assist in ensuring a more fruitful discussion at our next meetings.

7. WEEK OF 5 MARCH 2012[55]

385. This week, I held consultations on Member-control and flexibility, panel composition, third-party rights, and strictly confidential information (SCI).

Flexibility and Member-control

386. On flexibility and Member-control, we continued the discussions in the G40 setting.

Measures under review

387. I first recalled what I understood to be the main outcomes of our previous discussion on the "definition of a measure". Discussions had helped to clarify a number of aspects, but important differences remained. Questions had been raised about both the "negative list" approach and the actual list, including whether it was excessively restrictive and could foreclose legitimate claims. I invited the proponents to review this part of proposal in light of these comments and based on a more "principles-based" approach.

388. We then turned to the issue of "mandatory vs. discretionary measures". The United States explained that this distinction first arose under the GATT 1947 in relation to measures enacted and not yet in force. GATT panels had found that where a measure mandated an inconsistent action, it could be challenged as such before its entry into force because it already mandates inconsistent action. It noted that the distinction had been mentioned in WTO dispute settlement, without a clear indication that it would be maintained. The United States considered that if Members found such distinction to be useful, it would be worth clarifying to guide adjudicators.

[55] Previously circulated as JOB/DS/8.

389. The United States explained that the mandatory vs. discretionary distinction implies that a measure providing discretion to act either consistently or inconsistently with WTO obligations cannot be challenged as such. If a measure allows WTO-inconsistent actions as well as WTO consistent behaviour, it would not be appropriate for the dispute settlement system to presume that Members would act inconsistently with their obligations. Instead, it would have to wait and see if the discretion is exercised in a WTO-inconsistent manner.

390. I recalled that in recent small group discussions, it was observed that Members often make "as such" challenges so that a complaining party would not be required to challenge each and every application of a measure. The United States, in response, had drawn a distinction between the determination of whether a measure is mandatory or discretionary and the question of whether a challenge is made to a measure "as such" or "as applied".

391. In the G40 discussions this week, a participant questioned the appropriateness of "hard rule" language (such as "are not permitted") in light of the fact that the document is intended only as guidance. In response, the proponent clarified that the text was intended to provide clear guidance to adjudicators in the form of a DSB decision and not as an amendment to DSU or as an authoritative interpretation. The language used would not make it binding.

392. In light of the proponent's explanation of the origins of the distinction, it was asked whether the intention was to cover both questions of temporality and questions of discretion. The United States contended that the temporal and the discretion issues could be viewed as two sides of the same coin and the text was intended to capture both aspects.

393. Clarification was sought on the current jurisprudence with respect to the issue of mandatory v. discretionary, as well as on the motivation for this guidance. A participant explained that the Appellate Body had considered this distinction to be a useful analytical tool without however endorsing. It questioned whether this suggested that the Appellate Body had considered that the distinction would lead to undesirable results if generally endorsed. It was observed that in *US – Corrosion Steel*, the distinction was only mentioned as an analytical tool and that the Appellate Body cautioned against using it in a manner that would allow Members to escape dispute settlement review.

394. Several participants expressed concern that Members may abuse this distinction to avoid "as such" challenges by designing measures that would give some discretion to authorities to comply or not, although in fact authorities would never comply. Concern was expressed that the text may provide an incentive to Members to create regulations that give authority to an executive body without much guidance as to how such authority should be exercised. Should this authority be used in a manner that leads to a WTO inconsistency, the complainant would not be in a position to attack the law and would always have to chase the particular application. Even in situations where it can be demonstrated that the law is consistently applied in a WTO inconsistent manner, this law could not be challenged. For some participants, endorsing this distinction could be difficult to reconcile with the principle of prompt and effective settlement of disputes.

395. The proponent agreed that there should be no risk of abuse but did not see such potential here. It commented that, as things stand, many measures can be applied in numerous ways and cannot be challenged as such. For instance, measures that grant the authority to set tariffs in a variety of ways allow for inconsistent applications because tariffs can be applied above bound levels. This measure however could not be challenged as such. The United States further suggested that the fact that the Appellate Body has in certain cases examined whether there is discretion indicates that this issue is still relevant. The United States also suggested that the proposed text goes in the direction of prompt settlement of disputes, insofar as complainants do not have to wait for a measure to be applied in order to challenge it as such.

396. One participant suggested that the guidance would be useful if it allowed adjudicators to make a finding that if a measure that on its face grants discretion to act inconsistently were to be applied it in a certain way it would be inconsistent,. The United States considered however that this would require speculation as to how the measure might be applied and amount to an advisory opinion.

397. One participant observed that it might be problematic to create a rule explicitly stating that WTO adjudicative bodies are not permitted to presume that Members would choose to breach their obligations. In its view, adjudicative bodies never presume inconsistent behaviours. However, if there is continuous and persistent incompliance based on a legislation which provides discretion to comply or not comply, there would be a record of non-compliance. In such circumstances, it would be reasonable to assume that, even if the measure does not formally mandate inconsistency, it necessarily leads to inconsistencies. In its view, where there is a pattern of inconsistent application, the measure, even though if formally discretionary, should be challengeable as such. It was also observed that in situations of repeated inconsistent applications of a measure, the application of the presumption of good faith may be more complex.

398. In response, the United States noted that the example put forward suggested the existence of an additional measure or action indicating to the authorities how they should behave. This situation would raise, in the US view, evidentiary issues, but was not the type of situation the text intended to address. The fact that a measure is applied a number of times in an inconsistent manner does not make the measure inconsistent as such, in the United States' view. Situations of repeated application of inconsistent acts could not be resolved through a finding that the measure that grants a broad authority is inconsistent as such as a result of the application of the measure.

399. The proponent noted that so far no participant had expressed disagreement that a measure that mandates inconsistent actions can be challenged as such. It also noted the absence of disagreement on the assertion that if measure grants discretion, the adjudicative bodies cannot presume that the Member will act inconsistently. For the proponent, the disagreement relates to the manner in which these ideas are expressed.

400. One participant observed that there was no clear definition in the proposal of the concepts of "mandatory" and "discretionary". Although the intention appeared to be to refer to an obligation or discretion "to act in a manner that would breach the covered agreements", this absence of a definition led to uncertainties. It would be more comfortable with language referring to a measure that necessarily results in an inconsistency. In addition, a determination of what is "mandatory" or "discretionary" may in practice involve an assessment of the status of the specific measure under the relevant national law. The United States agreed that the question whether a given measure is mandatory or discretionary may involve consideration of its status under national law and observed that the actual text did not include the terms "discretionary" or "mandatory", so that it did not see a need to define them.

401. It was further asked whether a measure not considered legally binding under domestic law could still be considered mandatory under WTO law, in light of the role of municipal law in WTO dispute settlement. In order to understand better the as such and as applied distinction, a participant asked the United States to explain how this distinction would operate in a civil law context (in a system involving law, ministerial decrees and administrative decisions).

402. It was noted that the distinction had implications for the kind of remedies available. If a particular measure is found to be inconsistent as applied and the finding requires the Member concerned to remove the inconsistency, this would address the situation. However, if implementation was limited to a particular application, the dispute would not result in a satisfactory solution. It was also observed that in situation where a measure is found to be inconsistent in conjunction with others, DSB recommendations and rulings do not mandate an amendment of all the measures. The Member could lawfully choose to implement by amending only some of the measures. In the proponents' view, it was relevant to look at the question of implementation, but it is a different issue. It clarified that the proposal was not targeted at rulings on a group of measures. Rather, it relates to the situation in which a measure that affords discretion is found inconsistent. The implication for implementation is that the measure does not need to be modified, since the problem lied in its application. For example, a regulation that authorizes government officials to act in a consistent or inconsistent manner would be "discretionary" and would not have to be changed.

403. It was observed that the proponents seemed to link the notion of discretion to the question of compliance with WTO law. However, it was suggested, discretion also arises when a Member has the choice of applying or not applying a measure.

404. In concluding the discussion, I took note of the concerns expressed and of the United States' responses. I suggested that it would be useful to have further discussions between delegations that have expressed concerns about the potential for abusing the system.

405. We also considered the final paragraphs of the section on "Order of analysis". The United States explained that the issue addressed here is the temporal time-frame of measures examined by panels. It noted that in practice, various situations have given rise to questions. For instance, could a measure that existed at the date of consultations but was modified before issuance of the report be analysed by adjudicative bodies? What of a measure that no longer exists at the time request for consultations or a measure proposed but not yet adopted at the time of the request for consultations?

406. The proponent considered it would be useful to provide guidance because of the lack of consistency in panels and Appellate Body's practice. It noted that one of the concerns related to the situation where a measure is in place at the date of the request for consultations but repealed when a panel is requested and is later put back in place. The question that such situation poses is whether this would prevent findings. In the proponents' view, the complainant should be able to proceed and have findings in order to avoid having moving targets. The United States also recalled that the object of the dispute settlement system is to resolve actual disputes, so if a measure has expired before consultations, the panel should not review it. For these reasons, the United States proposes to adopt a simple approach and select a single date to determine which measures can be reviewed. Under this approach, a measure that exists at the time of request for consultations can be reviewed. Other questions will need to be addressed as issues of compliance.

407. Some participants agreed that this issue would merit consideration because it is a jurisdictional matter currently not clearly addressed in the DSU. It was suggested it might be addressed through an amendment to the DSU instead of guidance to adjudicators. The proponent agreed that this is a jurisdictional issue and that it was useful to look at Article 4.2 of the DSU as a source of inspiration. The language of this provision was in present tense, which implied that the measure needs to have an effect at the time of the request (measures that no longer exist or do not yet exist do not have an effect).

408. Concern was expressed that the language used in the proposed text did not make clear whether it would be possible to challenge a measure that is not yet in force at the time of the request for consultations but is expected to be in force soon. Clarification was also requested on the situation with respect to measures capable of repetition. The United States explained that measures capable of repetition would not necessarily be within the jurisdiction of panels, and that the proposal does not intend to capture historical measures. As for measures not yet in effect but existing at the time of the request for consultations, the United States clarified that they should be captured. However, measures not yet in existence (proposed measures) should not, because there is no certainty as to whether they will ever come into existence. In the US view, the defining document should be the request for consultations and the basic question to be answered is whether the measure was in the request for consultations.

409. Concern was expressed at the notion that the scope of the panel's jurisdiction could not be expanded between the request for consultations and the panel request. One participant observed that, in its view, the defining document for the panel's jurisdiction was the panel request, rather than the consultation request. Whilst it agreed that there must be consistency between the two documents, it expressed difficulties with the fact that the proposal would leave out measures related to the request for consultations because they were not in existence at the time of that request

410. The United States acknowledged that there might be measures not expressly covered in the consultation request that could nonetheless be brought into the scope of the panel proceedings. Panels and the Appellate Body had recognized that a purpose of consultations is to improve parties' understanding of the measures at issue and have therefore accepted to review existing measures related to those expressly identified in the request for consultations. However, the United States did not believe that this allowed for the addition of measures that are different and not related to the measures in the consultations request.

411. I thanked participants for the useful exchange and took note of the elements of convergence and also of the concerns expressed. I encouraged the proponents and other delegations to consult further to try to reach common views.

Panel composition

412. On panel composition, we concluded the discussions in the G40, focusing mostly on paragraphs 7 to 9 of the European Union's revised text.

413. One participant questioned what would happen if, in light of very specific criteria provided by the parties, the Secretariat was unable to find 12 panelists as foreseen in paragraph 4. The European Union recalled that, as noted in previous discussions, setting very specific criteria would put the Secretariat in a difficult position. For that reason, paragraph 4 of the text provides flexibility to the Secretariat. Further flexibility is provided by paragraph 7, which is intended to address the situation of deadlock that may arise when the criteria are too specific.

414. With respect to paragraph 7, which envisages the possibility of a second list being presented by the Secretariat, the European Union clarified that the parties would need to broaden the criteria in order to allow a second list to be proposed.

415. It was asked when this second list would need to be presented, and how this would affect the 20-day period for resorting to the Director-General to compose the panel. The European Union explained that it did not see the proposal as changing this period. Accordingly, the procedural steps foreseen in the proposal, including the presentation of a second list under paragraph 7, might or might not have all taken place, but the right of a party to proceed to DG composition at that point should not be called into question.

416. The European Union also clarified that the situation of an “insufficient number of panelists available” referred to a situation in which, after the availability check, there are less than 3 or 5 persons left from the initial list. In that case, the Secretariat would need to propose a second list. The European Union explained that the second list would replace the first one, and the parties would get to exercise veto rights on that list as well.

417. We then discussed paragraph 8, which seeks to clarify the moment at which a request for a developing country panelist would be taken into account in the panel selection procedure.

418. It was asked what the phrase "at the moment of indicating criteria under paragraph 4" implied and what would happen if the request for a developing country Member panelist was made at a later stage. The proponent explained that this is intended to operationalize Article 8.10 of the DSU by clarifying the appropriate moment for requests to be made under this provision. Earlier discussions indicated that the appropriate moment to formulate the request would be when the parties communicate their preferences, allowing the Secretariat to screen the universe of potential panelists taking into account these preferences. In its view, there was no need for a particular additional period for the developing country Member to consider its own status in addition to otherwise considering its preferences. The European Union also noted that, as things stand today, the request is made at the moment of communicating preferences.

419. Clarification was sought on the operation of the footnote to paragraph 8, in particular with respect to its first sentence which provides that "[a]mong nominations with equal combined preference, the person(s) with the lowest degree of divergence between the parties' rankings shall receive priority." In response, it was explained that the intent is that the Secretariat would examine how the points were obtained and select the more consensual candidate.

420. It was also asked how this part of the proposal would work in combination with the separate requirement of making an effort to satisfy at least one of the parties’ criteria and how it would be ensured that a reasonable number of developing country citizens would be proposed. The European Union responded that this is in the hands of parties when formulating their criteria. The proposal does not, in their view, change the current situation, insofar as parties do not know the number of developing country panelists considered by the Secretariat.

421. Concern was expressed as to whether the operation of the footnote may increase the risk that the overall composition arising from the rankings would not result in a combination of panelists that represents the qualities parties were looking for, if it took into account only the ranking of the individual candidate. In that respect, the proposal may lead to having recourse more often to DG composition.

422. In response, the European Union explained that the requirement relating to a developing country panelist would be connected to the overall balance of criteria defined by the parties. The system does not foresee two separate rankings. However, it implies separate counting exercises to ensure an overall balance between preferences and the requirement of a developing country national panelist where requested. If parties exercise their ranking rights responsibly they should ensure that the developing country Member panelist criterion is placed at an adequate level in the ranking and reflects the overall balance of preferences expressed.

423. It was further asked how the Secretariat would determine "the needed number of persons" under this footnote. The European Union confirmed that this could be expected to be one, under the current text of the DSU. However, under the proposal, nothing precluded that the number be higher, if the parties' preferences implied that there should be more than one developing country national panelist.

424. Finally, a discrepancy was noted between the text of the last sentence of paragraph 8, which refers to a "developing country citizen" and the language of Article 8.10 of the DSU, which refers to a "panelist from a developing country Member". The European Union clarified that there was no intention of introducing the concept of citizenship as a defining element of this provision.

425. We then turned to paragraph 9, which clarifies how composition by the Director-General would work under this proposal. The European Union explained the bracketed language in this paragraph. It noted that the first set of brackets ("[if possible][to the utmost extent possible]") was intended to introduce flexibility in the Director-General's decision to select persons not included in the Secretariat's initial list. The second set of brackets ("[to the extent they are available,]") clarified that the screening of availabilities of the highest ranked candidates, carried out in the previous phase, should also be taken into account by the Director-General.

426. The European Union explained that the flexibility provided for the Director-General to select the panel outside the Secretariat's original list under the two square-bracketed alternatives was introduced following discussions with other delegations. The European Union noted that an objective of the proposal was precisely to limit the Director-General's discretion to nominate persons that the parties did not have a chance to consider. Therefore the European Union's preference is for the second bracketed text ("[to the utmost extent possible]"), to give a strong encouragement to the Director-General to stay within the universe of panelists identified by the Secretariat. The European Union clarified that the choice between the two alternatives gives an indication of how difficult the situation would have to be to entitle the DG to go outside the list.

427. Further clarification was sought on the types of circumstances that may justify such departure from the Secretariat's list. It was asked what criteria would entitle the Director-General to go outside the list, and whether he or she would have to explain why it was not possible to stay within it. The European Union explained it did not envisage a system of challenge or review of the Director-General's decision, or a requirement for the Director-General to justify a decision to go outside the list. Rather, the proposal, and the bracketed language in particular, was aimed at providing some indication to the Director-General, but he would remain free to appoint who he considers are the most appropriate panellists for the dispute in accordance with Article 8.7, which remained the operative legal text in this respect. It was suggested that a more accurate formulation might then be "if appropriate".

428. It was asked how the proposal, which ultimately entitles the Director-General to appoint panelists outside of the list, would differ from the current practice and whether this would reduce the impact of the limited list initially presented. The European Union explained that the proposal aimed at achieving a proper balance. In this sense it was useful to make the parties aware that when they have resort to composition by the Director-General, they may not get their preferences; however it was also important to limit to the utmost extent possible the Director-General's ability to go outside the list.

429. It was also asked how the Director-General would be expected to take into account the preferences of parties with respect to the names in the Secretariat's list, including their objections to the composition arising from the ranking process. The European Union considered that, as things stand today, a variety of situations is already possible, and the whole spectrum of situations that arise today would also occur under the proposal. The Director-General should have all the rankings and even consult the parties in order to exercise his or her responsibility with the best available information.

430. With respect to the last bracketed language in paragraph 9 ("[to the extent they are available,]"), the European Union explained that this was intended to clarify that the Director-General would not have to consider persons whom the Secretariat knows are not available. However, it did not necessarily mean that all names would have to be checked before the Director-General made his choice. Rather, the Director-General would make his determination taking into account the availability check previously made by the Secretariat and his own.

431. It was asked what meaningful role the Chairpersons of the DSB and other relevant organs that need to be consulted by the Director-General could play, if the Director-General is limited in his choice to the list initially presented by the Secretariat. The European Union suggested that the proposal does not change the current practice insofar as the Director-General would continue to receive input from Secretariat staff and would still have the discretion to give weight to the opinions expressed by the different Chairs in the process of consulting them. The ultimate requirement remained, under Article 8 of the DSU, for the Director-General to select the most appropriate panelists for the dispute at hand. The possibility of nominating panelists outside the Secretariat's initial list also provided flexibility to the Director-General in this respect.

432. Reference was made to the earlier proposal for a roster of panelists and the broad support expressed for this concept in a recent symposium. The European Union observed that this had not, in past discussions, received the same level of support among participants in the negotiations.

Third-party rights

433. This week we continued to consider the draft legal text on third party rights in consultations, building on the convergence around the approach proposed under the first item in the document. Discussions in the small group led to further drafting improvements. The following text was considered:

> "11. (a) Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements4, such Member may notify the consulting Members and the DSB in writing, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations.
>
> (b) The Member to which the request for consultations was addressed undertakes to accord sympathetic consideration to any representations made by the applicant Member concerning its reasons for desiring to be joined in the consultations. The applicant Member shall be joined in the consultations unless the Member to which the request for consultations was addressed notifies, in accordance with subparagraph (c), that it considers that the claim of substantial trade interest is not well-founded.
>
> (c) The Member to which the request for consultations was addressed shall notify the applicant Member and the DSB in writing within 7 days after the date of receipt of the request to be joined in the consultations whether it [accepts the request or considers that the claim of substantial trade interest is not well-founded] [considers the claim of substantial trade interest to be well-founded or not]."

434. In the G40, the proponents reported that they had come to an agreement addressing the remaining concerns expressed by some delegations. The first sentence of subparagraph (b) of Article 4.11 was now agreeable. Concerning the two options offered by the bracketed language of subparagraph (c), the proponents clarified that conceptually the intention of the proposal was not

to change the current practice, which allows notifications to express acceptances of third party requests in a simple way, without elaborating on whether the interest is well-founded. With that in mind, the proponents believed that the language in the first set of brackets captures this idea and is consistent with drafting of subparagraphs (a) and (b.) The proponents submitted this for the consideration of the group whilst noting that they were open to suggestions.

435. One delegation questioned whether the language in the first square-bracketed would not undermine the automaticity embodied in subparagraph (b). It pointed to the relation and the potential contradiction between the two subparagraphs: according to subparagraph (b), an absence of notification would imply that the third party request is accepted, while the language of subparagraph (c) required ("shall") the defendant to notify both the acceptance and the rejection of requests. This, in its view, left no option for not replying, and therefore for the automaticity to operate. With the option of the first squared brackets, it was not clear which of subparagraph (b) or (c) is the operative provision.

436. A discussion followed on the manner in which the substantive conditions in subparagraph (b) would relate to the notification requirements in subparagraph (c). The proponents suggested that it would be useful to keep separate the notion of automaticity of acceptance and the notification requirement. There was an obligation to notify within 7 days when the claim is considered not to be well-founded. If no notification is sent, the automaticity operates and therefore the third party request is accepted. Separately, an obligation to inform the DSB of which Members were accepted could be included.

437. The proponents agreed that from an intellectual point of view there was a need to choose between automaticity and notifying both acceptances and rejections. They suggested introducing on subparagraph (c) a sentence that would acknowledge the possibility of not reacting. Another possibility at which the proponents pointed is that the notification of acceptance be made only to the DSB for transparency purposes. Drafting suggestions were made to reinforce the idea of automaticity, such as clarifying the DSB notification. The proponents agreed with the idea of a separate DSB notification.

438. I noted that there appeared to be no conceptual difference of view and that delegations shared the common view that an absence of timely rejection implied the automatic participation of the requesting Member. I suggested that proponents and other interested delegations consult further on the exact language to reflect the common intention of participants and bring new language to the next meeting.

439. The discussion then moved to the second aspect of the proposal, relating to panel proceedings.

440. The proponents recalled that the proposal on Article 10 contains three elements: the first element in Article 10.2 (a), which aims to provide a time period to notify the interest in participating as third party and regulate the issue of late third party notification. The second element was in Article 10.2(b) (iii), which provides for the possibility to participate in each substantive meeting. Finally, the third element is that the panel may grant additional third-party rights only upon agreement of the parties. The proponents also explained that this constituted a departure from their original proposal and took account of the concern expressed of not overloading the work of parties and at the same time facilitating third-party participation.

441. With respect to the timeframe for expression of third party interest, support was expressed for codifying the practice of the 10 days from the date of panel establishment to express third party interest. However concerns were raised with respect to the proposed treatment of notifications made beyond this 10-day period. Several participants saw value in allowing some flexibility in this respect. At the same time, questions were raised about the potential impact on the panel's organization of its work and the potential additional burden for parties, as well as on the composition of the panel, if the notification was received from a Member who had a national serving on the panel. It was also asked on what basis the panel would decide whether to accept such "late" requests.

442. The proponents clarified that the 10-day period constituted a crystallization of the current practice and could serve as an incentive to submit the request within that period. The proponents

clarified that they did not believe that allowing late third party notification would change the panel's Working Procedures, and the requesting Member would bear the cost of a late request. Leaving the issue of acceptance of late third party notification to the panel's discretion was intended to take account of the fact that parties may be prone to disagreements and this should not hinder the acceptance of reasonable requests. The proponent suggested that, after consulting with the parties to the dispute on their concerns, such as the nationality of a panelist or disruption in the proceedings, the panel would take these considerations into account in taking a decision on the request.

443. In respect of the situation in which the late request was presented by a Member whose national is serving on the panel, it was asked whether this would call into question the composition of the panel as possibly inconsistent with the requirements of Article 8, and whether entrusting the decision to the panel in that case would create a conflict of interest for the panelist concerned. In response, it was suggested that this provision may rather provide the solution to the question, in that it would not be consistent with Article 8 to accept as third party a Member whose national was serving as panelist, unless the parties agreed to it.

444. It was also asked who would take the decision if a late third party notification came before the panel's composition. One participant also was not certain that this issue was within the panel's jurisdiction to decide.

445. There was some discussion of the current practice in respect of notifications made more than 10 days after the establishment of the panel. It was observed that such notifications had been made in some cases and accepted by panels. It was also observed that the "10 day" practice followed as a carry-over from the GATT was currently not a clear "rule". One delegation questioned the existence of a clear practice on late third party notifications. Another delegation referred to three cases in which panels accepted late third party notifications, as confirming the practice.

446. One participant questioned the need, from a policy point of view, to codify this situation rather than leaving it to panels' discretion if these cases constitute an exception. It also questioned the need, from a practical standpoint, for such an extension. In its view, the 10-day period Members have to consider whether want to join as a third party at the panel stage is sufficient, since it starts the time of the written request and comprises the period before the first and second DSB meeting. It was also suggested that providing for acceptance of late third party notification could undermine the 10 day-period. It was asked what would be considered a reasonable period to express interest after the 10-day period.

447. I took note of the points raised and of the proponents' readiness to work towards language acceptable to all. I noted the suggestion made to leave this issue as something that could only be waived by the parties and not left to the discretion of the panel.

448. The discussion then turned to the second aspect of the text on Article 10, that is, the question of the rights to be granted to third parties. I noted in this respect that the proponents had made it clear, in their proposal, that their suggestion to limit the discretion of the panel to grant further rights in addition to those proposed in paragraph 2(b) was conditional upon acceptance of those standard rights. So in order to facilitate a constructive discussion, I invited participants to focus specifically on whether this proposed approach could constitute a fair balance of rights and obligations.

449. The proponents suggested that the proposal only added one right: the right to take part in the second substantive meeting, which would include the right to make an oral statement and the right to respond to the questions arising in and from the meeting. Additional rights beyond those identified would be subject to the agreement of the parties. This would bring clarity and predictability in the extent of third party rights, and would also bring consistency in this respect. The proposal aimed at achieving a balance in the treatment of third parties in different cases.

450. One participant expressed support for enhancing third party rights at this level and codifying rights that have been given in practice. Several other participants also expressed support for enhancing third party rights whilst ensuring that such access would not be detrimental to parties. However some participants considered that a better balance was reflected in an earlier proposal

that envisaged third parties being allowed to participate actively at the first substantive meeting but only to be present at the second meeting, with flexibility for the panel to grant additional rights on a case-by-case basis. Other delegations also expressed concerns about the burden arising from the proposed enhanced rights for the parties, in particular in relation to the second substantive meeting. It was also observed that the separate proposal on transparency would address the issues of attendance at substantive meetings and access to written submissions.

451. The proponents explained the need for setting aside a third party session at the second substantive meeting to make oral statements and respond to questions. They distinguished the right to be present from active participatory rights, clarifying that, when meetings are open to the public, third parties would not need to be present in the room.

452. It was also asked whether the correct place for such codification was the text of Article 10 of the DSU rather than Appendix 3. In this regard, it emphasized that regulating third party rights in Article 10 itself could create an imbalance compared to the parties' rights, which are detailed in the Appendix.

453. I encouraged participants to consider the linkages between this proposal and the proposal on transparency (open hearings and access to submissions) given that both proposals are not, in my view, mutually exclusive. I took note of the need to have a balance, as a matter of drafting symmetry, between the expression of parties' and third parties' rights in the text. I encouraged participants to try to bridge formal and substantive differences on these issues.

Strictly confidential information (SCI)

454. This week we also completed the discussion of Appendix 5 of Canada's revised text on SCI in the G40.

455. Further discussion took place on the role of the requirements to act in "good faith" and exercise "utmost restraint" in resorting to the procedures. It was reiterated that a general requirement to act in good faith was already embodied in Article 3.10 of the DSU, so that it was not necessary to repeat it again in a specific paragraph of the text. It was suggested that a general reference to Article 3.10 in some preambular language, and encompassing all phases of the procedures, may be more appropriate.

456. It was questioned again what the purpose was of also referring to "utmost restraint" and what situations this was intended to cover, given that the existence of a definition and of a challenge mechanism would seem to define the situations in which recourse to SCI procedures was legitimate. It was also asked whether this reference implied that the definition should be subject to a strict interpretation. Was it intended that, even if information fell within the scope of the definition, the party concerned would be expected to consider not seeking adequate protection for it? In this respect, it was observed that, depending on the legal status of the information, it may not be possible to decide not to seek protection for it.

457. The proponent clarified that the notion of "restraint" was intended, like the reference to good faith, to prevent abuses. This would signal to Members the need to consider seriously whether to seek additional procedures, taking into account the associated burden on the proceedings, and the general objective of transparency in the proceedings. There was, the proponent argued, a distinction to be made between the nature of the information and its value to the right-holder, and the Member's assessment of the contribution of that information to the proceedings and its decision to submit it as SCI.

458. Possible scenarios of abuse were identified, such as a situation where only a limited part of the information contained in a document is genuinely strictly confidential, where it may be sufficient to identify that information, rather than the whole document, as confidential. It was observed however that even in that situation, such issues could be addressed through recourse to the challenge mechanism and the application of the definition. In response, the proponent observed that the objective would be to avoid having to get to that stage, by encouraging Members to exercise some judgement from the outset in seeking protection under SCI procedures.

459. One participant suggested that what seemed to be at issue was the notion that recourse to the procedures should be something of an "exceptional" nature. Another participant suggested that the right balance would be one that allowed the parties to present the case fully, thereby enabling the panel to have at its disposal the relevant information for its determinations, while preventing abuses. Although ultimately, the issue could be decided on the basis of the definition in the challenge mechanism, there was merit in encouraging Members not to resort lightly to the procedures. Specific drafting suggestions were made, including a suggestion to have a general sentence to the effect that "each party shall exercise utmost restraint in exercising its rights under this Appendix", or something equivalent. Canada expressed readiness to consider alternative formulations.

460. The functioning of the proposed challenge mechanism was also discussed. In particular, it was asked how the presumption of treatment of the information as SCI would function, and whether it was intended that the burden of proof within the challenge mechanism rest on the party challenging the designation. Canada confirmed that this was its intention. It was observed that, given the cumulative nature of the three elements of the definition, it would be sufficient for the challenging party to demonstrate that any one of the conditions was not fulfilled. Conversely, if the designating Member bore the burden of demonstrating that all three conditions were met, this may prove excessively burdensome. The proposed allocation of the burden of proof was also consistent, Canada suggested, with the presumption of good faith.

461. By contrast, under paragraph 4, the presumption would be reversed, in that it would be for the party alleging that protection was required to demonstrate that the information at issue warranted protection as SCI. It was acknowledged, in this respect, that the level of protection afforded under paragraph 4 was less extensive than under paragraph 3, since by hypothesis the information would have been made available initially without protection.

462. Specific drafting improvements were suggested in paragraph 3, including the replacement of the term "criteria" by "definition" and of the terms "the panel considers" with "the panel decides". Canada agreed with these proposed changes, and also agreed to similarly review, *mutatis mutandis*, the terms of paragraph 4.

463. It was also suggested that the language used to describe how the information and material containing it should be disposed of in the event that the party chose to withdraw it following a successful challenge could be clarified. Specifically, it was not clear how the "contents" of information differed from the information itself and how it would be possible to return "information" beyond the return of the physical document or support containing it. It was also asked whether it would always be appropriate to require that the information not be used, when its withdrawal may be the result of a determination that it was in the public domain or that the other party was its right-holder and did not seek protection for it.

464. In response, Canada suggested that this part of the text could be reviewed to distinguish between: (1) return of what can be physically returned; (2) destruction of what cannot be returned and (3) not disclosing information that was only known as a result of its presentation in the proceedings.

465. Canada also agreed to review the language with a view to making clear that if the designating party did not oppose the challenge, there would be no need to go through the whole procedure and obtain a determination from the panel.

466. In response to a question, Canada further clarified that in the event of procedures being sought by a third party, where the panel would have the discretion to adopt procedures or not, that decision would not be based on an assessment of whether the information at issue met the terms of the definition in Appendix 5. Rather, the procedures under Appendix 5 would only come into play after procedures had been adopted in accordance with Article 18.4 (at the request of a party or third party). In this respect, Canada explained that it was reviewing also the terms of Articles 18.4 and 18.5, to distinguish more clearly between the right to seek the adoption of BCI procedures (to be addressed in Article 18.4) and the rights and obligations arising from such procedures once adopted (to be addressed in Article 18.5).

467. In response to a question concerning the extent to which the proposed procedures would differ from past adopted BCI working procedures, and in light also of the related proposal for a DSB decision, information was made available to participants concerning BCI working procedures adopted by past panels.

468. In conclusion, Canada indicated its readiness to review the language of its proposal in light of the comments made, with a view to presenting a further revised text.

8. WEEK OF 7 MAY 2012[56]

469. This week, I held consultations on third-party rights, Member-control and flexibility, remand, strictly confidential information (SCI) and developing country interests.

Third-party rights

470. On third-party rights, we continued our discussion of the revised text presented by the Friends of third parties[57], both in the small group and in the G40.

Third party rights in appellate proceedings

471. In the G40, we first discussed third party rights in appellate proceedings. The proponents recalled that they did not propose new text in this respect but supported the proposal in the Chairman's text of July 2008.

472. Several delegations expressed support for allowing flexibility to join the proceedings at the appellate stage and expressed readiness to consider logistical and practical arrangements to address other delegations' concerns over the potential burdens that this may entail.

473. Some delegations reiterated their concern that this proposal would entail additional burdens both for the Appellate Body and for the parties. In their view, this would have a bearing particularly at the hearing: the more third parties there are, the less time there is for parties to make their case. This would move the process away from helping parties resolve their dispute.

474. It was observed in response that granting Members the possibility to become third participants on appeal did not amount to creating a new class of interveners, as they would have the same rights that existing third participants already have. It was also questioned whether the proposal would in fact increase the number of third parties overall, given that under current rules, the need to reserve rights at the panel stage also created an additional burden on Members wishing to reserve systemic interests. In response it was observed that WTO Members who would choose to defer participation until the appellate stage would have to assume that all panel reports would be appealed, which is not the case.

475. It was suggested that in any event the Appellate Body would have the ability to address issues relating to the number of participants by managing participation so as to ensure balanced proceedings, as it does now. One participant doubted whether the Appellate Body would in fact do this. A proponent observed that procedural arrangements should be made in the Appellate Body's Working Procedures rather than in the DSU. A suggestion was made to insert general language in the text to clarify that the participation of third parties should not have an adverse impact on the ability of parties to argue their case, while leaving it to the Appellate Body to organize the details of how to achieve this through its working procedures.

476. It was also suggested that under the current practice, parties normally know the views of third participants, because they have already been expressed at the panel stage. It was suggested that new participation at the appellate stage implied that third parties may bring new legal points, submissions and arguments that parties will have to address. It was argued that this would undermine the parties' ability to defend their interests and focus on the resolution of their dispute. It was asked whether this concern might be addressed by imposing limits on issues that new third participants may raise, or applying an additional threshold for participation.

[56] Previously circulated as JOB/DS/9 and JOB/DS/9/Corr.1.
[57] Circulated as JOB/DS/6.

477. The proponent observed that it is the appellants and other appellants who define the issues examined on appeal and that third parties, regardless of their number, do not have this prerogative. Even bearing in mind the principle of *iura novit curia,* they saw no potential for new third participants to bring new issues on appeal. The most that third parties can do, they argued, is add new arguments, support existing ones or provide more perspectives on already discussed issues. With respect to the suggestion of applying an additional threshold for participation, it was observed that, as things stand today, there is no limitation in practice to participation at the panel stage. In addition, developing a test to decide which Members should be granted third party rights would be very difficult.

478. There was also some discussion of what would motivate a Member to become third participant at the appellate stage. Concern was expressed that interest might be expressed on the basis of the outcome of the panel proceedings rather than of the issues, thus polarizing the debates. In response it was suggested that the current situation was no different, given that such polarization may also take place at the panel stage. It was also suggested that this may in fact be a more efficient allocation of resources, as Members must currently join at the panel stage without necessarily knowing if the issue of interest to them will be relevant. It was noted, as in earlier discussions, that not all the issues may have been apparent from the beginning of the panel proceedings.

479. One delegation emphasized the importance of the opportunity for all WTO Members to participate in proceedings especially at this stage, given the Appellate Body's role in providing legal interpretations of the covered agreements. A discussion followed on the difference between the exclusive authority of the General Council and Ministerial Conference to adopt authoritative interpretations of the WTO Agreements under Article IX of the WTO Agreement and legal interpretations developed by panels and the Appellate Body, which are binding only on the parties to the dispute. The importance of this proposal especially for developing countries facing resource constraints that were unable to participate at the panel stage was noted.

480. It was suggested that the obligation to reflect third parties' arguments would be more cumbersome, if there are additional third parties. In response it was suggested that this burden should not be overestimated. It reflected current practice and simply consisted of inserting the arguments into the report.

481. I took note of the views expressed. I noted that a number of delegations were supportive of enhancing third party rights at this stage, while understanding the importance of not creating additional burden on the process. I also noted delegations' readiness to explore ways to address these concerns.

482. We also considered the text itself, including the manner in which the interest to join should be expressed, the deadline for expression of interest, and the description of the rights of third participants.

483. With respect to the manner in which interest should be expressed, a discrepancy was highlighted between the text of the proposal in Article 17.4, which refers to the "interest to do so", and Article 10.2 of the DSU which refers to substantial interest in "the matter". This left it unclear how broad the scope for expressing interest could be. The question arose whether there should be a lower threshold to participate in Appellate Body proceedings compared to panel proceedings. A proponent stated that it was not suggesting a lower threshold applied, though the thresholds may be different, to the extent that the interest in participating may be more systemic in nature.

484. It was suggested to replace the text on the notification of interest in subparagraph (b) with the original G6 text, which mirrored Article 10.[58] It was also suggested however, that given the limited scope of appeals as defined by Article 17.6 of the DSU, the interest at issue could only relate to issues within that scope. In this respect, a reference to "the matter" could be too broad. It was proposed to change the language in subparagraph (b) to refer to "interest in the appeal".

[58] "Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10**, shall have an opportunity to be heard and to** ~~may~~ make written submissions to~~, and be given an opportunity to be heard by,~~ the Appellate Body." (See also TN/DS/25, p. A-10, proposed Article 17.4(c).)

485. The 5-day deadline in Article 17.4(b) for expressing interest was questioned, in light of the Appellate Body's revised Working Procedures. Members would have to join as third parties prior to receiving the notice of other appeal. At the same time, a later deadline may further complicate the serving of documents.

486. An alternative deadline calculated from the date of circulation of the report was first suggested, but it was observed that it should be possible to join *after* an appeal is lodged, rather than before. A relative deadline was suggested instead, referring to the deadline for the notification of other appeal, for example "no later than 3 days after the deadline for the notice of other appeal".

487. The proponents were ready to explore language based on a "no later than" formulation, but remained concerned about the servicing of documents. A participant observed that under the current Appellate Body Working Procedures, the deadline for submitting a third participant's written submission is 21 days after the filing of the notice of appeal. It was suggested that it was appropriate to leave to the Appellate Body to determine how the documents could be served on new third participants.

488. With respect to the rights of third participants, it was noted that wide latitude seemed to be given to third participants in subparagraph (c), which refers to the "right to be heard". It was also suggested, however, that this language was in fact narrower than the language on "participating" in subparagraph (b). One delegation suggested that it should be clarified what access third participants should have to documents other than the notice of appeal. It was also proposed to merge subparagraphs (b) and (c).

489. In concluding the discussion, I encouraged the two groups of proponents to look for common ground on the issues discussed, in consultation also with other interested delegations.

Third party rights in compliance proceedings

490. The proponents explained that they did not want to change the meaning of this provision and that the intention was only to propose clearer language. They understood that under the existing DSU language and also under the sequencing proposal, there is no obligation to request consultations prior to requesting a 21.5 panel but it is possible. They believed it was necessary to clarify that, where consultations are requested, third party interest could be expressed provided that the consultations are open.

491. I recalled that in the context of our discussions on sequencing, changes were proposed to Article 21.5, including with respect to consultations. Specifically, it was proposed to clarify in Article 21.5(c)(i) that "The procedures under this paragraph do not require the complaining party to request consultations under Article 4 before requesting the establishment of a panel." The proponents clarified that they were trying to avoid any ambiguity that may result from this formulation. This language, they argued, can be interpreted as either precluding or permitting consultations.

492. I invited participants to comment on two aspects: (i) first, whether there is agreement on the notion that, if consultations are requested in the context of compliance proceedings under Article 21.5, third party interest in these consultations may be expressed in the same conditions as under original proceedings; and (ii) if this is the case, whether the proposed reformulation of Article 21.5(c)(i) adequately captures this intention.

493. Several participants sought clarification of the basis for the proponents' perception that the language previously agreed was unclear. The proponents explained that conceptually they believed that all delegations agreed that consultations are optional and therefore remained possible. They explained that whilst they did not interpret the current text as precluding consultations, some delegations may interpret it that way. They noted that the negative phrasing could have some legal meaning and sought to provide further clarity.

494. I sought confirmation of participants' views in this respect. Participants confirmed their understanding that the intended meaning of Article 21.5(c)(i) was to allow but not require consultations to take place before a panel is sought under Article 21.5. Participants also confirmed

their understanding that, if consultations were sought in the context of proceedings under Article 21.5, third party interest could be expressed as in original proceedings. [59]

495. It was observed that the proposed text had no specific linkage with the issue of third parties, and that the original language was part of the previously agreed sequencing text. The proponents stated that the intention was not to reopen something that was agreed, but they invited participants to explain why the proposed revised language was not acceptable and to identify their concerns with it.

496. One participant noted that it would be more comfortable with an express reference to Article 4 in the text. A proponent responded that such a reference was unnecessary, in light of the general reference to "procedures under this Understanding" in the introductory paragraph. Another participant suggested that the proposed reformulation may be simpler and therefore preferable.

Third party rights in proceedings under Article 22.6

497. We then considered the text relating to Article 22, paragraphs 6 and 7. The proponents explained that third party participation in Article 22.6 proceedings is not currently addressed in the DSU and is left to the arbitrator's discretion. It saw value added to allowing third parties to participate and to clarifying the situation in the DSU.

498. I noted that that the text was based on separate proposals on Article 22.6 and 22.7. The proposal here relates only to: (i) the final sentence of paragraph 6.(a), proposing that express third party interest in an arbitral proceeding under Article 22.6 could be expressed in conditions comparable to those applicable to original panel proceedings; and (ii) the reference to paragraph 4 of Article 17, in Article 22.7, where the possibility of an appeal of the arbitral decision is proposed. Whether there should be an appeal of such proceedings was a separate issue, which was not yet resolved. This part of the proposal was therefore relevant only to the extent that an appeal is accepted, and the proponents of third party rights confirmed that they took no position on whether that should be the case.

499. A proponent explained that Article 22.6 arbitral proceedings deal with two issues: claims about the level of nullification or impairment and claims that the principles and procedures of Article 22.3 of the DSU have not been followed. They therefore deal with factual and legal questions. Under current practice, participation and its extent is left to the arbitrator's discretion. The value of the proposal was to address this uncertainty. The idea was to express that Article 10 of the DSU applies *mutatis mutandis*; therefore whatever rights were granted under Article 10 would also be reflected in Article 22.6 proceedings. Any Member wishing to become third party would know from the beginning of the process which rights will it be granted.

500. One delegation expressed support for this proposal, noting that arbitrators often struggle with limited facts and important legal issues and could benefit from information provided by the third parties. It also agreed that the reference to Article 10 *mutatis mutandis* was an efficient way to deal with this issue and enquired whether all Members would have to express interest afresh to become third parties in this phase. A proponent replied that since arbitration proceedings often come several years after the initiation of the original proceedings, it would provide more legal certainty to ask all Members to confirm their interest.

501. Another delegation was sympathetic to proposals to enhance third party rights but felt there was a need to strike a balance between enhancing rights and an efficient dispute settlement system. It suggested that the proposal seemed to go too far, and that preserving the arbitrator's discretion to grant third party rights on a case-by-case basis contributed to striking such balance.

502. Some delegations observed however that at the retaliation stage, where there is already a finding of inconsistency and a complainant with the right to suspend obligations against another

[59] See TN/DS/25, page B-4, para. 19: "As regards the role of consultations in compliance proceedings, there was general support in the extended small group for consultations being possible, but not required, prior to the establishment of a compliance panel, and an understanding that Article 21.5(c)(i) properly reflects this. Further, there was general support, given the reference in Article 21.5(c)(i) to Article 4, for third party participation being possible if such consultations are requested."

Member, the situation had a degree of urgency and is essentially bilateral in nature, involving calculations, trade data and econometric analysis specific to the relations between the parties, rather than systemic legal issues. A proponent observed that under the current rules, the arbitrator had no guidance on issues such as how to make determinations on the level of nullification or impairment, what should be the starting point of calculations, or the methodology to be followed. The approach followed in one case may be replicated in other cases and followed as an example. Other Members may therefore have an interest in contributing by submitting their views on the approach to be followed. Another proponent argued that claims relating to the principles and procedures of Article 22.3 of the DSU, including cross-retaliation issues, are very much of systemic interest, especially in today' system where arbitral rulings are not appealed.

503. One participant suggested that if legal issues of systemic interest arise, they should be addressed through another avenue, not *via* third party participation in 22.6 proceedings. One delegation agreed that arbitrations may raise legal issue of systemic importance such as the concept of benefits, the scope of the violation, the scope and extent of compliance and non-compliance, the concept of nullification or impairment, the meaning of equivalence or how to ensure equivalence. However, it noted that at the same time there were costs to involving other participants, especially at this stage where there was a strong interest in speeding up the process. It recalled that the practice to date was to allow third parties under very limited circumstances, as illustrated by the *EC - Hormones* proceedings.[60] Granting third party rights in this case had amounted more to a consolidation of procedures on almost identical matters, where the outcome in one arbitration could affect the outcome of the other. In its view, third party participation should continue to be allowed only under these very limited circumstances. One of the proponents noted that it would be reluctant to limit the rights only to Members that are engaged in similar disputes. It considered that the merits of the proposal were greater than its risks and that delays would be manageable through working procedures.

504. We continued this discussion in the G40. In that context, the proponents explained that the aim of their proposal is to allow Members to participate as third parties in respect of systemic issues in which they have an interest, including the application of procedures under Article 22.3 of the DSU. It was noted that arbitrators in previous Article 22.6 proceedings have exercised their discretion to allow third parties to participate. The proponents wished to expand this opportunity to allow third party participation as a right of Members, with a specification of the rights to be granted.

505. Certain delegations expressed support for this proposal as a way to provide more access to the system. Supporters indicated that third parties could provide useful contributions to assist the arbitrators in their task, such as establishing a methodology for determining the level of suspension, or determining the proper counterfactual to assess. They noted that panel and Appellate Body proceedings also involve factual discussion, for instance, in SPS or TBT disputes, but this has not served as a reason to limit third party participation. Furthermore, they noted that the decision to allow third parties in the context of panel proceedings does not depend on how many Members might be affected by a given measure.

506. Other delegations, however, expressed concern that the proposal tilts the balance too far by allowing participation by third parties in specific factual questions that do not have application outside the parameters of a particular dispute. These delegations characterized Article 22.6 arbitrations as primarily an area of bilateral relations, and one that does not determine the inconsistency of application of any of the covered agreements. In this light, some delegations indicated a preference for retaining the current practice in place to leave an arbitrator with discretion to grant access, as opposed to granting an automatic right. At this stage in the life of a given dispute, delegations also expressed concern with delaying the determination of an outcome by allowing third party participation.

507. In response to a question, it was explained that under current rules and practice, third parties requests were received in five of the cases in which Article 22.6 arbitral decisions have been issued to date.[61] Third party rights were granted by the arbitrator in two of these cases,

[60] See WT/DS26/ARB and WT/DS48/ARB.

[61] See *EC – Bananas III (Article 22.6) (Ecuador)*, WT/DS27/ARB; *EC — Hormones (Canada) (Article 22.6 — EC)*, WT/DS48/ARB; *EC – Hormones (US) (Article 22.6 – EC)*, WT/DS26/ARB; *Brazil –Aircraft (Article 22.6)*, WT/DS46/ARB; and *US – Gambling (Article 22.6 – US),* WT/DS285/ARB.

both relating to the *EC - Hormones* disputes, where the complainants became third parties in each other's proceedings.

508. One delegation suggested that it may strike the right balance to allow third party participation, not during the arbitration itself but during an appeal stage, in the event that Members agreed to allow the determination of arbitrators to be subject to appeal. It was felt that this might permit third parties to provide input on any issues that were determined to be of systemic value, without overwhelming the arbitration exercise itself. In suggesting this, it was recognized that the question of appeal of Article 22.6 arbitrations formed part of a separate discussion. Delegations further questioned what effect third party participation at an appeal stage would have if the nationality of a third party were the same as that of an arbitrator. It was offered that Article 8 of the DSU would not apply in this context, as arbitrators were not considered to be "panelists". Some delegations felt that issues of conflict or bias would not arise, as an arbitrator would be bound by findings on appeal regardless of what any third party argued. Others suggested that the code of conduct and rigorous selection process should shield against any such concerns. Moreover, it was noted that the nationality of Appellate Body Members was never an issue when considering disputes on appeal, and similarly, nationality should not pose a problem for arbitrators.

509. I took note of the discussions and invited proponents to continue their efforts with other delegations and report on further progress.

Flexibility and Member-control

510. In the G40, we continued a discussion of the draft parameters on guidance to adjudicative bodies, focusing on the interpretive approach to be applied in WTO dispute settlement.[62]

511. I first recalled that the discussion in the small group had confirmed an interest in a principles-based approach. I encouraged participants in the G40 to consider this issue in light of that objective. I also recalled that a number of clarifications had been made in the small group discussions, which are described in earlier summaries.[63]

512. The United States recalled that the aim of this part of the proposal was to address the manner in which adjudicators should deal with the often noted fact that when reaching agreement on text, negotiators may leave some aspects unresolved. In such situations, it was appropriate to recognize the existence of ambiguity, but it would not be for adjudicators to resolve it, nor should they undertake to fill gaps in agreed text. The four subheadings under this proposal were intended as complementary and informing each other.

513. Some participants indicated at the outset that, in their view, adjudicators are capable of resolving the issues before them and therefore they were not persuaded that guidance was necessary in this matter. In addition, concern was expressed that the guidance itself should not lead to further confusion.

514. Several delegations observed that the application of the relevant rules of interpretation, including Articles 31and 32 of the Vienna Convention on the Law of Treaties (VCLT), would provide the means for adjudicators to resolve any ambiguities arising in the interpretation of provisions of the covered agreements.

515. There was some discussion of the types of situations in which ambiguities may arise. It was observed that the notion of ambiguity was itself not without ambiguity. It was acknowledged that ambiguities may be deliberate ("constructive") or unintended. A distinction was also suggested between ambiguities relating to language and those relating to concepts. It was questioned whether ambiguities of different origins should receive the same treatment.

516. The proponent clarified that their intention was to provide guidance only with respect to situations in which an ambiguity remained after the application of the rules of interpretation of Articles 31 and 32 of the VCLT. Specifically, the situation at issue was one in which the

[62] See TN/DS/25, pp. A-29 and A-30.
[63] See JOB/DS/4 paras. 58 to 66 and JOB/DS/7 paras. 2 to 6.

adjudicator would have completed an analysis of the terms of the treaty in accordance with Article 31 and determined that this analysis left the meaning "ambiguous", as envisaged in Article 32, and where recourse to the supplementary means of interpretation of Article 32 has also not allowed the ambiguity to be resolved. In this situation, more than one interpretation would remain possible, and the intention was to provide guidance to adjudicators as to how to resolve this remaining uncertainty. The proponent explained that its proposed solution was to clarify that, in such situations, the ambiguous language should not serve to validate a finding on the claim or defence at issue, where this would require foreclosing one of the possible meanings of the language at issue. This, the proponent clarified, did not involve an enquiry into the underlying reason for the ambiguity.

517. One participant suggested that the application of the interpretive process under Articles 31 and 32 of the Vienna Convention is not so linear, and that the reference to ambiguity in Article 32 does not address the question of whether the adjudicator is bound to rule.

518. Clarification was also sought as to what exactly the proposal would imply, in terms of the adjudicator's ruling on the matter before it. It was clarified that the intention was not to have a situation of *non liquet*, but rather that the language at issue could not serve as basis for a successful claim or defense. In other words, the burden of establishing the claim or defence would not be met by the party bearing it, at least not on the basis of the ambiguous language invoked, if the meaning of that language remained ambiguous. This would ensure that the intentions of negotiators are respected, by preventing the adjudicator from deriving rights and obligations from language that lent itself to more than one interpretation.

519. It was questioned whether this implied that the solution would always be in favour of the defendant, if the interpretation that leads to an absence of violation is systematically favoured. In response it was observed that the guidance would also apply to situations where the ambiguity involves a defence. Concern was also expressed that the introduction of such guidance may generate an incentive for strategic behaviour, by systematically arguing the existence of ambiguity in order to escape a finding of violation.

520. It was also asked on what basis a possible interpretation would be preferred over another and whether ruling out one of the possible interpretations might not in itself diminish the rights and obligations of Members. It was further observed that to the extent that what was at issue was the interpretation of specific language, this language should be given meaning. It was asked how this approach would ensure that the *effet utile* of the treaty terms is preserved.

521. With respect to gap-filling, it was suggested that this was a distinct notion from ambiguity, although one participant observed that an inappropriate resolution of an ambiguity may result in gap-filling. The proponent agreed that this was a distinct notion but considered that the same principle should apply, i.e. that the adjudicator should not seek to resolve the gap by filling it. Rather, it would be for the Membership to do so. The proponent expressed interest in hearing views on whether the language proposed in the draft text, including that the function of adjudicative bodies is to resolve disputes over obligations undertaken and not to substitute for negotiators and re-write, reduce or supplement the agreed text, accurately captured this intention.

522. In concluding, I took note of the fact that the discussion had clarified the intended scope of the guidance. At the same time, it remained unclear to what extent participants wished to provide guidance to adjudicators on this issue, and if so, what this guidance should be. I encouraged the proponent and interested delegations to continue to discuss, including on the specific language highlighted by the proponent.

Strictly Confidential Information (SCI)

523. This week, we discussed a further revised text presented by Canada. Canada first noted that the DSU currently foresees that submissions to adjudicators are confidential and also envisages the possibility of making public some of this information. It proposed to have ultimately three levels of confidentiality: (i) the traditional confidentiality of information submitted to panels; (ii) transparency proposals that would have some information made public; and (iii) some information sufficiently important in value to make it more confidential than the standard confidentiality requirement.

524. Canada recalled that its original proposal was quite ambitious, and that a more "light touch" approach was later developed, moving away from a detailed mandatory procedure. Over the past year, valuable input received from other participants had allowed further evolution, to reach the current version, this combined simplicity and a guarantee of protection where necessary, including checks and balances to avoid abuse.

525. The revised version of the text, Canada explained, still had four components:

- DSU text, containing core rights and obligations;

- An appendix, less detailed than in earlier versions of the proposal to provide guidance to adjudicators, setting out minimum procedural requirements;

- Minor changes to panel working procedures in appendix 3;

- A draft DSB decision for a body of sample BCI working procedures adopted by past panels, providing flexibility for experimentation and information-sharing and the development of best practices.

526. Canada then explained that under Article 18, the order of paragraphs 4 and 5 had been rearranged, so that paragraph 4 sets out the right to have the procedures established, while paragraph 5 addresses the requirements relating to the procedures once adopted. With respect to the duration of protection, two options were proposed in paragraph 5, reflecting suggestions made in earlier discussions.

527. Participants were appreciative of Canada's effort to revise the text in light of earlier comments and discussions.

528. With respect to Article 18.4, it was discussed whether one or two sentences would be preferable, to express the situations in which protection should be granted. It was explained that two aspects were intended to be covered: first, the right to seek protection for information from the initial panel stage and to ensure the continuity of this protection through to subsequent stages of the proceedings; and secondly, the possibility of seeking protection for the first time at a later stage if necessary. The proponent expressed readiness to explore possibilities of expressing this in a single sentence, though it was unclear how easily the concepts of right to protection and continuity of protection could be expressed simultaneously.

529. It was questioned whether it would always be necessary to adopt procedures for BCI protection at the later stages of the proceedings, for example if the information protected at the panel level was not relevant to the issue under appeal. It was suggested that language such as "where requested by a party, the [adjudicator] [Appellate body] shall adopt procedures …" might address this concern. It was also suggested that if the procedures in the Appendix were intended to apply to adjudicators other than the panel, the reference to the panel in the challenge procedure should be adapted.

530. There was also a discussion of the extent to which protection might be needed for the first time later than the panel proceedings. It was suggested that Article 21.3 arbitral proceedings could be covered, even if the likelihood of SCI being submitted at that stage was low. Questions remained on the extent to which it would ever be legitimate to present new information, and thus seek protection for it, at the appellate stage. The proponent explained that its intention was to allow protection to be sought at every stage where it is admissible, without seeking to alter existing rules as to what was or was not permissible in this respect. In particular, there was no intention of modifying Article 17.6. It was asked to what extent the proposal might not nonetheless indirectly amount to an amendment of this provision, to the extent that it would imply that new evidence may be submitted at the appellate stage. The proponent expressed readiness to consider further how this issue might be addressed, for example through language such as "nothing in these procedures will prevent the submission of new information at a later stage if it is otherwise allowed".

531. It was observed that the commentary submitted with the text suggested that third parties may seek BCI protection, to be granted at the discretion of the panel, but this intention was not

expressly reflected in the text of Article 18.4. In Article 18.5, on the other hand, reference was made to procedures adopted pursuant to Article 18.4 at the request of third parties, despite the fact that third parties did not enjoy a right to obtain the adoption of procedures under Article 18.4.

532. A participant wondered if the reference to the "same level of protection" being granted throughout the proceedings should appear in Article 18.5 rather than Article 18.4, as it related to the level of protection. Canada suggested that this aspect relates to both the granting of the protection and the level of protection.

533. It was questioned whether it was necessary to specify in Article 18.4 that incorporation of the principles of Appendix 5 could be "directly or by reference". It was also asked what the consultations with parties in 18.4 would relate to, if all the points included in Appendix 5 had to be incorporated in the procedures anyway. The proponent clarified that Appendix 5 addressed only the definition and the challenge mechanism, and the procedures to be adopted by the panel would likely also include many other aspects. While the elements included in Appendix 5 would have to be incorporated, other aspects could be consulted on.

534. Some participants sought clarification of the extent to which parties would be free to depart from any of the terms set out in Appendix 5, including the definition and the challenge procedures, to suit their particular needs in a given case. They saw merit in allowing a degree of flexibility in this respect, where the parties agree to it. Clarification was sought in this context on the meaning of the expression "minimum" provisions and whether it implied a distinction in the status of different elements of the Appendix. The proponent clarified that the intention was not to allow any departure from the terms of the Appendix, and that this expression referred to the entirety of the provisions in the Appendix. This would not preclude a higher threshold for protection, but it would not be possible to adopt a less demanding definition or to eliminate the challenge procedure as contained in the Appendix. In the proponent's view, providing excessive flexibility in this respect would defeat the object of the procedures.

535. A participant requested clarification of the role of the concept of "exceptional circumstances" in Appendix 5, and at what stage in the procedures this would come into play. The proponent suggested that this notion would not come into play at the stage of adopting the procedures, but at the stage of submitting information. The exceptional circumstances would not need to be justified, as good faith would be presumed.

536. Some participants also continued to have concerns over various elements of the definition, including the requirement of "serious harm to essential interests". It was asked how a panel would be expected to assess this criterion and whether it was desirable to require it to engage in such an analysis. Canada considered that the notions of serious harm and essential interest were fairly widely used in judicial settings, and could be left to adjudicators to provide more specific meaning thereto. Concern was also reiterated with respect to the requirement of "reasonable efforts" to maintain the information secret and its implications with respect to the treatment of leaked information. With respect to the notion of information being "lawfully" held, the proponent clarified that this was intended to signal a requirement of ownership, though it stressed that the lawful owner would often be a private entity, distinct from the Member seeking protection for the information in the proceedings. It considered that the definition, which was inspired by domestic practices, reflected elements commonly found and was applicable in a variety of situations.

537. It was questioned whether the definition of SCI properly belonged in the Appendix or whether it should rather be located in the main text. The proponent was not persuaded that there would be added value to having it in the provision itself.

538. It was also asked whether the references to concepts taken from intellectual property law, such as "public domain" and "undisclosed information", were appropriate. For example, the notion of "public domain" may in fact be quite limited in scope. It was suggested that an examination of the definition of some of these terms under the TRIPS Agreement may assist in clarifying their meaning. The proponent expressed willingness to review this to ensure that the terms used would properly reflect the intended scope of coverage.

539. Clarifications were sought as to how the procedures addressed information subject to protection under Annex V of the SCM Agreement. It was questioned in particular how procedures

under the DSU, to be adopted by a panel, could bind a facilitator established under the SCM Agreement. It was clarified that the intention was to ensure that information already made available under Annex V would be entitled to protection under SCI procedures in panel proceedings, and also that the initial procedure under Annex V be covered, at least from the time that panel proceedings start.

540. With respect to the relationship between SCI protection and the confidential status of information submitted under Annex V procedures, the proponent suggested that just as SCI protection was granted in addition to and beyond the basic DSU status of confidentiality of information submitted to adjudicators, nothing precluded information protected as confidential under the SCM procedures from also qualifying as SCI once panel proceedings started. The proponent was open to discussing protection of information as SCI under facilitation procedures going backwards, but at minimum it sought coverage going forward once the panel was established. It also acknowledged a temporal problem in the formulation of this part of the text, and was open to looking into that.

541. I took note of the positive response of participants, and also of the questions raised. There seems to be a common view that SCI protection is important, and I encouraged Canada to try to take on board the comments heard as much as possible. I indicated that I would like to revert to this issue as soon as possible based on progress to be made in near future.

Remand

542. This week, we continued our discussion on remand.[64] In discussing this issue in September, we had initially focused on two broad conceptual issues: (1) the question of who should initiate remand, and (2) whether a "double-implementation" procedure was desirable, or whether the entirety of the findings and recommendations – including those implicated within the remand procedure – should be adopted and implemented together.[65]

543. In November, the G6 had presented a non-paper in which it shared further thoughts about these two basic conceptual questions. Also in November, Korea proposed an alternative approach reflected in draft legal text.[66] We had not had an opportunity to discuss this text at length until now.

544. This week, the G6 initially identified certain areas of convergence between the proposals, such as the fact that it would be for the Appellate Body to identify the situations giving rise to remand and for a party to initiate remand proceedings. It also identified several issues for discussion, including: (1) how we should express who can remand; (2) how a request for remand to the original/reconstituted panel is couched; (3) how to address concerns over delays; (4) how to address issues of split implementation and whether language is required on how to address split implementations; (5) how to address requests for multiple remands; and (6) what happens in the event that parties decide not to remand.

545. We then had a threshold discussion on who should trigger or initiate remand, and the role a complainant or respondent may play within a remand mechanism. Both proposals under discussion contemplate that either a complainant or respondent may wish to seek to initiate a remand proceeding under certain circumstances. Both proposals also envision that the Appellate Body would need to indicate situations in which it could not "complete the analysis", which would give rise to a situation where a party may request remand of a particular claim or defence. Delegations agreed that parties should retain the ultimate decision as to whether or not to proceed with remand.

546. Delegations discussed whether either party to a dispute should be allowed to request remand. In this context, delegations considered several hypothetical scenarios, to clarify how the findings and recommendations of the Appellate Body would be expressed, including in the situation where the Appellate Body upheld a finding of inconsistency in respect of a given claim, but was unable to complete the analysis in respect of a defence raised by the respondent in relation to that

[64] See TN/DS/25, pp. A-11 and A-12.
[65] See JOB/DS/4, paras. 6 to 24.
[66] See JOB/DS/5, paras. 20 to 36.

inconsistency. The questions arose of what findings the Appellate Body would make in that situation and what recommendations would flow from these. [67]

547. It was suggested that the procedure should not result in a situation where implementation obligations might arise with respect to an initial violation, while the outcome of the defense remained uncertain. It was questioned whether it would be the case that a respondent would have an interest in initiating a remand proceeding in such a situation, if no recommendation has been made with respect to the initial finding. Clarifications were also sought as to how, under the second proposal, the notion of the scope of the findings being "enlarged" or reduced would apply, including in these situations.

548. Participants also considered the question of implementation of the findings and recommendations in remand situations. There are still different views as to whether, as a result of a failure to complete the analysis and a desire to conduct a remand proceeding, there should be a "single adoption" for the ensuing panel and Appellate Body reports or whether there should be a "double adoption" system.

549. As envisioned, under a single adoption procedure, the entirety of the Appellate Body's findings in a dispute would be reflected in a single report and adopted in one instance, after the conclusion of a remand proceeding. Under a double adoption scenario, it would be possible to adopt the initial Appellate Body report, containing any completed findings (together with the relevant panel report), and proceed with implementation in respect of those findings while unresolved aspects of the dispute are addressed through remand. Thereafter, there would be a second adoption of the report or reports addressing those claims or defences that were addressed during a remand proceeding.

550. Delegations discussed how these proposals might impact on the implementation procedure, taking into account a Member's domestic political constraints. Concern was expressed that a double or split adoption procedure would result in every subsequent step of the proceedings, including the RPT for implementation and any compliance proceedings, also being "doubled".

551. Clarifications were also sought as to what would happen, under both proposals, in the event that no remand was sought, and how the findings and recommendations of the Appellate Body would be expressed in both cases.

552. Following this discussion, I encouraged both proponents to work together to identify areas of further convergence in their proposals. I also encouraged other delegations to work with proponents. The proponents confirmed their interest in continuing to discuss their proposals in the build-up to our next discussions.

Developing country interests

553. A group of proponents of developing country interests[68] presented this week, as a non-paper, a concept note setting out issues of common concern.

554. They observed that whatever outcome is achieved in this negotiation, it will have to contain issues of interest to developing countries. These should be at the heart of a solution, so that developing countries and LDCs can access the system. Until now, they observed, not many developing countries have been able to take part in dispute settlement proceedings. There were Special and Differential Treatment provisions in the DSU, but these were generally not effective. The group wanted to give teeth to these provisions to enable greater participation of developing countries in dispute settlement.

555. The group explained that the concept paper is an effort to unify previous proposals and incorporate new elements of discussion to enrich the debate. It identifies several areas of interest:

[67] This question was discussed with reference to three scenarios identified in earlier discussions last year. See JOB/DS/4, para. 7.

[68] This non-paper was presented jointly by the African group, Cuba, Ecuador, India and Pakistan.

- Adequate timeframes, to address specific needs of different disputes and adjust timeframes to accommodate difficulties faced by developing countries;

- Inducing compliance. The proponents are seeking ways to level the playing field in various ways, including taking account of the impact of the measure on the economy of the developing country complainant, support from other Members or administrative sanctions;

- Mitigating the costs of litigation;

- Regulating access to participation of non-parties and non-Members, including to:

    - give clarity to how Article 13 of the DSU may be used (*amicus curiae* briefs) and;

    - enhance third party rights in the panel and appellate stages.

556. Participants welcomed the proponents' joint effort in presenting this paper. It was observed that this was a sign of engagement and commitment to these negotiations and of proponents' eagerness to engage other participants in a discussion.

557. Several participants shared the proponents' view that many developing countries faced difficulties in engaging effectively in dispute settlement proceedings, and agreed that developing country interests needed to be an integral part of any outcome in these negotiations. It was suggested that levelling the playing field should be a key objective in this respect.

558. The document was acknowledged as a good basis for discussion, and participants expressed readiness to engage constructively in discussions, including at a conceptual level, on the basis of the document. It was also commented that a number of these issues had been discussed in the past, including on the basis of specific text, and that this would facilitate discussion.

559. At the same time it was observed that "the devil is in the detail", so that it would be necessary also to look at specific language in order to make a full assessment of the proposals. The proponents clarified that their intention was precisely to generate a discussion that could give rise to the development of draft legal text, taking into account the views and concerns of other Members. This would provide the best chances of developing text that would address the concerns of both the proponents and other participants, and thus be agreeable to all. The proponents illustrated with examples how they have been working towards specific solutions that could give practical meaning to various provisions and concepts identified in the concept note.

560. Some participants noted that the broad objective should be to ensure that the dispute settlement system is user-friendly and accessible to all Members, so that the issues did not necessarily present themselves in terms exclusively of developing country vs. developed country distinctions. The wide variety of circumstances that different Members may face in practice, including among developing countries, was noted.

561. Several participants offered preliminary comments on some of the specific issues identified in the paper, expressing support for the objectives, or raising questions.

562. I thanked the proponents for their important effort in presenting this paper, which I believed represented much work and was an important contribution to our work towards a successful conclusion of the negotiations. I noted that many of the issues in this document have been discussed already and for some time, though not always at the level of detail that would have been desirable. Positions had remained somewhat unclear in some areas, and it would be important now for all participants to engage constructively in an open discussion towards legal text. I noted that this document presents a very good opportunity to find common ground on these issues.

9. WEEK OF 4 JUNE 2012[69]

563. This week, I held consultations on remand, Member-control and flexibility, developing country interests and strictly confidential information (SCI). We also briefly took stock of ongoing work on third party rights and remand.

Remand

564. On remand, we continued the discussion of the G6 and Korea's proposals in the small group.

565. From previous discussions, my sense was that further work was required on the threshold issue of who should trigger remand and the issue of single vs. split adoption and its consequences on the implementation of findings. This week I suggested that we focus on clarifying a series of more technical issues on which some progress could be achieved without prejudice to views on these two conceptual issues :

a. how a request for remand should be formulated;

b. whether the panel's mandate should also include the possibility of making legal findings or should be limited to making only factual findings; and whether the remand panel would be able to deal with new factual evidence;

c. what happens in the event that no remand is sought; and

d. the question of multiple remands.

How a request for remand should be formulated

566. The G6 was of the view that the proposal in the Chairman's text,[70] based on their own proposal, was solid, having been crafted in response to Members' requests for flexibility. The proposal addressed the formulation of remand at Article 17*bis*, specifying that the referring party, without prejudice who that may be, should request remand in writing to the original panel, notifying the DSB and third parties.

567. Korea observed that its proposal did not differ substantially from the G6 proposal: the Appellate Body would clarify what issues need to be remanded and formulate tentative conclusions. Either party could then request these issues to be referred to the original panel for remand. If a party decided to exercise the option of remand, it should notify the DSB and other parties in writing. Korea also clarified that the mandate of the remand panel is framed by the Appellate Body's tentative conclusions and the party's remand request, so that the remand panel is confined to analysing only those issues identified by the Appellate Body as needing remand and referred to it by a party.

568. Clarification was sought on situations where more than one issue is remanded and whether, in such situation, two separate remand proceedings were envisaged, or a single proceeding with multiple remands notified at the same time. In response, Korea stated that if the claimant requests an issue to be referred to remand and the responding party also refers another issue to remand, only one remand procedure would take place, in which both issues would be examined. The G6 agreed with Korea's understanding that both requests would be folded into a single panel procedure, although some language may be needed to address the timing of requests.

569. It was asked whether the remand panel's mandate would extend to the examination of a defence that was not considered by the original panel because it had found no initial violation. In that situation, if the Appellate Body reversed the panel's finding and remand was required to complete the analysis of the initial claim, would the remand panel also have the mandate to consider the relevant defence? In response, both proponents considered that if the respondent had not raised the defence before the original panel, it would not be for the remand panel to examine it. However if the defence had been raised, then they believed that the remand panel

[69] Previously circulated as JOB/DS/10.
[70] See TN/DS/25, Article 17*bis*, para. 2, at p. A-12.

should be authorized to analyse it. It was also suggested that it would be for the Appellate Body to identify what is to be remanded and to include the defence in the scope of findings needed to complete the analysis. In light of this clarification, it was further asked whether the proponents intended to change the current practice since, as things stand today, the Appellate Body would only analyse a defence if a breach has been found. The proponents clarified that the proposal does not alter the current practice, whereby defences put forward by a responding party are analysed in original panel proceedings even if they were not part of the request for the panel's establishment.

570. Another scenario was considered, whereby the original panel would exercise judicial economy with respect to the chapeau of Article XX of the GATT 1994 because it finds that the requirements of the relevant subparagraphs are not met. In that scenario, would the respondent be entitled to remand this issue to the panel? The proponents confirmed that, in their view, this question could be remanded to allow the analysis to be completed.

571. A further scenario was identified, whereby the Appellate Body would reverse a panel's finding that the panel request failed to meet the specificity requirements of Article 6.2 of the DSU. It was asked whether the remand panel would be competent to examine the entirety of the claims not initially ruled on. It was further asked how the Appellate Body should describe the scope of remand in a situation where the panel has declined to exercise jurisdiction on certain claims. The proponents explained that the proposal relied on the Appellate Body' ability to identify the findings needed to complete the analysis and enable a party to seek remand on specific issues. They also suggested that situations in which the panel has declined to exercise jurisdiction may not be covered by the remand procedure, which was not a "magic bullet" to solve all problems, but was intended primarily to deal with factual deficits. A participant noted that it had understood the G6 proposal to be more ambitious and suggested that a remand procedure that was narrowly limited in scope would fail to meet the objective of facilitating a prompt resolution of the dispute. It suggested that the timing implications of remand should be assessed in light of the overall perspective of settling the dispute: a broader remand would provide timesavings to the extent that parties would be able to avoid having to launch a new dispute on issues that would otherwise be in the scope of the remand.[71]

572. A delegation raised concerns about the definition of the scope of the remand referral, noting that in remand proceedings, there is an implicit constraint on what a party can identify for remand, based on what the Appellate Body has identified. In this respect, the proposal sets a limitation on what a remand panel is entitled to examine (in paragraph 3 of Article 17 *bis*), but no similar limitation is expressed on what a party can bring before the remand panel. In this delegation's view, in light of the increasing number of challenges on the basis of Article 6.2 of the DSU in original panel proceedings, it was important to anticipate similar challenges on requests for remand. Korea clarified that it did see such constraint embedded in paragraphs 2 and 3 of Article 17 *bis* and that the combination of these provisions is an attempt to put boundaries to the issues that can be remanded by the parties. The G6 agreed with Korea that both provisions create concentric circles: paragraph 3 sets out the theoretical maximum scope of the panel mandate and paragraph 2 constrains such scope further; as a result the panel may only examine what is indicated by the Appellate Body and what the parties have chosen to remand.

573. It was also suggested that the use of term "issues" in the G6 text creates some uncertainty as to the intended scope of the remand panel proceedings: Article 6.2 of the DSU uses the terms "measures" and "legal basis", Article 7 uses the term "matter", and the proposal seems to introduce a new term: "issues". The G-6 confirmed that this concept was intended as distinct from the concepts of "measures", "legal basis" or "matter" and that on this aspect, the proposal deferred to what the Appellate Body would define as the "issues" that need to be clarified to enable completion of the analysis.

574. It was asked what the form of the referral would be and whether it would be through a letter addressed to the Chairman of the panel and notified to the DSB. The G6 observed that, notwithstanding further drafting improvements, on principle it would be satisfied with requesting parties to send a letter to the Chair of the panel, copied to the DSB and circulated to the Membership.

[71] See also the discussion reflected in paragraphs 17 to 19 below on factual vs. legal findings.

575. A difference was noted between the two proposals on the timing of the referral: whilst the G-6 proposal provides that a party shall make referral prior to adoption of the Appellate Body report, Article 17*bis* in Korea's proposal states that the referral takes place "by the time the Appellate Body specifies". Korea clarified that this language served to provide a deadline beyond which if no party seeks remand, the Appellate Body would issue its report according to its scheduled timetable. It also clarified that the Appellate Body would indicate what issues need to be remanded in tentative conclusions, which would not be issued in the form of a report or circulated to the Members. These tentative recommendations would only be issued to the parties and will identify and describe the issues that need factual elaboration.

576. Korea also confirmed that these tentative recommendations would not be drafted as an interim report. Therefore, no input is expected from the parties after having read them. Korea further explained that the timeframe to request remand would be taken into account in the period for completion of the Appellate Body's work.

Factual and legal findings

577. Participants then considered whether the remand panel should be entitled to address both facts and law or whether its mandate should be limited to making factual findings, leaving the completion of the analysis to the Appellate Body.

578. One delegation questioned whether it would make sense for the purpose of solving the dispute to have a purely factual remand and suggested that a remand procedure that could get to the bottom of the dispute was desirable. In response, Korea stated that the limitation to factual issues draws on the existing practice of the Appellate Body, which already completes the analysis, and that the proposal was intended to facilitate this more systematically. It agreed that remand was conceivable for both type of issues but it would then be a new proceeding. It was unsure that such a complex procedure could be completed in 60 days, which is the timeframe envisaged in this proposal. If the remand procedure covered legal issues, it could also open the door to multiple remands and appeals. Korea considered that a balance needed to be found between the benefits of a holistic approach and the efficient resolution of the dispute.

579. Some delegations were sympathetic to the concerns of wanting to expedite the procedure but considered that there were benefits to having two stages of analysis. It was suggested that if a panel is able to examine both facts and law, it may have a better sense of what factual findings are required and this would avoid situations where the panel might provide the Appellate Body with facts that are not those that it needs to complete the legal analysis. It was also suggested that there is a rationale for the system that is currently in place, whereby the panel examines the facts and the law and the Appellate Body reviews the legal determinations made by the panel. It was suggested that the introduction of remand should not alter this division of functions which was important in increasing Members' confidence in the system, and that limiting the panels' role to fact-finding would diminish the parties' right to obtain two views and a full review of issues in dispute.

580. It was questioned how much time would in fact be saved with the imposition of this limitation to the remand panel's mandate. Korea suggested that the duration of compliance proceedings could serve as proxy for an estimation of the time involved. It also noted that factual remand was the other side of the coin of single adoption of report. It saw the benefits of full remand proceedings but stressed that they would require more than 60 days.

581. The proponents clarified what type of evidence a remand panel could review. The G6 stated that it saw a similarity between their proposal and Korea's in that both were silent on the question of new evidence. It explained that the rationale for this was that this issue will have to be dealt with on a case by case basis. Korea also did not wish to preclude the possibility of examining new evidence if necessary and relevant to the issues being remanded. Both proponents wanted to accord a certain level of discretion to panel to review new evidence if that was necessary to assist in completing the analysis.

582. One delegation recalled that the source of problem addressed with the remand procedure is the lack of factual findings and it was therefore important to be able to consider new evidence if that is needed to complete the analysis. It also observed that, if the complainant remained in

control of the issues to be remanded, it would be in a position to judge whether remand should focus on narrow factual findings where there is already evidence on the record or whether it wants a finding on broader issues. It emphasised it was important not to introduce too many restraints into an instrument that is to be a tool to solve problems.

What happens if no remand is sought?

583. The G6 suggested that the question of what happens if no remand is sought only arises in cases of single adoption because the clock then starts ticking. It explained that under the G6 proposal, the timeframes, deadlines and automaticity of procedure are retained. Korea explained that under its proposal, if no remand is sought, completion and circulation of the Appellate Body's report would take place as scheduled. In this respect it noted the commonalities of both proposals.

584. A participant asked what implications a decision not to pursue remand would have for subsequent compliance proceedings. The situation considered was of an implementation measure addressing a finding of inconsistency, where the complainant argues in compliance proceedings that the measure is inconsistent with another aspect, that could have been remanded in the original proceedings but was not. In the view of the G6, this question related to the jurisdiction of compliance panels, which was not modified by the remand proposal: if a compliance panel is entitled to look at this aspect of the measure under the current rules, it would remain so under the proposal, and if it is not, the proposal would not broaden the scope of the compliance panel's jurisdiction. One delegation saw useful guidance on this issue in a case concerning anti-dumping determinations where the panel and the Appellate Body found in favour of complainant on one issue, not on the second. If the measure taken to comply modified the first aspect and not the second, the respondent could raise this question on the unchanged part of the measure, to the extent that the measure was a measure taken to comply. In response it was questioned whether the existence of a remand procedure would not in itself introduce a modification, such that it may be inappropriate to assume that existing solutions would continue to apply unchanged if remand were introduced.

585. I took note of the useful contributions and proposed to resume the discussion of remand in our next meeting. Overall, my sense was that the discussion revealed that the two proposals converge on a number of practical aspects, such as the form or the timing for requesting remand. The discussion also reflected a common understanding of the allocation of roles between the Appellate Body and the parties in the process of referral and the scope of the remand panel's mandate. Under both approaches, the remand panel's mandate is the result of the Appellate Body identifying the issues that need to be clarified in order to complete the analysis and the parties choosing which of these identified issues are ultimately remanded.

586. Without prejudice to the proponents' respective positions as to which party should trigger remand, it appears that both proposals also concur on the possibility of remanding both breaches and defences, and on the possibility for the remand panel to analyse untested defences so long as they were raised in the original panel proceedings. Both proponents also coincide in their assessment that the purpose of a remand procedure is primarily to solve issues of factual deficiency, and that new evidence could be examined by the remand panel where relevant.

587. It was less clear, however, to what extent the proponents intended situations in which the panel had declined to exercise jurisdiction to be covered by the remand procedure (for example in the event of claims not having been examined at all by the original panel, on the basis of an initial finding under Article 6.2 of the DSU).

588. The discussion also suggested that a number of participants favoured a broad remand procedure, covering also issues of law. This was deemed to better contribute to the prompt resolution of the dispute and to preserve the rights of parties to a double review of legal issues. Korea remained concerned that such a procedure could not take place within a 60 day-deadline but recognized that both types of remand, factual and legal, could be envisaged.

Flexibility and Member-control

589. This week, we also completed a discussion of the proposals on Flexibility and Member-control in the G40.

590. Discussions first addressed the draft parameters on the use of public international law in WTO dispute settlement.[72] The US indicated that it had continued to talk to delegations since the small group meetings and confirmed its readiness to discuss this further with interested delegations in light of the interest previously expressed in a more principled-based approach. The US explained that the basic idea in these draft parameters is to address the relation of WTO dispute settlement to public international law, which has arisen in a number of cases but not yet received a clear answer.

591. The US recalled that WTO dispute settlement is designed to apply the WTO covered agreements, and not other international law. Hence, WTO adjudicators are not called upon to *apply* or enforce other rules of public international law. It clarified that where the WTO covered agreements themselves referred to or incorporated provisions of other agreements (such as in the TRIPS Agreement), these would become relevant by virtue of this incorporation.

592. This was a distinct question, the US explained, from the possible role of public international law in the *interpretation* of the WTO covered agreements. In this respect, Article 3.2 of the DSU foresees a role for public international law, in that it refers to the customary rules of interpretation of public international law. It has been understood that the Vienna Convention on the Law of Treaties (VCLT), in particular Articles 31 to 33, contains such rules. Article 31, the US explained, refers to "relevant rules of international law applicable in the relations between the parties"[73] as an aspect to be taken into account in interpreting treaty terms. This raised the question of what this notion encompasses.

593. The US observed that references have sometimes also been made to other sources of international law without it being clear what their role might be. For instance, the ILC commentaries refer to certain maxims and other principles that are not codified in Articles 31 to 33 of the VCLT. Discussion has also arisen, the US explained, about references made by adjudicators to the procedures of other tribunals. This in the US view, is not an "application" of public international law but rather involves the adjudicator logically drawing from the experience of other adjudicators to develop its own approach to procedural issues. The overall purpose of the guidance was for the Membership to provide greater clarity as to how it expected adjudicators to address these issues, rather than leave them guessing the extent to which public international law may be relevant to their task.

594. In the discussion that followed, delegations sought further clarification of the problem being addressed through the proposal. Some delegations questioned the need to provide guidance through a DSB decision, which may unduly freeze the issues. In particular, what constitutes customary law was a matter that is by nature evolutionary. Concern was also expressed that an attempt to codify generally uncontroversial notions may introduce unwanted ambiguities or rigidities. It was suggested that incremental development through successive cases may be more suited to developing adequate solutions and that resolving some of these delicate issues through general guidance may be overly ambitious. It was also suggested that caution should be exercised in seeking to limit the use of public international law by adjudicators. The US explained that a purpose of providing the guidance through a DSB decision was to allow flexibility for future evolutions. In response it was questioned whether such a decision, which may not be easy to modify, would really be flexible.

595. There was also a detailed discussion of the notion of "other rules of international law applicable between the parties" in Article 31.3(c) of the VCLT. In this context, the US explained that its proposal was to clarify that, for the purposes of interpreting the WTO Agreement, the expression "applicable in the relations between the parties" refers to all WTO Members (i.e. the parties to the WTO agreement) and not just the parties to the dispute. Other rules of international law applicable between a limited number of WTO Members only would therefore not be considered

[72] See TN/DS/25, p. A-27.
[73] See Article 31.3(c) of the Vienna Convention on the Law of Treaties.

to be "applicable in the relations between the parties" within the meaning of Article 31.3(c). This would ensure that the interpretation of provisions in the WTO covered agreements would not differ depending on who the parties involved in the dispute are, and that WTO Members who have not agreed to be bound by certain other rules under international law would not see their WTO obligations affected by such rules.

596. Rules arising from an RTA were cited as an illustration of a type of "rules of international law" that may be applicable between the parties to the dispute but would not qualify as meeting the requirements to be taken into account in the interpretation of WTO covered agreements under Article 31.3(c). It was noted that this was a distinct question from whether Article XXIV of the GATT 1994 might be invoked in justifying the WTO-consistency of measures taken in the context of an RTA.

597. It was also clarified that the interpretation rules contained in Articles 31 to 33 of the VCLT apply to WTO dispute settlement not as treaty text meeting the requirements of Article 31.3(c) but because, as elaborated in early cases and since then, they have been acknowledged to constitute "customary rules of interpretation of public international law" within the meaning of Article 3.2 of the DSU.

598. The US also sought the views of other participants on whether any evolution had, in their view, taken place since the VCLT that would suggest a need to update the reference, and on whether provisions other than Articles 31 to 33 of the VCLT (such as Article 28 on non-retroactivity of treaties) also reflected customary rules of interpretation. One participant suggested in response that Article 28 appeared to set out a principle of international law of a substantive rather than interpretative nature.

599. It was questioned whether the reference in the proposal to an ILC commentary explaining that certain maxims and general principles were not included in the codification of Articles 31 to 33 might be confusing. It was observed that in the quoted passage, the ILC suggests a broad degree of discretion for the adjudicator to use such maxims and principles, which seems at odds with the US intention of delineating limited uses of international law by WTO adjudicators. The US considered that the cited passage suggests a two-fold message: first, that such maxims are not part of customary rules, so that they are not required to be followed and secondly, that it remains possible to apply them out of common sense. The US was ready to review this part of the text in this light, but considered that the key question remained what guidance members wished to provide in respect of such issues.

600. In closing this discussion, I noted that these were important issues and encouraged participants to pursue further discussions to clarify their intentions in this respect.

601. The discussion then turned to the proposal on panelist expertise in Article 8.2, on the basis of the text previously considered in the small group.[74]

602. Several participants confirmed that they had no difficulty with the objective of this proposal. It was also observed that this objective was fully complementary with the separate "panel composition" proposal.

603. Some clarification was sought as to how the requirement of "specific expertise in the kind of matter at issue" was intended to operate in combination with the seemingly more general concepts of wide spectrum of experience and diverse background. In response it was clarified that the intention was to ensure that among the panelists, but not necessarily in each individual panelist, specific expertise relevant to the case at hand would be found. As to what such expertise might consist of, this would be informed by the preferences expressed by the parties in each case.

604. One delegation agreed that panelists should be well-qualified but had reservations on the added value of this text. It considered that broad knowledge of WTO issues could be useful, especially in cases involving more than one covered agreement. In response, it was noted that the text did not seek to modify the requirements outlined in Article 8.1, which related to the qualifications expected of panelists generally. It was also observed that the language of the

[74] See Job/DS/7, para. 22.

proposed Article 8.2 was drafted in hortatory terms ("should"), allowing for a margin of flexibility in its application.

605. I took note of the fact that a number of delegations see merit in this proposal, and also noted the doubts of one delegation as to its benefits. I encouraged the proponent to meet with that delegation to discuss this further.

606. In conclusion, I noted that we had completed our discussion of these proposals, but much work remains to be done. I encouraged the proponents and other interested delegations to continue to work together on these issues.

Developing country interests

607. On developing country interests, we returned to the concept non-paper presented by the Africa Group, Cuba, Ecuador, India and Pakistan in May.

608. The proponents confirmed that they were continuing to work towards draft legal text reflecting the ideas contained in this paper. They explained that the non-paper, combining several earlier proposals and bringing together complex topics, was intended to make Members aware of what was being worked on and gather their views.

609. I encouraged participants to provide as much guidance as possible to the proponents concerning their level of comfort in respect of the various possible solutions identified in the non-paper and on the parameters that would make it easier or more difficult to support specific proposals, encouraging them to engage in a frank and constructive exchange.

610. Some participants welcomed the suggestion by the proponents that draft legal text be put forward issue-by-issue to the extent possible, if this allowed the discussion to become text-based as soon as possible. It was noted in this respect that comments at this stage could only be preliminary, though it was also observed that the existing Chairman's text already provided some basis for a text-based discussion. The proponents committed to expediting the drafting process in order to present some draft legal text by the next meetings.

611. This week, we considered the first three topics addressed in the non-paper: (i) adequate timeframes to address the specific needs of developing countries; (ii) adjusting the remedies available in order to induce effective compliance; and (iii) mitigating the cost of litigation in dispute settlement procedures.

Timeframes

612. The non-paper proposes adjustments to various stages of the proceedings to accommodate the specific needs of developing countries, including a longer consultation period, adequate time for the preparation of submissions to panels and a longer RPT for implementation.

613. Some delegations noted that recent experience showed an increasing number of developing countries actively involved in disputes and well integrated, which suggested that Members had been able to work under DSU timeframes.

614. A participant noted that an assumption on which the proposal seemed to be based was the existing financial and human resources constraints. However, the longer the process, the more costly it will become. The proponents responded that there was no assumption that lengthening timeframes would reduce costs. However, human resources constraints implied that a developing country would have to either ask for more time to prepare or appear before the adjudicator unprepared.

615. The proponent of the separate proposal on time-savings observed that a quicker process generally appeared to serve the goal of a prompt resolution of disputes. It enquired whether the proposal to extend timeframes would apply to all developing countries or whether it was envisaged to target specific subcategories such as LDCs or SVEs or according to other criteria which would reflect specific problems of access.

616. Other participants also asked whether the extended timeframes would apply to all developing countries, regardless of whether they are complainant or respondent in a case and regardless of the development status of the other party. Some delegations expressed concerns, should the extension of timeframes for developing countries apply only in disputes between developing and developed Member countries. This would raise, in their view, due process issues and would also undermine the basis of the request as grounded in the beneficiaries' development needs. For this reason, one participant urged the proponents not to limit their proposal to situations in which the other party is a developed Member. A delegation noted that, as a developing country, 90% of the disputes in which it had been involved concerned another developing country and asked the proponents to clarify paragraph 4 of the non-paper, which stated that adjustments shall be made "at the request of the developing country respondent".

617. In response, the proponents observed that these questions and concerns had already arisen in the context of earlier discussions on the nature of special and differential treatment provisions. Bearing in mind that, ideally, it would be better for the proposal to benefit all developing countries, the scope of coverage of each proposal would be considered individually. In principle, given that the intent of the proposal is to address asymmetries between developed and developing countries, the proponents considered that if the dispute involved two developing countries, normal timeframes would apply and there would be no extension. However, they also stated that as far as the respondent's first written submission was concerned, the respondent deserved more time, regardless of the development status of the complainant. The proponents committed to looking into the scope of each proposal. As for the inter-linkages with the time-saving proposal, the proponents offered to meet with the proponent of that proposal at the drafting stage.

618. A delegation voiced concerns about trying to introduce new categories of Members. It emphasized the many difficulties developing country face in meeting the DSU deadlines (such as mobilizing resources, drafting documents in English, logistical arrangements), regardless of their size. It stated that these problems needed to be addressed, instead of re-categorizing Members on the basis of criteria such as size, territory, population or growth, which would be very sensitive.

619. With respect to the timeframe for consultations, the proponents noted that procedures under the DSU were premised on the presumption of good faith by Members. In light of such presumption, the proponents believed that giving Members more time before establishing a panel would contribute to solving disputes prior the establishment of a panel and avoid the dispute moving to a further stage.

620. Several delegations raised questions and concerns with respect to lengthening consultations. A first question that arose was what was the exact time period that was to be extended and whether the proposed extension of the timeframe of consultations related to existing 60-day and 30-day periods, or whether it related to the timeframe proposals reflected in the Chairman's text. Other delegations expressed concerns that it may lengthen the process as a whole and preclude a prompt resolution of the dispute. Other delegations questioned the need for explicitly introducing such adjustment since in practice, consultations extend beyond the 60 day-period when there is a genuine interest in solving the dispute. They pointed out that the DSU already includes the possibility of lengthening the consultations timeframe by agreement between the parties.

621. One participant stressed that any changes introduced should be workable and was not persuaded that this would be the case for this part of the proposal.

622. The proponents explained that the aim of this proposal was to make the best use of the time allocated in the process and provide an opportunity to developing countries who truly wish to avoid a dispute to do so. The proponents emphasized the various internal coordination problems developing countries face, such as hiring lawyers or making logistical arrangements to attend consultations, which in their view justify a longer consultation period. As for the exact period in the consultations the proposal sought to extend, the proponents stated that they were still at the drafting stage on this aspect, but a 30-day timeline to hold consultations was without doubt too short, although ideally, overall timeframes needed to be extended as well.

623. As far as the timeframe for the respondent's first written submission is concerned, the proponents explained that it was generally admitted that complainants currently have the benefit

of time on their side. They felt that the respondent, especially a developing country, may not be able to present its views properly in the short timeframe allocated for the first written submission.

624. Questions were raised again concerning the exact time-period that proponents wished to extend and whether the proposed extension took as a basis the Chairman's text. It was noted that the Chairman's text already contained a provision directing the panel to grant such extensions,[75] and that a workable mechanism could be envisaged, to have panels ruling on such extensions.

625. One delegation raised due process concerns with respect to having two distinct deadlines, one for developed country Members and an extended one for a developing country Member. The proponents replied that Appendix 3 of the DSU already embodies two different deadlines for the complainant and respondent's first written submissions.

626. Finally, concerning the length of the RPT, a participant noted that the current rule was to determine the shortest time period possible, and asked how the proposal would relate to the existing guideline for arbitrators. The proponents noted that as things stand, 15 months was the guideline and they would consider how to phrase the draft text and whether it should identify 15 months as a minimum. Another delegation noted that there was already language in the Chairman's text[76] which would direct panels to take into account the developing country status of the implementing Member, which would ensure the proposal's workability. It also noted that in the current practice, arbitrators tend to recognize that developing countries may face particular difficulties in implementing rulings.

Inducing effective compliance

627. The proposal seeks to level the playing field between developing and developed country Members, in the absence of effective compliance by a developed country, in the following ways:

- The calculations of the level of nullification or impairment of benefits would include the impact of the measure on the economy of the affected developing country Member;
- A developing country Member seeking to retaliate may cross-retaliate without resorting to procedures set out in Article 22.3 of the DSU;
- If compliance is not achieved, collective enforcement by other Members would be allowed,
- If there is still no compliance, administrative sanctions would apply against the Member concerned.

628. The proponents indicated that, as noted by past panels, the obligation to bring measures into conformity is a fundamental element of the system and a basic element in the DSU. All players at all times should respect all their obligations. In their view, prolonging non-compliance can inflict huge damages on developing countries and can unravel important segments of their economies. The proposal therefore provides tools to effectively induce compliance.

629. Participants asked whether and, if so, why the proposals would not apply when the other party is a developing country. It was observed that inducing compliance was a very important element for the overall effectiveness of the dispute settlement system. This was as fundamental for developing country Members as it was for developed country Members and disputes between developed countries were sometimes not complied with either. Some delegations noted that the development status of countries is not the only reason for which compliance was sometimes not achieved and that the problems relate more to imbalances in economic powers or domestic implementation difficulties. The proponents considered that despite the overall good record of compliance there were still pending cases which showed that the system is ineffective for some Members. This needed to be addressed to make it effective for all Members.

630. One delegation agreed with the statement in the non-paper that "prompt implementation of the rulings and recommendations of the DSB is essential to ensure the proper functioning and

[75] See TN/DS/25, p. A-8, Article 12.10 (grey-shaded text).
[76] See TN/DS/25, p. A-3, footnote h.

credibility of the dispute settlement system." However, it could not reconcile this principle with the proposal to extend the implementation period.

631. A clarification was sought on the second sentence of paragraph 6 of the proposal ("(…) on the basis of the level of nullification or impairment of benefits, including the impact of the measure on the economy of that developing country"), noting that, under current rules, the suspension of concessions is based on the nullification or impairment caused by the inconsistent measure. It asked whether the proposal sought to impose suspensions that would exceed the impact of the inconsistent measure and asked them to clarify how the proposal was related to the notion of "equivalence". The proponents noted that Article 21.8 of the DSU already required the DSB to consider the impact of the measures on the economy of the developing country Member concerned and that the proposal intended to give meaning to this provision.

632. One delegation noted that the proposal on cross-retaliation would be the easiest aspect to put in place in terms of workability, since the current system already recognized cross-retaliation.

633. Several delegations enquired about the concrete mechanisms by which collective retaliation would be put in place. One delegation alluded to the concept of auctioning retaliation rights. A delegation stated that collective retaliation would fail the test of workability and that it could not envisage a workable system in which a partner would retaliate on behalf of another Member. One delegation expressed concerns with the use of the term "enforcement".

634. The proponents replied that a simple mechanism of collective retaliation could be envisaged, under which a Member could look for a partner to retaliate in situations where cannot do it. They welcomed any ideas delegations may have on how to create an effective mechanism of collective retaliation.

635. Several delegations enquired about the notion of "administrative sanctions". The proponents referred in response to the administrative measures already foreseen in the WTO Agreement when Members fail to promptly provide their contribution to the WTO budget.

636. A delegation noted that with the imposition of administrative sanctions, the situation would move from a two-party situation to an organization-wide situation. It questioned who would decide that there is absence of compliance and who would take the decision of imposing administrative sanctions. Should it be the DSB, it noted that according to the current rules, this should be done by consensus. It wondered whether this aspect of the proposal would also imply a need to amend the Marrakesh Agreement and questioned whether such amendment formed part of the current mandate to review the DSU.

637. It was also observed that the non-paper highlighted difficulties developing country Members have in exercising their retaliatory rights, and yet, the proposal aimed at increasing such retaliatory rights. It was suggested that if developing countries already face particular challenges in implementing retaliatory rights, providing them with increased rights was not likely to induce compliance, if the problem of exercising those rights remains.

638. A delegation suggested that compensation be explored as an alternative means to induce compliance, by strengthening Article 22.1 of the DSU. It was noted that the main problem under the current system was that compensation was voluntary and that implementing Members do not offer compensation. On the contrary they rely on the fact that the other party will not enforce its retaliation rights. The proponents took note of this suggestion and said they would be looking into strengthening compensation. They also welcomed any other suggestion delegations may have to induce prompt compliance.

Mitigating the costs of litigation

639. The proponents seek to establish rules concerning the allocation of litigations costs, in particular for small developing countries and least-developed countries. In particular, they contemplate (i) the creation of a special fund to cover litigation costs for developing countries and (ii) setting out specific rules for the allocation of litigation costs between the parties to the dispute. Litigation costs would be borne by the party who brings an unsubstantiated complaint or that imposes a WTO-inconsistent measure, as determined by a panel and/or the Appellate Body.

640. The proponents explained that the non-paper combined two earlier proposals, the idea being that the WTO would house a fund to finance lawyers' fees in disputes between developing and developed country Members, covering the costs for developing country. The fees of the Advisory Centre on WTO Law (ACWL) would be used as a basis for this.[77] The proponents explained that, whilst the ACWL contribution to developing countries' access to the dispute settlement system is very important, it is still insufficient to provide access to all developing countries. The proponents explained that they had received a number of questions in bilateral meetings, such as who would pay the fund, where the budget would come from, what the timing of the contributions would be, or how many times countries could access it. They intended to present a comprehensive matrix on these aspects. With respect to the allocation of litigation costs between the parties, the proponents mentioned that one Member had expressed concerns about these costs being punitive, and noted that such allocation of costs is in place in a number of national jurisdictions as an administrative aspect of disputes.

641. Delegations asked what should be understood by "litigation costs" and whether all phases of the proceedings would be covered. The proponents confirmed that in principle none of the dispute settlement stages would be excluded from this notion.

642. Several participants asked for clarification of the concept of "unsubstantiated claims". Concern was expressed that a single unsubstantiated claim could determine who pays the costs of the entire process. The proponents clarified that the term used was "unsubstantiated complaint", precisely to avoid debates on the number of claims that would need to be successful, and that it would be left to the adjudicator to make this determination. Some delegations stressed the definitional challenges and noted that in most cases it is difficult to determine who has lost or won a case.

643. Some delegations drew a parallel with the notion of "frivolous claims" in investment cases, and cited NAFTA Chapter 11 dispute resolution as an example, noting that despite litigation costs being regulated they were not allocated in all cases. Proponents took note of these comments and stated that they would look into other dispute resolution mechanisms as guidance for drafting their proposal.

644. Some delegations expressed concerns about the use and abuse of litigation costs, which could have a deterrent effect on legitimate disputes or create an incentive to bring disputes that would not have been brought otherwise. Whilst considering that the financial costs for using the WTO dispute settlement system was a legitimate concern, they remained cautious on the manner in which it should be addressed. In that respect they expressed a preference for the fund as opposed to litigation costs.

645. A delegation questioned whether conferring on panels and the Appellate Body the authority to allocate litigation costs would change the nature of the dispute settlement system. It noted that the allocation of costs is a very different issue from that of WTO-law consistency. In addition, it noted that reports only acquire a binding force after they are adopted by the DSB and therefore questioned whether the allocation of costs prior to DSB endorsement of the existence of an inconsistency would raise an issue. The proponents contended that under the current rules, arbitrators already make a determination of costs when dealing with proceedings under Article 22.6 of the DSU and that the proposal would only be introducing other aspects.

646. A delegation enquired about the relationship between the fund and litigation costs. The proponents clarified that litigation costs would only be allocated in the event the fund is exhausted. They also explained that the fund was not only the first step but also the preferred option, insofar as it was perceived as more neutral and had not been criticized by delegations as punitive.

647. Other delegations raised practical operational questions such as when the payments would take place and questioned whether the fund would ever be exhausted, if the provision foresees refund in case of unsubstantiated complaints. One delegation raised concerns about using ACWL fees as a benchmark, considering that those were too high, and suggested that recourse to the ACWL was hindered where conflicts of interests arose.

[77] See http://www.acwl.ch/e/disputes/Fees.html for current fees.

648. The proponents committed to revert to the questions raised at the next meeting.

Strictly confidential information (SCI)

649. We continued and completed a discussion of the proposal on SCI, based on Canada's revised text of May.

650. With respect to the proposed Decision by the DSB, Canada explained that the objective was to allow Members, including those who may not have been parties to previous proceedings involving BCI procedures, to have access to the range of procedures adopted to date. This would allow them to draw from this experience in the development of specific procedures in future cases. It would still remain for each panel to decide on the working procedures to adopt for the purposes of a given case. In response to a question, Canada observed that this was a matter of transparency on institutional arrangements for the benefit of Members, distinct from the transparency issues raised under separate proposals.

651. A number of delegations expressed support for the proposed decision, and sought clarifications on its operation. Canada explained that the document referred to in the decision would contain BCI procedures adopted by past panels and attached to their reports, as available as of the time of the DSB decision. With respect to subsequent proceedings, the decision would contain an instruction, going forward, for the Secretariat to make available SCI working procedures adopted by adjudicators, upon completion of the relevant proceedings. The proposal referred to availability of these procedures on the WTO website as the most convenient way to access such information, but this did not prejudge exactly how this should be done. For example, documents containing these procedures could be circulated and then accessed through a dedicated page on the website.

652. A clarification was sought as to whether Annex V procedures under the SCM Agreement were intended to be covered also. The proponent suggested that resolution of that question may follow from resolution of the relationship of BCI to annex V proceedings in the rest of the text.

653. Discussions then focused on other aspects of the text not fully addressed in earlier discussions. There was a discussion in particular of the two square bracketed options under Article 18.5, expressing the scope and duration of the protection to be granted to SCI. Canada recalled that the second option had been introduced in light of comments and suggestions received in earlier discussions, to address concerns arising from the original formulation. Under the first option, a mechanism for withdrawal of the designation was foreseen, and the approach was based on the duration of protection. This had been noted to raise some practical questions as to how and when such withdrawal would take place. Under the alternative approach (second square bracketed text), the duration of protection was not directly addressed and no mechanism was required to implement it. Under this approach, protection continued to exist beyond the duration of proceedings, and the information could be used only for the purposes of the dispute. In this respect, it may be a preferable approach. This approach also avoided discussion arising as to whether an SCI designation confirmed by a panel would be binding on the parties and would prevent a subsequent unilateral withdrawal of the designation.

654. There was some discussion of how information that is withdrawn from the proceedings as a result of a successful challenge would be treated. Specifically, it was questioned what the difference was between the treatment of such withdrawn information and information protected as SCI, if in both cases parties were precluded from using it. In response, it was explained that the two types of information received fundamentally different treatment within the proceedings: withdrawn information would no longer be part of the record and could therefore not be used in the proceedings, while SCI would be fully within the proceedings. With respect to restrictions on the use of withdrawn information outside the context of the proceedings, it was asked whether the text precluded the use of such information even in situations where the panel might have determined that the information did not warrant protection because it was in the public domain, and whether the restrictions on use of such information were in fact stricter than those imposed under Article 18.5 for information protected as SCI. It was clarified that the intention was that withdrawn information could not be used to the extent that it had been obtained through the proceedings, but this would not preclude its use on other bases if it was otherwise known.

655. In this context, it was also highlighted that it was very important for holders of sensitive information to have a clear assurance that, if SCI status is denied in the proceedings, any information submitted could safely be withdrawn without being disclosed. It was also suggested that, in any event, information that had been made available in the proceedings, whether ultimately determined to be SCI or not, would normally constitute confidential information under Article 18.2. Hence, its disclosure was also precluded on that basis.

656. Some discussion followed on situations in which information that should have remained secret may nonetheless have come to public attention though inappropriate acts of disclosure, and how this should be treated. In this respect, a participant observed that it may not be relevant how the information came to be in the public domain, if that was the outcome.

657. In response to a request, Canada confirmed that it would be possible, under the proposal, for parties to agree to allow information that did not meet the definition to be protected, in that the designation would only be reviewed if challenged. It believed that this was unlikely and that the challenge mechanism would provide checks and balances in this respect. This was part of the overall balance of interests reflected in the procedure: the panel was bound to adopt procedures if requested, but it retained control over the contents of the procedures to be adopted, other that the elements in Appendix V. The parties then controlled the designation of information as SCI in the absence of a challenge.

658. Concern was raised that in a situation where information submitted by another party was alleged to be SCI, it would be difficult to recall the information if it had already been widely disseminated. It was suggested that such adverse impact could be minimized if it were made clear that in the event of such situation, the information should be treated as SCI pending the completion of the panel's assessment of its designation. Canada considered that such risk existed and was difficult to avert, but that the type of preventive measure suggested could perhaps be taken by a panel without this needing to be expressed in the text.

659. Concern was also reiterated on the notion of "exceptional circumstances" in paragraph 2 of Appendix V. Canada confirmed that it was not intending to introduce a test to be applied by a panel, but rather an encouragement to use the procedures rarely. It was suggested that this might be expressed differently, for example referring to resorting to the procedures "only when necessary".

660. In response to a question, Canada also explained that it saw no contradiction between the protection of SCI and the confidentiality of information under Article 18.2. The proposal would introduce an additional level of protection for some information, but the confidentiality of all information under Article 18.2 would remain.

661. In concluding this discussion, I noted that it would be important to continue to work at the technical level towards clean draft legal text at least on those aspects where there is basic agreement on the concepts. I suggested that at this point, based on discussions to date, that included at least the following aspects:

- that WTO adjudicators would be required to adopt SCI procedures if requested by a party;
- that a third party may also request the adoption of SCI procedures but this is not a right;
- that whatever level of protection is provided at one stage of the proceedings should be carried over into the next phases if requested; and
- that a procedure should be available, under which the adjudicator could ascertain whether the information for which protection is sought merits such protection.

Stock-taking

662. In the G40, the proponents of third party rights reported that they were continuing discussions among themselves and remained available for further discussion as necessary.

663. The proponents of remand also indicated that they had had constructive meetings together and were collaborating towards perhaps presenting a single document showing areas of convergence and divergence to facilitate further discussion.

664. I encouraged proponents of issues in respect of which the work has not yet been completed to make every effort to be ready for the next set of meetings, for completion of this phase of the work.

10. WEEK OF 16 JULY 2012[78]

665. This week, I held consultations on timeframes, including developing country aspects. We also briefly took stock of on-going work on other issues.

Developing country interests/Timeframes

666. This week, proponents of "developing country interests"[79] submitted draft legal text on the first issue addressed in the concept paper presented in May,[80] i.e. timeframes.

667. During last month's discussions, it was noted that there was a linkage between this and the separate Australian proposals on time-savings. For that reason, we considered both sets of proposals together, seeking to identify points of potential convergence and divergence between them and to discuss inter-related aspects of both proposals.

668. In light of the fact that the two sets of proposals do not cover exactly the same stages of the proceedings, we proceeded on the basis of the chronological order of proceedings under the DSU. I also invited delegations to raise and discuss potential linkages with other proposals that may have timeframe implications.

669. As background to the discussion, information was made available to participants on experience to date with respect to timelines under the DSU.[81]

Consultations

670. The legal text presented by proponents of developing country interests addresses different aspects of consultations, under Articles 4.10 and 12.10. In introducing the text, the proponents explained that earlier discussions of the concept paper had been very productive in providing them with ideas for the present text and that they had also had useful consultations with Australia to examine commonalities and differences between their respective proposals.

671. We first considered the joint proponents' proposed amendment to Article 4.10 of the DSU, on developing country interests in consultations. They explained that many in the group felt that this provision, as currently drafted, is not specific enough. The proposal therefore seeks to clarify the content of the obligations as well as who bears the burden of it. They propose to add to the text two concrete examples of obligations that clarify the scope of the general obligation: (a) in disputes brought between developing and developed countries, the venue of consultations should be the choice of the developing country Member; and (b), to address capacity constraints of developing countries, developed countries should submit all questions in writing 15 days in advance to allow an adequate preparation of the consultations.

672. Participants thanked the proponents for putting forward specific draft text. A number of delegations expressed sympathy for the concerns underlying the proposal. Several participants sought clarification of the scope of the obligations in relation to the development status of the parties. The proponents clarified that the provision was specific to consultations held between developing and developed countries and would not apply to consultations held between developing countries. They also clarified that subparagraph a) was limited in scope to consultations held

[78] Previously circulated as JOB/DS/11.
[79] The text is co-sponsored by the Africa Group, Cuba, Ecuador, India, Malaysia and Pakistan.
[80] See JOB/DS/9, para. 84 and JOB/DS/10, para. 44.
[81] Tables on: the timeframes from consultation requests to panel establishment; the timeframes from panel establishment to the establishment of the RPT; the duration of the RPT; the timeframes for compliance panel proceedings; and the timeframes for recourse to arbitration under Article 22.6.

between developed and developing countries, but regardless of whether the developing country is acting as complainant or as respondent, while subparagraph b) would be limited to consultations involving a measure *taken by* a developing country Member.

673. With respect to the draft *chapeau* of Article 4.10, several delegations expressed concerns about the use of the verb "shall", which reflects a hard obligation, combined with the expression "*inter alia*", which suggests an obligation of an open nature. They also enquired about the appropriateness of using "shall" in a "best endeavors" obligation phrased in terms of "giving special attention". It was also asked what rights could be covered under the expression "*inter alia*", beyond those specifically identified.

674. One delegation noted that the *chapeau* seemed to set a general requirement to give special attention, which seems to be an obligation of behavior not requiring any particular results. In contrast, subparagraphs a) and b) require specific actions or consequences. Overall, in that delegation's view, the term "special attention" did not seem to be defined contextually by a) and b) and these subparagraphs seem to go beyond granting special attention. It suggested that the text of the generic requirement to give special attention and the specific obligations be separated. Another participant suggested using the expression "these obligations shall include but not be limited to…" in replacement of "*inter alia*".

675. The proponents took note of delegations' concerns with respect to the use of the prescriptive language "shall" together with the term "*inter alia*". They explained that their proposal was intended to address the lack of specificity of Article 4.10 and to provide meaning to the obligations it embodies. The use of "*inter alia*" is intended to ensure that issues specifically identified as important to developing countries are captured by the scope of this provision. The proponents clarified that the idea was not to broaden inappropriately the scope of this provision. They were prepared to review the proposed language in this light.

676. One delegation underlined the importance of being able to measure and assess the fulfillment of obligations, where the verb "shall" is used, as opposed to "should". It cautioned against the use of prescriptive language that would create distinctions that are difficult to adjudicate. The co-proponents recalled that differential treatment for developing countries is recognized in existing WTO covered agreements and ministerial declarations, including the DSU, and that these rights, which are granted on the basis of the existence of asymmetries between Members, should not be called into question. The proponents also cautioned against a text filled with empty "shoulds" as basis for special and differential treatment.

677. Other participants suggested that the discussion should focus on how to operationalize specific provisions, so as to move constructively and find possible ways to get around polarized issues. I noted that special and differential treatment discussions have never been easy, because of the existence of definitional issues. However, the objective was to improve the relevant provisions with a view to strengthening them and making them more precise where possible and the discussion should try to focus on the merits of each proposal rather than questions of principle.

678. A participant acknowledged the importance of special and differential treatment and supported it but observed that, based on the discussion, it seemed that proposals were likely to face more resistance when giving a right to a party would at the same time withdraw rights of the other party. In its view, the key laid in enhancing developing countries' rights without undermining the position of other Members. There was also a need for pragmatic ways to operationalize special and differential treatment without eroding well-established and successful practices. Another delegation emphasized the importance of focusing on the specific challenges developing countries are facing in the use of the dispute settlement procedures.

679. In relation to subparagraph a) and the choice of venue for holding consultations, several delegations requested the proponents to clarify the meaning of the term "venue" and whether it means the particular city in which the meeting takes place or the actual room and conditions in which the meeting will take place, in which case this could lead to sweeping results. The proponents clarified that venue in this context meant the city or place and proposed to clarify this if necessary.

680. The proponents also recalled that subparagraph a) was limited in scope to consultations held between developed and developing countries; however, the choice of venue would be in the hands of the developing country Member, regardless of whether it is acting as a complainant or as a respondent.

681. A delegation noted that the DSU currently contains no rule on the determination of the venue and that providing such a rule would be useful to ease possible tension amongst consulting parties. Several delegations acknowledged the specific financial constraints of developing countries, but also stated that regardless of financial resources, it is often difficult to have all members of delegations in a single venue. For this reason, in their opinion, it would be more convenient to leave the choice of the venue to a case-by-case determination so as to provide discretion and flexibility to the parties. They suggested that some language could be included to require developed countries to take into consideration, in the determination of the venue, special problems of the developing country Member.

682. Several participants considered that the choice of venue was a problem particularly for developing countries that lack financial resources to fly members of their delegations to Geneva. They also noted that the determination of the venue is often a source of tension between the parties. They expressed sympathy for any proposal that tries to overcome challenges the dispute settlement process imposes on developing countries and saw merit in a provision that would make the choice of venue depend on the developing country Member. One delegation suggested that the proposal could envisage financial contributions to allow developing countries to reach the consultations venue agreed by the parties.

683. Some delegations expressed reservations on the repercussions such provision could have on third party participation. They noted that if the chosen venue was the capital of the developing country Member, it was likely that most Members having expressed interest in being joined in the consultations would not be able to participate effectively due to their own financial constraints. It was suggested that Geneva is often chosen as the fallback option in order to facilitate third party participation to the consultations. Another delegation disagreed, noting that in its experience as a developing country and third party, the most valuable third party participation was in subsequent stages of the proceedings. It also suggested that there were other possibilities to allow participation of third parties when the chosen venue is not Geneva, for instance by allowing the presence of local diplomatic representatives of the third party in question. In response it was questioned, however, whether this would allow an efficient participation of third parties.

684. The proponents noted that third party participation was a valid concern but that their proposal only aimed to address the problems of developing countries involved in consultations as parties, and did not aim to tackle third party participation issues. Existing obstacles to third party participation under the current DSU would remain but their proposal did not exacerbate them.

685. Subparagraph b of the proposal foresees that, in consultations involving a measure taken by a developing country Member, any questions shall be submitted in writing at least 15 days before the date of holding consultations.

686. Several delegations saw merit in the advance presentation of questions for the purpose of holding fruitful consultations and in the interest of both parties. They suggested that the provision should therefore be extended to all developed and developing country Members. One delegation questioned the need for codifying and limiting the scope of what was in fact a current practice in all consultations in which it had been involved. Another delegation did not consider the inclusion of such rule to be necessary since, as other participants had indicated, advance questions were in the interest of both parties.

687. The proponents welcomed the fact that participants seemed to agree that sending written questions in advance was important and beneficial to the consultations process. It was precisely for this reason that they considered it would be useful to codify this practice in the text. They explained that since the purpose of consultations is to avoid the adjudication stage and to facilitate settlement, advance notice of questions would provide developing country respondents with time to consult the relevant ministries and stakeholders and thereby promote a positive solution to the dispute. However the intention was not to limit the flexibility of Members. They agreed to

consider, in light of the discussion, the merits of broadening the scope of this provision and welcomed the drafting input of interested delegations.

688. Whilst agreeing that advance questions in writing enhanced the efficiency of consultations, some participants expressed concern that the scope of consultations would be limited to those questions. They suggested that language be introduced to clarify that the scope of consultations would not be limited to written questions sent in advance and that the complainant could raise additional and supplementary questions not posed in writing. The proponents confirmed that it was not their intention to preclude follow-up and additional questions.

689. With respect to the 15-day timeframe, it was suggested that this was rather short, insofar as a party has 10 days from the receipt of the consultations request to respond to it and 30 days to hold them, which implies that advance questions would be sent only 5 days after receiving the response to the request for consultations. The proponents explained that this period had been chosen in light of another proposed amendment in their proposal, namely to extend the 30-day timeline to enter into consultations. Another delegation suggested that it might be clearer to set the date of the receipt of written questions with reference to the date of the consultation request instead of the date of holding consultations.

690. We then turned to the duration of consultations, which is addressed differently in the two proposals. The draft text presented by the joint proponents would amend Article 12.10 of the DSU to extend by 15 days the period within which parties should enter into consultations in cases involving a measure taken by a developing country Member. The proposal would also *extend* the period of consultations, including for perishable goods cases, without specifying by how many days it should be extended. In contrast, the Australian proposal envisages the *shortening* of the consultations period to 30 days, with the possibility of extending it to 60 days for developing country Members.

691. I recalled that under Article 4.7 of the DSU, the complaining party currently may not request the establishment of a panel before 60 days have elapsed from the date of receipt of the request for consultations, unless the responding party fails to meet the DSU deadlines to respond to the request or to enter into consultations. The consultation stage can also be concluded earlier if the parties jointly consider that consultations have failed to settle the dispute. I also noted that in practice, the average duration of consultations to date has been 162 days (from the date of request for consultations to the date of the first request for panel establishment).[82]

692. Australia recalled that its original proposal was grounded in looking at the entire dispute settlement process to see where time could be saved. It clarified that the proposal would not alter the possibility of holding consultations for a period longer that the contemplated timeframe, but the objective was to allow an accelerated procedure if parties wished to expedite the process and proceed to the panel stage. Further to earlier discussions, it had also thought it useful to allow the possibility of an additional 30 days for consultations involving a developing country Member.

693. The joint proponents explained that their proposal contained two elements. They wished to retain the 60-day period before a panel can be requested, especially in light of the statistics that show that most cases do not go beyond the consultations stage, which in their view signals the usefulness of holding consultations. They expressed comfort with the Australian proposal insofar as its special and differential treatment provisions would maintain the existing 60-day period until a panel can be requested for developing country respondents. Some of the proponents wished to extend this period beyond 60 days and they sought other delegations' views in this respect.

694. The joint proponents explained that their first concern related to the period for entering into consultations, noting that the current 30 days (or as otherwise mutually agreed) was too short. Therefore they proposed to extend this period to at least 15 more days when the measure consulted upon is taken by a developing country Member, irrespective of whether the complainant is a developing or a developed country Member. In their view, 45 days would provide sufficient time to developing country Members to address internal coordination issues before entering into the consultations.

[82] As of 6 July 2012.

695. A participant asked how the proponents determined that 15 days would be the appropriate extension of this period. The proponents clarified that this choice had been made after consulting with other developing countries active in dispute settlement and in light of their experience to date, which has suggested that an additional two week-period would help to better prepare consultations.

696. Several delegations expressed support for lengthening the period for entering into consultations for developing countries to 45 days, recognizing the potential challenges in meeting a shorter deadline. One participant explained that, although their general position was to favour neutral provisions, in this particular case it recognized that developing country Members faced particular challenges and would view positively this lengthening as a special and differential treatment provision. It was also suggested this would make the consultations more meaningful, thereby promoting the preferred outcome of mutually agreed solutions.

697. A participant suggested that this extension should not be contingent upon the developing country Member's request but rather should be automatic. Another noted that the use of the expression "at least" seemed to suggest that there were no limits on the time-period that could be requested and wondered what discretion was left to the other party to reject such requests. To address this concern, it was suggested that the words "at least" be deleted. It was also asked whether multiple extension requests could be made and would have to be accepted. The proponents explained that their intention was not to allow developing countries to extend the consultations period beyond what is reasonable. Should a developing country request 15 additional days, those would be granted. Further additional time would be granted only upon agreement. The proponents were prepared to adjust the language to reflect this intention.

698. The proponents also clarified that the proposal should be read in the context of Article 4.3 of the DSU, which provides that consultations should be entered into within 30 days or as otherwise mutually agreed. The proposal was meant to alter only the 30 day-period, not the parties' discretion to agree on another timeframe. In that context, it was suggested that this part of the proposal could be relocated to Article 4.3, where the duration of consultations is otherwise addressed. This would also clarify that if the parties wanted to hold consultations in less than 45 days, nothing would preclude it. The following language was suggested: "…enter into consultations within a period of no more than 30 days when consultations involve a measure taken by a developed country Member, or no more than 45 days when consultations involve a measure taken by a developing country Member, or a period otherwise mutually agreed".

699. Some participants did not favour, however, extending the 60 day-period to request panel establishment or the timeframe for consultations in cases of urgency. It was suggested that a lengthening of these timelines would adversely affect the complainant's right without promoting a mutually agreed solution amongst the parties.

700. Some participants drew attention to the potential tension between lengthening the period to enter into consultations and the period during which a party is precluded from requesting panel establishment. Some delegations questioned the value of maintaining an additional 15day-period within which the panel cannot be requested when it is clear to the parties that the consultations will not lead to a mutually agreed settlement. It was suggested that the period for entering into consultations could also serve to set the period to request a panel, especially if it is extended to 45 days for developing countries. Australia noted in this respect that its original proposal had not been framed taking into account the joint proponents' proposal to lengthen the period for entering into consultations to 45 days, but that, with such extension in mind, it could be considered to allow the request for establishment of a panel to be made as soon as the consultations period has elapsed, that is after 30 days for developed and 45 days for developing country Members. Australia also clarified that its proposal involved no change to Article 4.3.

701. The joint proponents expressed concern at the suggestion that under the original Australian proposal they would have been allowed a full 60 days without a panel being requested but that with a 15 days extension of the period for entering into consultations, they would have to forego that right. They considered that the period between entering into consultations and requesting the establishment of a panel was useful, to reflect on what has occurred during the consultations stage and explore opportunities to settle the dispute. Other participants also considered that this period allows follow-up on the consultations, to prepare for the panel stage or provide an opportunity for the Member whose measures have been consulted upon to withdraw or amend them. A

participant suggested that the period for entering into consultations and the period within which a panel cannot be requested were two different aspects: the former aimed at reaching an amicable solution between the parties, whereas the latter was the initiation of the third-party adjudication phase, which escaped the control of the parties.

702. Australia stressed that there would be no obligation, under its proposal, to request a panel immediately after the consultation period has elapsed. On the contrary, its proposal was intended to provide flexibility to parties wishing to request a panel immediately to do so, but did not prevent consultations from running their full course.

703. In concluding, I noted that further discussions appeared to be needed amongst the joint proponents and Australia to square the circle and bridge gaps between the inter-linkages of both proposals.

704. Finally, we turned briefly to panel establishment. Australia explained that Members can currently block the establishment at the first DSB meeting at which a panel is requested and that such possibility disappears at the second request, where establishment becomes automatic. Australia was of the view that this slowed the whole process down and that by applying the rule of negative consensus from the first DSB meeting, between 2 to 4 weeks could be saved. It noted that past discussion had indicated that some developing countries would wish to retain the *status quo*, allowing them to block the establishment at the first meeting.

705. One delegation expressed support for saving time at this particular stage. However, it expressed concerns with introducing special and differential treatment at this stage insofar as, if a question arose as to whether a Member has a right to block, this would oblige the DSB to adjudicate it, which it was not in a good position to do.

706. I thanked the proponents and delegations for the useful discussion and proposed to resume after the summer break.

Stocktaking

707. At the end of the week, we also took stock of other ongoing work.

Remand

708. I asked proponents of the two proposals on remand to update us on any recent progress made. They informed the G40 that they met in this week with the objective of developing a single, merged text. In this exercise, proponents indicated that they have identified several areas of convergence and have inserted brackets in areas where divergence remains, also taking into account comments received from other delegations over the past months. Proponents informed the group that they will continue to work over the summer and hope to bring a merged text, with some brackets, to our meetings in the fall. I encouraged them to have such text ready by our next meeting in September.

Developing country interests

709. We also took stock of recent work on developing country interests, other than timeframes. The proponents indicated that they are consulting with a broad range of developing country delegations as they work towards draft text related to the remaining aspects of their proposal. They signaled their intention to present new text in late October. I took note of their efforts and encouraged them to continue their work and present a legal text as soon as possible to facilitate a useful discussion. I also indicated my intention of continuing the discussion on timeframes in September, as well as of holding a discussion on aspects of the proposal pertaining to third party interests, in connection with other third party-related proposals discussed recently.

Post-retaliation

710. A proponent of a proposal on post-retaliation informed delegations that it recently held several constructive meetings with other proponents in the interest of possibly developing common

text for further discussion in upcoming meetings, in a manner comparable to the ongoing work on remand. I encouraged proponents to work towards text that could be discussed moving forward.

Next meetings

711. In concluding the week, I proposed that we meet the week of 17 September to continue our discussions on remand and on developing country interests and timeframes. I also mentioned that it would be useful to seek to wrap up work on some areas where broad agreement has been expressed but text had not been finalized. Specifically, I proposed that we attempt to conclude the work on mutually agreed solutions and third party participation in consultations. I requested proponents to work towards final text in both areas for the next meetings. I also suggested that we discuss any new developments on the post-retaliation proposals.

11. WEEK OF 1 OCTOBER 2012[83]

712. This week, I held consultations on third party rights, developing country interests and timeframes. We also took stock of ongoing work on remand and post-retaliation.

Third party rights

713. We resumed the discussion on third party rights in consultations, in an attempt to finalize the revised text on the basis of what was previously agreed.[84]

714. I recalled the proposed text for subparagraph (a), which foresees that a Member wishing to participate in consultations shall express its substantial trade interest to consulting Members and DSB in writing within 10 days from circulation date of request for consultations.

715. I also recalled the convergence reached around the concepts reflected in subparagraph (b), that is, a clarification regarding the consideration to be given to the representations made by the Member wishing to be joined in consultations and the notion that a request to join consultations would be considered accepted, unless the responding party notifies within 7 days that it does not accept it. In the latest version of the text, as reflected in JOB/DS/8, this 7-day deadline was located in subparagraph (c) and referred to in subparagraph (b).

716. We then turned to the outstanding drafting issue. I recalled that the proposed subparagraph (c) addresses the notification to be made by the responding Member further to a request to be joined in consultations and that the most recent version of the text foresees that both acceptances and rejections would be notified. I recalled that this was inserted in response to the interest expressed by some delegations in ensuring that transparency would be provided on the outcome of all requests, including those that have been accepted. I noted that under the current practice, the respondent is required to notify acceptances, but not rejections, of requests to be joined in consultations, and that the Secretariat then circulates a document listing Members whose requests to join have been accepted.[85] In light of this practice, I enquired whether delegations would be ready to explore mechanisms other than notifications by the responding Member in order to achieve greater transparency, for instance through the circulation of a DSB document listing the Members that have and have not been joined in the consultations.

717. The proponents reported that they had been working on different ideas to address the tension arising between, on the one hand, the automaticity flowing from the absence of a response within 7 days and, on the other hand, the enhanced transparency derived from making available the information regarding both of acceptances and rejections. The proponents explained that a first solution they envisaged was to delete the word "unless" from subparagraph (b) as drafted in JOB/DS/8, to allow the notification of both rejections and acceptances, and to include a subparagraph regulating the consequences of a failure to notify. The second option considered by the proponents was to keep the text of the provision in its most recent version, deleting the first set of brackets of subparagraph (c) and maintaining the second set of brackets. In addition, they

[83] Previously circulated as JOB/DS/12 and JOB/DS/12/Corr.1.
[84] See JOB/DS/8, paras. 48 to 53.
[85] See Minutes of the DSB meeting of 27 July 2000, WT/DSB/M/86, paras. 94 to 97.

envisaged introducing a subparagraph (d) as a transparency provision, foreseeing a list of Members that have been accepted and rejected.

718. The proponents explained that in their view, both solutions would achieve the same objective. They invited views from participants on their preference as to whether both acceptances and rejections, or only rejections, should be notified. They also sought delegations' views on the introduction of a provision regarding the failure to notify. Finally, the proponents asked participants how they envisaged addressing the transparency issue, either by imposing a notification obligation of the Member to which the request to be joined has been addressed or by foreseeing another mechanism, such as a DSB document.

719. Some delegations expressed a preference for notifying both acceptances and rejections to the applicant Member. However, another delegation considered that this would undermine the principle of automaticity embodied in the proposal, which foresees the notification of rejections only.

720. A possible approach was discussed, under which the second sentence of subparagraph (b) would contain the 7-day deadline for notifying rejections of requests to be joined, and subparagraph (c) would provide for the issuance of an official document containing a list of Members that have been joined in the consultations, based on requests notified under subparagraph (a) and any negative responses received under subparagraph (b). Some participants stated that they were generally comfortable with such an approach, and made drafting suggestions to streamline the text. Further discussion focused on clarifying what should be notified and circulated to the applicant Member and to the DSB under the various subparagraphs.

721. With respect to requests to be joined in consultations (subparagraph (a)), it was suggested that it was appropriate to continue to notify them to the DSB and circulate them individually, as was currently the case.

722. With respect to responses to the requests (subparagraph (b)), it was discussed whether they should be individually circulated, or whether sufficient transparency would be provided by having a single document issued with a list of Members whose requests were accepted, but no circulation of the individual responses, as was currently the case. Participants discussed the difference between the two types of communications to which subparagraphs (a) and (b) would refer, and to whom they should be circulated. One delegation noted that subparagraph (a) refers to letters of notification of interest to join, which, under the current practice, are circulated to Members, whereas responses to these letters, whether accepting or rejecting the request (referred to in subparagraph (b)), are currently not circulated. In this delegation's view, there would be duplication if individual letters of rejection and acceptance were circulated in addition to a list of Members having been joined in the consultations.

723. In this context, the appropriate language to distinguish between the notification of requests to join under subparagraph (a) and the notification of responses under subparagraph (b) was discussed. It was suggested that if there was to be a difference of treatment between these two situations in terms of circulation of documents, the language should reflect this. I drew delegations' attention to the current language of the DSU that uses the verb "notify" for the letters of expression of interest to join the consultations and the verb "inform" for the letter of responses. A participant suggested that responses in subparagraph (b) be notified to the applicant Member and to the Chairperson of the DSB, rather than to the entire DSB. This would imply that letters of responses are not circulated to the DSB. One delegation considered that the verb "inform" would not be appropriate for the applicant Member and considered the expression "notifying" the applicant Member to be more suited. However, it agreed that referring to the Chairperson of the DSB for the letters of responses and using the verb inform the DSB Chairperson would distinguish between the two types of letters and avoid duplication of information.

724. Several delegations expressed support for a list to be issued, as opposed to the circulation of individual response letters. A participant questioned, however, why it was assumed that the circulation of the response letters to the Membership should be avoided and whether other participants considered that making this information public would be difficult, either for the rejected Member or for the Member rejecting the request. Some participants considered that the

notifications of requests and responses foreseen under subparagraphs (a) and (b) would be sufficient.

725. Some delegations, while supporting a list approach, highlighted the benefits of notifying both rejections and acceptance to the applicant Member, as a matter of good practice. A participant considered that it would be appropriate to maintain the current practice of notifying the applicant Member as to whether it has been accepted or rejected, but also considered that it would not be necessary to swamp Members with individual communications in this respect, especially if a summary document is circulated, gathering the information. It was noted that the proposal did not foresee a requirement for Members to identify the motives behind a rejection, so that circulating the letters of response would not provide more information than a list. Circulating a single list as opposed to letters of responses and a final list would also contribute to reducing costs and red tape. Another delegation questioned this assertion, noting that in the event of late acceptances, a second list would need to be issued. In response it was suggested that such corrigenda would be an exception.

726. If a document listing the Members that have been joined in the consultations were envisaged, it was suggested that the timeframe for the circulation of such document should be based on the deadline of subparagraph (a) rather than on the date of specific requests to be joined, to ensure that it is not affected by the different dates at which various requests might be made. It was also suggested that the circulation should occur before the consultations take place. Other delegations questioned the need for establishing a DSU-mandated deadline on this particular point, noting also that the DSU generally does not establish obligations on the Secretariat. It was suggested that the text could simply require the document to be circulated "promptly". Clarification was also sought as to the basis on which the list would be drawn up, in the event that only rejections are notified.

727. A delegation sought clarification as to the reason for changing the current practice. The proponents recalled that the original objective of their proposal was to facilitate third party participation at different stages of the proceedings. In this respect, convergence was reached on the "sympathetic consideration" formulation, which would allow Members to consider different preoccupations of requesting Members at the consultation stage. During the discussions, some delegations had expressed transparency concerns. The idea of a list and the debate around what needs to be notified had emerged in this context.

728. Proponents and other interested delegations continued to work on this issue after the meeting. I encouraged them to continue this work between now and our next meetings.

Developing country interests/Timeframes

729. This week, we also continued a discussion of timeframes, based on the proposals reflected in the Chairman's text of July 2008 and the draft legal text presented in July by proponents of developing country interests.

Panel establishment

730. We considered the proposal to allow panel establishment to take place at the first meeting at which it is requested, while allowing the possibility of establishment at a second meeting upon request of a developing country Member.

731. The proponent explained that its objective, as in other timesaving proposals, was to seek a more efficient use of time wherever possible. Specifically, there seemed to be no particular purpose to holding two meetings for the establishment of panels.

732. Several participants supported the objective of gaining time at this stage of the proceedings by allowing panels to be established at the first meeting at which the request is placed on the DSB's agenda. One participant observed that, while the two-meeting procedure had been introduced initially as part of the agreement towards automatic panel establishment, practice under this provision had demonstrated that this led to unnecessary delays.

733. Some participants had no objection to the proposal, provided that developing country Members would retain the right to two meetings. They explained that the time between the two meetings was important in order to prepare for the subsequent panel stage, especially for developing country Members with resource constraints. In this context, it was asked if such preparations could not start prior to a panel's establishment, during the consultations phase. In response it was noted that, for example, the formalities required to hire outside counsel may take time and the decision may be taken only once a panel proceeding is under way. It was also discussed whether this concern could be addressed by ensuring that sufficient time would be granted to such developing country Members to prepare their submissions once the panel is established. It was further suggested that the time between the two meetings might serve to settle the dispute. In response it was observed that settlement opportunities would continue to exist subsequently.

734. Some participants expressed concern that special and differential treatment at this stage of the proceedings should not lead to jurisdictional issues before the DSB that may derail the entirety of the proceedings. This could occur if the DSB had to determine the status of the responding Member in order to decide whether establishment should take place at the first meeting or may be postponed. It was observed in response that the need for adjudicative bodies to rule on the development status of a party may arise under a number of existing provisions under the covered agreements, wherever S and D treatment was foreseen. In further response, it was suggested that issues relating to substantive rulings under the covered agreements by the adjudicators were of a different nature from jurisdictional issues, which may affect the validity of the panel's establishment, and hence of all subsequent procedural steps. It would be preferable to avoid creating such a situation.

735. It was observed that the proposal, as currently drafted, foresees "sympathetic consideration" to be given to a request for postponement made by a developing country Member, rather than automatic postponement. This would not raise the same jurisdictional concerns as an automatic right, if it was left to the discretion of the complaining Member to accept or decline a postponement request. Some delegations considered, however, that this would be insufficient to guarantee that the right to a second meeting would be preserved.

Submissions to panels

736. The discussion first focused on the proposal that the complainant be given 14 days, instead of the current 3 to 6 weeks, for the filing of its first written submission under the indicative timetable in Appendix 3 of the DSU. It was recalled that the rationale for this proposal was to rectify what is perceived as an imbalance in the current DSU text, i.e. the fact that the complainant, who has full control over the initiation of the proceedings, is given more time than the respondent to prepare its first written submission. The proponent recalled that its original proposal envisaged a period of 5 days only, which had been considered too short and therefore extended to 14 days. It also recalled that the proposal would also introduce a starting point for the timetable, from the organizational meeting.

737. A participant noted that it has long observed that the Appendix 3 timelines for first submissions make little sense in light of experience and should be inversed to reflect reality. With respect to the starting point of the timetable, it suggested that the date of receipt of the final timetable may be a better point of reference, given the time that may elapse between the organizational meeting and the finalization of the timetable.

738. With respect to the proposal to amend Article 12.10 to provide a minimum period of 4 to 6 weeks for the filing of a responding developing country Member's first submission, a clarification was sought as to whether this was intended as a strict minimum requirement, as opposed to the timelines under Appendix 3, which are indicative. The proponents confirmed that this was the intention, in order to guarantee that developing country respondents would have sufficient time to file their submissions. A participant expressed concern at the stricture of this approach, noting that in some cases, proceedings had been accelerated in a manner that would become impossible under this proposal.

739. The proponents sought clarifications on the practice to date and the effectiveness of the current Article 12.10, which contains no minimum timeframe. In response it was observed that panels would normally seek to accommodate as much as possible the requests of parties with

respect to filing dates, whether Article 12.10 was expressly invoked or not. However it would be difficult to draw general conclusions on the effectiveness of the existing provision based on this practice.

Reasonable period of time for implementation (RPT)

740. We then turned to the reasonable period of time for implementation. For arbitrators determining the RPT pursuant to the current text of Article 21.3(c) of the DSU, the guideline is a period of 15 months from the date of adoption, but the RPT may be shorter or longer "depending upon the particular circumstances". In addition, it has been established, through successive arbitral awards under this provision, that the RPT should be the shortest period possible within the legal system of the implementing Member. Pursuant to Article 21.2, some arbitrators under Article 21.3(c) have taken into account the situation of the developing country Member to determine the time within which it can implement the recommendations and rulings.[86] In practice, the average length of the RPT to date has been 11 months and 16 days when it has been determined pursuant to Article 21.3(c) arbitration and 9 months and 5 days when agreed by the parties pursuant to Article 21.3(b).

741. The Chairman's text of July 2008 contained a footnote "h" at Article 21.3(c), enjoining the arbitrator to take into account the particular problems and interests of developing country Members. The legal text presented in July includes similar, though not identical, language, as a final subparagraph to Article 21.3 of the DSU.

742. The proponents explained that they were trying not to be too prescriptive. They highlighted that, contrary to the Chairman's text, their proposal was not limited to RPTs determined by arbitration and would cover also RPTs determined under subparagraphs (a) and (b) of Article 21.3. It was suggested that the term "establishing" might be more accurate than the term "determining" if agreed RPTs are also intended to be covered. The proponents agreed. The proponents also confirmed that existing footnotes in the DSU text were not intended to be deleted.

743. A number of participants agreed that it was appropriate, in the context of determining an RPT, to take into account factors that may affect the implementation process within the domestic legal system of the implementing Member, including practical aspects that may have an impact on what a "reasonable" period may be in the circumstances. In this respect, it was acknowledged that significant constraints may be faced by developing country Members in the implementation process and support was expressed for the thrust of the proposal. At the same time, it was suggested that such circumstances should be taken into account in any RPT determination, not only those relating to developing countries.

744. A number of clarifications were sought as to how extensive the scope of the provision was intended to be. In particular, it was asked what exactly the terms "interests" and "problems" of developing country Members were intended to cover and how they differed from each other. It was asked whether these terms might for example cover considerations relating to the interests of a domestic industry affected by the rulings, or considerations not directly relating to the measures at issue and the implementation process, such as the general economic situation of the implementing Member. It was suggested that, in the absence of a clearly defined scope, the provision did not make clear how extensive it might be. It was suggested that some considerations, such as political sensitivities in the implementing Member, may not be relevant to the determination.

745. The proponents observed that these terms were already found in the DSU. It was noted that Article 21.2 referred specifically to "matters affecting the interests of developing country Members *with respect to measures which have been subject to dispute settlement*", thus limiting the scope of the provision. It was also asked why the term "particular", which was found in the previous text, was omitted from the text of the proposal. The proponents expressed willingness to consider such language to clarify the scope of their proposal. They explained that their primary aim was to ensure that it could not be argued, in the context of an RPT determination, that considerations relating to constraints faced by a developing country Member should not be taken into account in determining the "shortest period of time" for implementation in the domestic legal system of the Member concerned.

[86] See Award of the Arbitrator, *Indonesia – Autos*, WT/DS54/15, para. 24.

746. In this context, the proponents emphasized that they were not seeking to modify the existing benchmark for the establishment of an RPT, but to guard against interpretations that would preclude such considerations from being given due attention. They noted that such considerations had in the past already been considered by arbitrators, for example in *Indonesia – Autos* or *Argentina – Hides and Leather*. Other participants sought further clarification of what would be gained by the proposal, in light of the existence of such rulings under the current rules, and whether it was intended that more would be done under this provision than was currently the case. The proponents confirmed that the intention was to reflect in the DSU text the existing practice, rather than modify it.

747. Clarification was also sought with respect to the use of the expression "of developing country Members" and whether this was intended to relate to the implementing Member, or both parties, or all Members. A participant suggested that the text could be clarified by referring to "problems and interests of implementing developing country Members". In response it was observed that there may be instances where a complainant Member's interests might be taken into account, for example to determine that administrative action for implementation should take place rapidly rather than slowly. Another participant questioned how the circumstances of the complaining Member could have an impact on what constitutes "the shortest possible period" within the implementing Member's domestic legal system.

748. It was asked whether the proposal implied that the objective of achieving immediate compliance would no longer apply. A participant observed that while immediate compliance is the preferred outcome, the DSU recognizes that where this is not practicable, a "reasonable period" will be granted. It suggested that the benchmark developed under Article 21.3(c), based on the "shortest period possible" within the legal system of the Member concerned, struck the right balance between the objective of prompt compliance and what is possible in reality, and this was what arbitrators had sought to achieve. In that context, it was appropriate to consider the relevant circumstances in the implementing developing country Member. The proponents agreed with this characterization and confirmed that the objective of their proposal was to ensure that such circumstances would be taken into consideration.

749. In conclusion, I took note of the elements of convergence on some of the drafting improvements proposed, and noted that further discussion seemed necessary on the nature of the problems or interests to which consideration is to be given and the scope of coverage of the proposed text.

Period before adoption of panel report

750. We also discussed possible time-savings in the period before adoption of the panel report. Panel reports are currently adopted not before 20 days and not after 60 days counting from the date of circulation. In practice to date, on average 47 days elapse before adoption or notification of an appeal. This aspect of the proposal foresees the possibility of immediate request for adoption upon circulation, still allowing the 10 days after the report is placed on the DSB agenda to examine it.

751. A number of participants expressed support for this proposal, noting that these timesavings should not have any great negative effect on parties. In particular, participants recognized that this proposal would work in conjunction with the proposal to circulate panel reports to the Membership in the original language, in advance of their translation into all official WTO languages, without prejudice of the legal deadlines for adoption. This would imply that all Members would receive the final report at the same time as the parties and would therefore have more time prior to its official circulation in the three languages to consider it. Some participants expressed concern in cases where the original language of a report was French or Spanish. It was observed that in such cases, the parties to the dispute themselves, who are most affected by the adoption or appeal, would have requested this and would therefore not be prejudiced.

Stocktaking

Remand

752. I invited the proponents of different proposals on remand to provide an update on the state of their recent work. They indicated that they were not yet ready to share progress at achieving a common text but had worked together recently to achieve further convergence on outstanding areas where the proposals take different approaches. They also recognized the need to gain support among the larger group. They would continue to engage with each other and other Members in the coming weeks in advance of our next meetings, in order to present a single document.

753. I thanked the proponents for their efforts and encouraged them to work intensely with a view to moving forward so that that they might present their progress at our next meeting to the larger group. I encouraged them to take into account the views of other delegations, with an interest in concluding and moving to the next phase in our process.

Post retaliation

754. I also invited proponents of the two proposals on post-retaliation to provide an update on their recent work.

755. I recalled that the two groups' proposals seek to introduce detailed procedures to deal with the situation in which the Member concerned considers that it has complied with the rulings and recommendations, after retaliation has been authorized. Earlier discussions had revealed a number of points of convergence between the two proposals, but also significant differences that had not been bridged. In particular, the proposals differed in their approach to the initiation of compliance proceedings in a post-retaliation situation.

756. Under the European Union/Japan approach, the Member concerned would notify the DSB that it has taken a measure that it believes achieves compliance with the DSB recommendations and rulings. On the basis of this notification, the complainant may elect to initiate compliance proceedings if it disagrees that compliance has been achieved. Under the G6 proposal, on the other hand, the responding Member should request the establishment of a compliance panel if it believes it has achieved compliance with the DSB recommendations and rulings. In short, the European Union and Japan approach would have the complainant initiate compliance proceedings also in a post-retaliation situation, while the G6 approach places the onus on the responding Member to justify that it has remedied the non-compliant situation, before the retaliation authorization can be removed.

757. The proponents updated the group on some of the outstanding differences between their two proposals, in the hope that the views of other participants could provide some direction for ongoing discussions. Foremost, the proponents observed that their proposals differ in respect of which party should bear the burden of proof in respect of initiating a compliance proceeding in the post-retaliation context. Both proponents associated the issue of which party should bear the burden of proof with the question of which party should initiate proceedings, in cases where there is a disagreement as to whether compliance is achieved.

758. Participants debated the nature of compliance proceedings in the post-retaliation context. Some delegations questioned whether the circumstances would be any different in compliance proceedings in the post-retaliation context as opposed to those following the conclusion of an RPT in the initial stages. It was suggested, in response, that the situation differed in that, at the post-retaliation stage, an authorization to suspend obligations had been granted. Delegates discussed whether the legal positions would be different in that context, since the legal question to be addressed, i.e. whether compliance had been achieved, was the same in both situations. In this light, it was questioned whether it would make sense to formulate compliance procedures applicable in the post-retaliation context – including for the initiation of the procedures and allocation of the burden of proof – that would operate in a way that is fundamentally different from procedure applicable in other contexts.

759. Delegations also noted the relevance in this context of the approach previously endorsed in respect of sequencing, which would provide for the initiation of compliance proceedings by the complaining party. It was also noted that the guidance offered by the Appellate Body in *US/Canada – Continued Suspension* under the current rules would be of limited relevance in such context. Some participants also considered that these rulings of the Appellate Body did not in fact provide clear guidance as to how compliance proceedings should operate in a post-retaliation context, even under the current rules.

760. Participants then considered how the proposals would work in terms of defining the terms of reference of a panel in post-retaliation compliance proceedings. It was discussed in particular how, under the G6 proposal, the two requests, by the complainant and respondent, would combine to define the panel's terms of reference, and how the allocation of burden of proof would operate. The G6 explained that the respondent party would identify the steps taken for the removal of the specific inconsistency that had been the basis for the earlier findings of violation, and would bear the burden of demonstrating compliance in respect of such provisions in the proceedings, while the complaining party would bear the burden of demonstrating any new inconsistency that it may have identified in its own request.

761. Concerns were expressed over the potential complexity of distinguishing between the sources of initial violations and new claims for the purposes of distributing the burden of proof among the parties in the proceedings. One participant also expressed concern that an approach that would place the burden of demonstrating compliance on the responding Member may call into question the presumption of good faith, which was problematic.

762. There was also a discussion of the potential jurisdictional role of a detailed notification by the Member concerned as a means of ensuring that the Member concerned would bear an initial burden to bring forward sufficient information to allow an assessment of the consistency of steps taken towards compliance, and as potential basis for subsequent compliance proceedings.

763. One delegation asked whether a requirement for consultations was part of either proposal and whether this could assist parties in determining what remains in disagreement prior to reaching the panel stage. There was an interest in considering further this possibility.

764. Following the discussion, I encouraged delegations to continue their discussions in the coming weeks in an effort to achieve further convergence in advance of our next meeting.

12. WEEK OF 12 NOVEMBER 2012[87]

765. This week, we concluded a consideration of the issues under discussion. Specifically, we took stock of recent work on post-retaliation, remand and third party rights. We also discussed draft legal text presented by a group of proponents of developing country interests.

Post-retaliation

766. As you will recall, post-retaliation was discussed in October, based on the proponents' explanation of their recent efforts to bridge the gaps between their positions. In this context, the EU and Japan on the one hand, and the G6 on the other hand had explained where their main difficulties remained.

767. This week, the proponents confirmed that they had continued to meet to seek common ground. They also reported that although significant differences remained between their positions, they were committed to continuing to work together towards narrowing these differences.

768. I took note of the continued interest in addressing this issue and of the goodwill of proponents to come to common positions. I encouraged them to continue their efforts.

[87] Previously circulated as JOB/DS/13.

Remand

769. The proponents of remand, that is, on the one hand the G-7 and on the other hand Korea, present a consolidated merged version of their texts this week. Participants welcomed the effort of proponents.

770. The proponents explained that this was not a joint proposal but rather reflected the joint effort of proponents to move as much as possible towards common positions. The text reflected some convergence. Some drafting changes had been introduced, notably to the language defining how the party entitled to seek remand would be defined under the Korean approach. On other elements of the proposals, significant differences remained and were identified in the document.

771. Specifically, five key points of divergence were identified:

(a) the nature of the document in which the Appellate Body identifies the need for remand;

(b) the constraints imposed on who can initiate the remand procedure;

(c) whether the Appellate Body issues two full reports, subject to separate and double adoption or one report subject to single adoption;

(d) the jurisdiction of the panel and the format and scope of the results of its review;

(e) whether the results of the panel's remand review are subject to appeal.

772. In light of this, I invited other participants to clarify as much as possible where their preferences lie in respect of these various points.

773. With respect to the nature of the document in which the Appellate Body would identify issues for remand, clarifications were sought as to how the Korean proposal for "tentative findings" would work. It was asked whether the totality of the Appellate Body's findings on issues not requiring remand would be reflected, and if so whether these would also be "tentative" and subject to further review. Concern was expressed that this may lead to re-opening of completed issues. If not all findings were reflected however, this could make it difficult for the parties to assess the merits of seeking remand or not. It was questioned what the legal status of the tentative findings would be, pending adoption.

774. The proponent explained that the tentative findings would include aspects not for remand as well as remand issues, and would bear some resemblance to an interim report. However the comments of parties would be limited to the question of remand. The proponent also clarified that the use of the term "tentative" was intended to convey the fact that the report as a whole would not be final at that stage.

775. It was asked what sort of time-frame Korea had in mind for the completion of the remand process under its proposal. Korea responded that this would be determined on a case-by-case basis by the Appellate Body. It could be expected that some additional time would be required, but this would be outweighed by the benefits of having a remand procedure.

776. It was suggested that the question was to find a well-balanced solution, reconciling timeframe and procedural concerns. It was noted that the prior circulation of tentative findings had merit in terms of allowing a single adoption and implementation procedure. Concern was also expressed however that it was not entirely clear how the "tentative" report would work. In this respect, the alternative of the Appellate Body issuing a full report, as it would now, was simpler.

777. Clarification was also sought on the meaning of the expression "appropriate findings" in the G-7 text, and what this implied beyond the terms of Article 19 of the DSU. In response it was explained that this language was intended to convey that the Appellate Body should make full findings on those issues on which the analysis was completed. A participant recalled that this language had originally been introduced, together with additional language, to address uncertainties about the nature of findings and recommendations to be made under Article 19 of

the DSU in the event that a defence was left pending. It was noted however that the proposed language did not in fact make clear how the Appellate Body was expected to address this issue. If that was the objective, then this could be addressed more clearly. In this respect, it would be possible to explore ways of providing clearer guidance to the Appellate Body, to ensure that it would make findings and recommendations only in respect of those issues that would not be affected by a remand procedure.

778. With respect to who can initiate remand, the different approaches reflected in the two proposals were noted: either the text itself would define which party may initiate remand, or the Appellate Body would determine it.

779. It was asked whether proponents had considered the concerns previously expressed about risks of unwanted delays if remand can be initiated by the respondent, including with respect to claims that the complainant itself may not have had an interest in pursuing further. It was suggested that there may be ways of dealing with situations where defences are at issue, for example by ensuring that the Appellate Body would not make findings if completion of the analysis was not possible on a defence. This would also eliminate the need to consider this question of defining which party can initiate remand. In addition, to the extent that a "double adoption" procedure was rendered necessary by the need to avoid unnecessary delays if the respondent initiated remand, the resulting complexities appeared to be a high price to pay, which could maybe be avoided.

780. With respect to double vs. single adoption, it was recalled that a number of participants had expressed concerns about potential delays in the proceedings. It was also suggested that in practice, although there may be circumstances in which separation would be possible, it was not clear that immediate implementation of completed rulings would generally be feasible, because claims tended to be intertwined. In this respect, the Member concerned might legitimately invoke the need to wait for the outcome of the remand proceeding in arbitral proceedings to determine the RPT concerning the initial completed rulings. Several participants reiterated their concern that a double-adoption procedure gave rise to a number of procedural problems in later stages of the dispute.

781. In light of the various complexities and unresolved questions introduced by the proposals, a participant was not convinced on balance that the procedure would be of net benefit. A proponent observed in response that in numerous cases to date, the Appellate Body had been unable to complete the analysis on some issues. These instances of "incomplete" resolution of disputes showed that the introduction of remand would be beneficial.

782. With respect to the scope of referral and the possibility of appeal, it was suggested that the scope for appeal should remain as it currently is and no attempt should be made to redefine what types of findings are appealable. In this respect, it was observed that even factual findings may give rise to issues on appeal. Notably, some issues may involve both factual and legal aspects, and such mixed issues should remain subject to appeal. It was also suggested that it may be very difficult to distinguish factual and legal issues as proposed by Korea.

783. Korea observed that its intention was to limit the scope of remand, so that the issue of appeal would not arise, and that the scope of remand proposed was based on the existing practice of the Appellate Body of "completing the analysis", which would be endorsed in the proposals. A participant noted that this remained an exceptional practice by the Appellate Body and that it would be reluctant to place the Appellate Body in the difficult situation of having to complete the analysis more systematically.

784. A participant recalled its concern that a remand procedure should not be an opportunity to introduce new factual elements in the proceedings. The proponents recalled their prior observation that both proposals were deliberately silent on this issue, to allow flexibility as necessary depending on the type of situation at issue. This was however not intended to allow a complete re-opening of issues.

Third party rights

785. You will recall that we had reverted last month to the draft legal text on third party rights in consultations, in the hope of finalizing that text. This week, the proponents of third party rights shared a consolidated text on all aspects of third party rights. In this text, they sought to bring together, to the greatest extent possible, the text contained in the Chairman's text and the more recent text proposed by the Friends of third parties, in order to reduce some of the confusion that may arise from the coexistence of these two texts. They also sought to reduce differences between them to the extent possible. Remaining differences are also identified in the consolidated text.

786. With respect to third party rights in panel proceedings (Article 10.2), discussion mostly focused on the question of whether the panel should be allowed discretion to accept the participation of Members who expressed interest more than 10 days following the establishment of the panel.

787. Some participants considered that such flexibility, which existed in current practice, could usefully be codified. Other participants expressed concern that the language proposed in respect of notifications after the initial 10-day period may create an incentive to notify late. It was observed that such late notifications should not lead to complications in the proceedings. It was also noted that the text did not provide guidance to the panel on the parameters that may guide its decision to accept or not late third party notifications. Specifically, it was asked how late notifications would be treated in relation to the requirement under Article 8.3 of the DSU that no national of a third party be selected as a panelist unless the parties agree. This question arose both if the late notification was made prior to the composition of the panel and if it was made after composition.

788. The proponents clarified that they were seeking to keep a balance between this possibility and an incentive to express interest within the 10 days. They emphasized that if the 10-day rule itself was codified, it would be necessary also to expressly allow flexibility for later notifications in order to retain the flexibility that existed under current practice. It was suggested that if late notifications were to be allowed, some language should be developed to explain the elements on which the panel might base its decision, including in relation to panel composition issues under Article 8.3.

789. The proponents also pointed out that their proposed text would no longer refer to "substantial interest", which in practice had turned out not to have any practical meaning.

790. With respect to the rights of third parties in panel proceedings, the proponents noted that they were in agreement on most issues, including presence of third parties at both substantive meetings, but there were differing views on whether third parties should be able to take the floor in the context of both meetings or only in the context of the first one.

791. Some participants reiterated their reservations concerning active participation of third parties at both substantive meetings. It was suggested that this question should be assessed in light of whether it would disrupt the panel proceedings and put parties in difficulty for the effective presentation of their positions. Another participant noted however that there may be a tension between allowing third parties full access to information in the course of the proceedings but not the opportunity to speak in the later stages.

792. With respect to additional rights in panel proceedings (proposed Article 10.2(c)), it was proposed that they be granted only upon agreement of the parties, on the premise that the level of rights automatically granted would be enhanced, thereby reducing the need to allow additional rights to be granted. Some participants noted that this part of the text was closely tied to the level of basic rights that would be defined in the previous paragraph. Therefore it should be considered together with that text.

793. With respect to the proposal to allow third party interest to be expressed for the first time before the Appellate Body (Article 17(4)), some participants reiterated their concerns with respect to the potential undue burdens that this would impose on the proceedings and on the parties, at a stage of the proceedings when time was scarce. Concern was also expressed that, to the extent that the proposal would remove some of the incentive for taking part at the panel stage, this could

adversely impact on the quality of panel reports, while at the same time allowing new issues to be expressed for the first time before the Appellate Body. Overall, one participant was not convinced that the added convenience for some Members outweighed the additional burdens on the parties.

794. The proponents recalled that only new arguments, not new issues, might be raised by third participants on appeal. They also considered that, to the extent that the proposal might lead to increased levels of participation at the appellate stage, the procedural burdens that this entailed could be handled by the Appellate Body, which was already accustomed to adapting its proceedings to such constraints.

795. A participant asked whether a middle ground might be available, to allow the costs to the parties not to outweigh the benefits. The proponents considered that the proposal reflected such a balance, by providing a time-bound opportunity and allowing the Appellate Body to organize the proceedings so as not to create undue burdens.

796. It was commented that 5 days might be an insufficient period for Members to determine whether they had an interest in participating. The current Appellate Body Working Procedures provided for the filing of notices of other appeal on day 5. A few additional days may therefore be needed to allow a fully informed expression of third party interest. The proponents agreed.

797. With respect to the proposed Article 21.5(c), participants agree that, if consultations are requested in the context of compliance proceedings, expressions of third-party interest should be possible. The only point under discussion is how this should be formulated. The Friends of Third Parties consider the language contained in the previously agreed sequencing text to be unclear in this respect and propose alternative language. It was noted that there was no disagreement on the concepts here, and this drafting issue could be reserved for now.

798. The Friends of Third parties propose to allow third party participation in Article 22.6 proceedings. It was discussed whether these proceedings involved issues that were primarily of a bilateral nature and therefore not warranting input from other Members, or whether legal or other issues of broader systemic interest were also at issue. There continued to be different views in this respect. Some participants consider that these proceedings involve primarily factual issues relating to the calculation of the impact of the measures on the complaining party. Others consider that the application of the principles of Articles 22.4 and 22.3 by the arbitrator necessarily involves legal aspects (including an interpretation of the meaning of nullification or impairment) and other issues of general interest, such as the choice of methodologies available for the calculation of nullification or impairment.

799. A participant suggested that it was desirable to maintain consistent treatment among various arbitral proceedings across the DSU and observed that third party access was limited in arbitral proceedings under Article 25. A proponent questioned the analogy to Article 25 proceedings, which it considered to be of a different nature.

800. Another participant suggested that a middle ground might be considered, between the current practice, which suggested limited discretion exercised by arbitrators, and full third party access. This might be achieved by providing the arbitrator with guidance as to the basis on which to accept participation.

801. Finally, it was noted that BCI issues may arise in retaliation arbitral proceedings, which could be expected to be handled in a similar manner as in other phases of the proceedings.

802. We also briefly considered potential third party participation at the appellate stage of retaliation proceedings (Article 22.7), if this were to be accepted. Those participants that had reservations about third party participation before arbitrators under Article 22.6 also were not in favour of such participation at an appellate stage of such proceedings.

803. Finally we considered the consequential changes to Appendix 3 of the DSU that would arise as a consequence of enhanced third party rights at the panel stage under Article 10.2. The language in paragraph 6 had been adjusted to reflect an agreement reached by the G-7 and Friends of third parties.

804. Participants who had expressed reservations concerning the need for a second oral statement of third parties before the panel questioned the text proposed in that respect in paragraph 7 of Appendix 3.

805. A number of participants also doubted whether it was necessary to mention in paragraph 8 the possibility for the panel to ask questions of the third parties, as it was clear that this was already possible. In this respect, it was also noted that the panel would be able to give the parties an opportunity to comment on any responses to questions by third parties in the context of the second meeting.

806. The proposals on transparency, in particular open hearings, were also recalled. It was noted that their adoption could make some aspects of the proposed text unnecessary.

Developing country interests

807. This week we also discussed draft legal text presented by proponents of developing country interests, on effective compliance and access to the system for developing country Members. Other Members welcomed the circulation of this text as an important step forward to facilitate discussion.

Facilitated cross-retaliation for developing countries

808. The proponents suggest the adoption of the following text as Article 22.3*bis* of the DSU, to facilitate cross-retaliation by developing country members:

> "Notwithstanding the provisions contained in Paragraph 3, if the complaining party is a developing country, such Member shall have the right to seek authorisation to suspend concessions or other obligations in any sector(s) under any covered agreement(s)."

809. As the proponents explained, this language reflects other participants' comments in earlier discussions. In particular, the former language "in a dispute between a developing country Member and a developed country Member" had now been removed. Facilitated cross-retaliation would be available to developing country complainants irrespective of the respondent's status.

810. In the proponents' view, the procedure for cross-retaliation under Article 22.3 of the DSU was too cumbersome and developing countries should not have to demonstrate that retaliation in a sector or under a covered agreement is not practicable or effective. The additional time required for this justification process could have serious implications for the economy of the developing country complainant in question. The proposal therefore addressed the time implications of this process before the arbitrator.

811. Some participants welcomed the removal of the reference to the status of the responding Member ("double S and D") as a step in the right direction. Some participants supported the proposal.

812. Some participants questioned whether the proposed text added any value to Article 22.3 of the DSU, which already allows cross-retaliation for any type of complainant. A participant, while sympathetic to developing country constraints, asked what specific difficulties motivated the proposal. It was suggested that if a developing country complainant had a small volume of trade, it could easily demonstrate that retaliation in the same sector is not practicable or effective. Another participant stated that it was reasonable to support developing countries but this had to be done fairly and neutrally.

813. The proponents also wished to ensure neutrality and fairness under the DSU. They explained that the proposal would not introduce a new right: Article 22.3 of the DSU already provided for cross-retaliation. The added value of Article 22.3*bis* would be to make Article 22.3 readily accessible for developing countries. Some large developing countries would have no problems retaliating under Article 22.3. However, a majority of developing countries lacked a sufficiently diverse trading profile to effectively retaliate in the same sector. For many Members, enforcing compliance was the most frustrating aspect of WTO dispute settlement. The specific

problems faced in the past by certain developing countries were well known to all. These experiences made the issue a legitimate one.

814. Some participants reiterated their support for the sequence currently reflected in Article 22.3 of the DSU, of starting with the same sector and then moving to other sectors and then other agreements. They argued that retaliation in the same sector facilitated an assessment of equivalence. The proponents agreed that the sequence codified in Article 22.3 of the DSU made sense. However, the language of that provision was not workable for developing countries, because the process of justification was too burdensome. The proponents explained that their proposal addressed only certain evidentiary issues: it would maintain the need for the complainant to provide an explanation of why it was not practicable or effective to retaliate in the same sector or agreement, but it would do away with the subsequent exchange of arguments on that evidence. The proposal did not change the way the arbitrator calculates equivalence.

815. It was asked how the proposal would address asymmetry between a large developing country complainant and a small developed country respondent. The proponents answered that retaliation served to induce compliance, and all WTO Members were bound to comply. Although compliance was an issue irrespective of the respondent's status, the proposal involved S&D because in practice developing country Members had always complied.

816. The proponents explained that large developing country Members would not be excluded from the proposal, but they would not need it to effectively retaliate and were not the main target of the proposal. Some participants suggested that if the intention was to address the specific difficulties faced by certain developing countries, Article 22.3*bis* should be limited to that group of Members. If Article 22.3*bis* remained available for large developing countries, the means would not match the otherwise laudable goal of facilitating cross-retaliation for those developing countries that face particular constraints. For instance, some guidance could be given to arbitrators on the elements to be taken into account in assessing impracticability and ineffectiveness under Article 22.3 of the DSU.

817. The proponents explained that they had reflected upon providing such guidance to arbitrators but concluded that this would be difficult to achieve. For instance, cross-retaliation could be facilitated if raw materials or intermediate goods amounted to a certain proportion of a developing country Member's trade profile. However, there was no simple definition of these concepts. Reliance on the relative size of the parties' economies also presented challenges. The proponents were open to discussing any ideas for a reliable indicator. A participant signalled that any reclassification of Member would be politically sensitive.

818. Finally, it was suggested that the text should say "developing country Member" instead of "developing country".

Calculation of level of nullification or impairment

819. The proponents suggest an amendment of Article 22.4 of the DSU to take into account the economic impact of the inconsistent measure on the developing country complainant. The provision would read as follows:

> "The level of the suspension of concessions or other obligations, authorised by the DSB shall be equivalent to the level of the nullification or impairment. If the case is one brought by a developing country Member, the level of nullification and impairment shall also include an estimate of the impact of the inconsistent measure on the economy of such Member."

820. The proponents explained that developing countries had become extremely vulnerable as they had experienced an increase in export concentration between 1995 and 2011. Exports constituted a significant and growing share of developing countries' GDP, and were growing relative to domestic consumption. Trade restrictions increased the price of imports, and reduced demand. As a consequence, production, income, employment and ultimately consumption decreased, too. With time, this could lead to a negative spiral in other parts of the economy.

821. The proponents added that S and D was a long-established principle of WTO dispute settlement. Under the 1966 Procedures referenced in Article 3.12 of the DSU, panels in disputes initiated against developed respondents had to take into account the impact of the measures at issue on the developing country complainant.[88] Similarly, the 1979 dispute settlement understanding provided for appropriate action based on the impact of the measure on the developing country complainant.[89] Under Article 21.8 of the DSU, the DSB was required to take into account the impact of the measures at issue on the economy of the developing country complainant. The proposal would add a second sentence to Article 22.4 to make Article 21.8 of the DSU effective.

822. Several participants supported the proposal, arguing that Article 21.8 of the DSU had to be made effective in practice. A participant considered that the Arbitrator in *EC - Bananas III* had recognized that the impact of an inconsistent measure might be higher for developing countries.[90] Certain participants sympathised with the proposal's rationale and supported its intent but remained sceptical on how it could be implemented in its current form.

823. Some participants welcomed the move away from "double S and D" in this proposal. In contrast, one participant regretted that, unlike the original proposal, the revised version did not take into account the interests of developing countries both as complainants and respondents.

824. Some participants asked whether, under the proposal, the concept of nullification or impairment would differ depending on the complainant's status. It was suggested that this concept should remain unified, while taking into account the concerns of developing countries in a case-by-case approach. Clarification was also sought on the relationship between the current and proposed text. Whereas the current Article 22.4 equated the level of retaliation to the level of nullification or impairment, the proposed second sentence seemed to provide for a compulsory additional consideration. Some participants expressed concern that this would create two standards for nullification or impairment: one applicable to all Members and another one with a premium for a subset of Members. Concern was also expressed that an *a contrario* reading of the proposed text should not change the concept of nullification or impairment for other Members.

825. The proponents responded that their proposal did not intend to change the concept of nullification or impairment and would not create two levels of nullification or impairment. It merely suggested that, in addition to trade effects, an estimate of economic impact be included in the calculation of nullification or impairment for developing country Members. The proponents stressed that it was important to see the motive of their proposal. An inconsistent measure against imports from a developing country complainant involved nullification or impairment that went beyond mere trade losses. The measure had an impact on the entire economy of the developing country. The proposed second sentence of Article 22.4 added value to the current text for those Members.

826. Certain participants wondered how economic impact would be calculated, and asked if the complainant would need to quantify and justify the impact before the arbitrator determines it. One Member considered that economic impact could be problematic as an element of nullification or impairment *per se*, and also from a practical interpretive perspective. The boundaries and methods of that calculation would be unclear, so the proposal should specify what the arbitrator should assess in this regard.

827. The proponents explained that they were not suggesting a sweeping amendment to the DSU. They did not question the practice of Article 22.6 arbitrators. The DSU did not set forth formulas or methods to calculate nullification or impairment or the level of retaliation. The established practice was that each party had to sustain its factual assertions. Current practice also reflected a prudent approach, avoiding claims that could not be meaningfully quantified. The proponents were merely suggesting that a particular factor, which was already present in the DSU,

[88] See Decision of 5 April 1966 on Procedures under Article XXIII, paragraph 6 (BISD 14S/18, reproduced in The WTO Dispute Settlement Procedures, A collection of the Relevant Legal Texts, Third Edition, 2012).

[89] See Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, Adopted on 28 November 1979, para. 23 (L/4907, BISD 26S/210).

[90] See *EC – Bananas III*, Recourse by the European Communities to Arbitration under Article 22.6 of the DSU, Decision by the Arbitrator, WT/DS27/ARB/ECU.

be included in the calculation of nullification or impairment as S&D for developing countries. Ultimately, it was for the arbitrator to determine equivalence.

828. One Member found that "impact" was too broad a term and that it was unclear how it should be assessed. The proposed text made the concept of nullification or impairment even more unclear than what it already was. It was also suggested that in some cases the economic impact could be non-existent or at least not additional to trade effects. It was questioned whether it was correct to assume that the additional factor of economic impact would be a positive figure in each case. The proponents, in response, questioned whether a Member would challenge a measure if it had a positive economic impact.

829. It was questioned whether the term "also" was necessary, if the intent was not to include an element additional to nullification or impairment. The proponents considered it to be necessary because arbitrators had limited nullification or impairment to trade effects whereas, for developing countries, the impact of inconsistent measures is not limited to trade loss. A participant questioned however whether practice to date implied that the concept of nullification or impairment was limited to trade effects. It was suggested that a variety of means of calculating the nullification or impairment might be envisaged, depending on the circumstances of the case. Perhaps the term "nullification or impairment" should be defined – and not exclusively for developing countries.

830. A participant suggested that the text could be redrafted to focus on the subset of developing country complainants that faced the problem that was being addressed. It was further suggested that, if the proposed modification served to make Article 21.8 more effective, the link between the two provisions should be strengthened. This could be achieved either by referencing Article 21.8 in Article 22.4 or by adapting the language of Article 22.4 to Article 21.8. For example, the proposed second sentence of Article 22.4 might read as follows: "If the case is one brought by a developing country Member, *in determining* the level of nullification and impairment, the impact of the inconsistent measure on the economy of such Member *shall be taken into account.*"

831. It was asked what period would be taken into account in the calculation of nullification or impairment. In response, the proponents explained that the way in which nullification or impairment would be calculated would not change under the proposal. It would remain prospective, from the end of the reasonable period of time to comply. Hence, economic impact would also be assessed as from the end of the reasonable period of time.

832. A participant suggested that the text refer to "an estimated impact", instead of "an estimate of the impact", of the inconsistent measure.

<u>Retaliation on behalf of another Member</u>

833. The proponents suggest inserting new language into Article 22.6 of the DSU as subparagraph (b), which would follow the current language of that provision, to be renumbered as paragraph (a). The proposed subparagraph (b) reads:

> "Where a developing country Member has been authorised to suspend concessions or other obligations under Article 22.6 (a), and it considers that it is not practicable or effective to utilize that authority, the DSB shall, upon request by such Member, authorize other Member(s) to suspend concessions or other obligations on behalf of the requesting Member unless the DSB decides by consensus to reject the request. The authorization established in this Article shall be the same as the initial authorization granted under Article 22.6 (a)."

834. The proponents explained that the proposal was no longer called "collective retaliation" because not all Members would be allowed to retaliate on behalf of the developing country complainant. The complainant would approach some other Members and explain that it faces difficulties in using the authorized retaliation. If specific Members are prepared to do so in its stead, the DSB would then authorize the transfer of the original authorization.

835. It was asked whether the transfer should be decided by the DSB or by the Member originally authorized to retaliate. A participant questioned whether the term "unless the DSB decides by

consensus to reject the request" was necessary. It was also asked whether the term "on behalf of the requesting Member" was accurate, as retaliation was formally authorized by the DSB. Clarification was also sought as to whether the right would be fully transferred to another Member or would remain formally vested with the complaining Member. The proponents explained that the right itself would remain with the complaining Member.

836. It was asked whether the term "same" would entail that both the authorized level and sectors of retaliation would remain unchanged. The proponents responded that Article 22.6 clearly specified what retaliation would be authorized. Other Members could not deviate from the sectors and levels originally authorized.

837. It was further asked how the proposed Article 22.6(b) would work together with the proposed Article 22.3*bis*. If the authorization to retaliate was transferred to a developed Member under Article 22.6(b), would that Member benefit from any cross-retaliation flexibilities obtained by the complainant under Article 22.3*bis*? The proponents confirmed that the flexibility of Article 22.3*bis* would also apply to a developed Member retaliating on behalf of a developing country under Article 22.6(b). This was confirmed by the second sentence of the proposed Article 22.6(b).

838. It was also asked whether a specific amount of authorized retaliation could be passed on to more than one other Member and if so, whether and how the original amount would be divided among these Members. Another participant asked whether the DSB authorization would specify which Members may retaliate on behalf of the developing country and in regard to what amount.

839. It was further asked whether the Members exercising the right would have any margin of manoeuvre. For instance, if after a year a Member ceases to retaliate, could that Member or the original complainant transfer the right to retaliate to another Member? The respondents answered that any margin of manoeuvre would undermine the predictability of WTO dispute settlement. Article 22.1 of the DSU provided that retaliation shall be temporary.

840. One participant supported the proposal and considered it might be necessary in certain situations. Another participant welcomed the fact that this proposal, which resembled an earlier one, was being discussed again.

841. A number of participants questioned the proposal's systemic and practical implications. Several participants indicated that they understood the underlying rationale of the proposal and recognized the difficulties that certain Members may face in retaliating effectively against larger economies. They also recognized the importance of prompt compliance. At the same time they were not persuaded that the means proposed to address this issue were suitable. Certain participants were supportive of looking positively to ways to solve compliance issues, but considered that it must also be ensured that proposals are workable and don't create more problems than they seek to resolve. In light of the bilateral nature of existing remedies under the DSU, multilateral retaliation "on behalf" of others would be hard to achieve.

842. One participant could accept the notion of transfer of rights in this context, noting that the notion of subrogation of rights was already present in the context of bilateral investment treaties. Another participant, while sharing the concerns of the proponents concerning the difficulties of inducing compliance for small economies, expressed fundamental systemic concern with the notion of a transfer of treaty rights in a context of state-to-state relations.

843. It was debated whether Article 14 of the Anti-Dumping Agreement already led to a comparable situation within the WTO system, in which a Member acted on behalf of another. A participant considered that this was the case, while another considered the situation not to be comparable because under that provision, the investigation and related actions are taken by the importing Member itself.

844. A participant considered that the notion of transfer of retaliatory rights to a Member who had not invoked the dispute settlement procedures was fundamentally at odds with the principles embodied in the DSU. In particular, Article 3.7 made clear that retaliatory measures were authorized as a last resort available to a Member having invoked the procedures and after following a number of procedural steps. The proponents observed in response that the complaining Member would have followed all the relevant procedural steps, which would not be

circumvented. Only after these steps have taken place, would the complaining party look for partners.

845. It was also noted that the proposal would involve the transfer of the right to a Member without a direct interest in the matter at issue. It was questioned what the incentives might be for the Member exercising the retaliation rights to do so, and it was suggested that this may give rise to situations of abuse. In response, the proponents observed that the starting point for the proposal was a situation in which a developing country Member was unable to exercise its rights. The non-compliant Member had an obligation to abide by its obligation and the objective was to induce compliance by that Member. A participant noted that the existence of asymmetries between Members should not create an advantage for developed Members to the detriment of small economies.

846. A participant considered the proposal unworkable as it referred only to Article 22.6, not Article 22.7 of the DSU. In cases where the original respondent objected to the requested retaliation, the DSB authorized retaliation on the basis of Article 22.7 of the DSU, following arbitration. So far, most requests for authorization to retaliate pursuant to Article 22.6 had been challenged by the respondent. Hence, the proposal would not cover the most typical situation.

847. A participant noted that under this proposal, as with certain others considered previously, the DSB would need to adjudicate the development status of a Member, which was problematic. Questions were also raised about the practical workability of the proposal. It was observed that there appeared to be no opportunity for the Member concerned to raise an objection to the complainant's assessment that it is not practicable or effective for it to retaliate, and no mechanism to ensure that the measures would be applied consistently with the authorization. It was asked who would be accountable for the application of the retaliatory measures in the event that the authorization was applied by several Members and how disputes concerning such authorisation would be handled, in a post-retaliation scenario. A participant noted that experience suggested that calculation and application of the level of suspension was not straightforward. Many questions remained today in this respect. The proponents observed that the question of ensuring that equivalence was respected in the application of the measures already arose in current practice, as illustrated by the *EC – Bananas III* and *US - Gambling* cases.[91] This was not modified by the proposal.

848. A participant considered that some of the underlying premises of the proposal, i.e. that large economies were less compliant than others and that retaliation was the principal motivation for compliance, were questionable. If that were the case, Members would wait until the last moment prior to facing retaliation to comply, which was in fact not the case. The system was overall functioning very well and care should be taken to make improvements without making things worse. It was also suggested that the threat of retaliation was not the fundamental reason for Members to comply or not comply. Rather, they complied because they were committed to the system. Absence of compliance could arise for a number of reasons. Remedies were an instrument provided by the system to retain balance in trade relations in the event of non-compliance. However the complaining party may not achieve much, if other Members retaliate on its behalf but the situation ultimately remains the same because retaliation is not the best mechanism to induce compliance. The proponents observed that retaliation was the remedy currently available under the DSU. They were open to suggestions as to other means of inducing compliance.

849. It was asked whether the proponents had considered looking to a strengthening of compensation, the other remedy available under the DSU. The proponents explained that they had discussed this possibility, but that compensation also raised issues as a means to induce compliance.

850. In closing, I noted the efforts of proponents in presenting draft legal text and encouraged delegations to continue to discuss. It appeared that there was broad recognition of the difficulties faced by small developing country Members in retaliating effectively, but a number of questions remained on the proposed solution that needed to be addressed in order to move forward.

[91] See *EC – Bananas III*, Recourse by the European Communities to Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27/ARB/ECU and *US – Gambling*, Recourse by the United States to Arbitration under Article 22.6 of the DSU, Decision by the Arbitrator, WT/DS285/ARB.

Administrative measures

851. A proposed Article 22.8*bis* focuses on administrative measures to be authorized by the DSB, when non-compliance continues after the end of RPT.

852. The proponents explained that the objective of this proposal was also to achieve effective compliance in situations of prolonged non-compliance. Reference was made to Article 3 of the DSU, which defines dispute settlement as a key element of security and predictability in the multilateral trading system and to Article 21.1, which recognizes prompt compliance as essential to the resolution of disputes. The proponents observed that in practice, a long time elapsed before obtaining remedies. Finally, 21.7 established that in matters raised by developing country Members the DSB would consider what action to take, as appropriate to the circumstances.

853. Under this proposal, temporary measures would be applied, comparable to measures imposed in the Budget and Finance Committee for non-payment of WTO contributions, as recently modified and adopted by the General Council. This would be another alternative available to developing countries unable to suspend obligations. The measures proposed include barring from chairmanship of WTO bodies, no access to the WTO documentation and website, reporting by the Secretariat on implementation of the measures and a yearly notification to the Minister.

854. Participants noted that the proposed Article 22.8*bis* would apply to all Members. One participant welcomed this, as neutral provisions seemed more workable.

855. Certain participants supported objective of inducing compliance. Some believed the systemic implications of the proposal needed further reflection. Several participants found the proposal problematic in light of its systemic and practical implications. It was suggested that the proposal was punitive and thus different from other proposals on developing country issues. It was also noted that the scope of the measures, which extended to access to WTO chairmanships and documents generally, reached beyond dispute settlement activities. It was also noted that the usual way of achieving compliance was through consultations and engagement with the other party, while the proposed measures would disconnect Members from the WTO and impede them from participating in dispute settlement and other WTO activities. Also, it could impinge on the interests of Members that wished to share documents with Members that happened not to have complied with DSB recommendations and rulings.

856. In response, the proponents explained that the proposal served to improve the surveillance of implementation by the DSB and to induce effective compliance, including by involving the Director-General and the WTO Secretariat. The objective was not to impose punitive sanctions such as fines. Nor did the proponents intend to cut Members off the WTO. They referred to the recently adopted procedures for Members whose dues were in arrears. Those procedures covered all Members, even developing countries that faced serious economic constraints. Access to documents was important, the Budget and Finance Committee adopted its procedures nonetheless. Also, Members' legislatures had committed to comply with WTO rules when they approved WTO accession.

857. Various participants noted that the text suggested that measures would be available upon the expiration of the reasonable period of time to comply. However, proceedings may be necessary to determine whether compliance had been achieved. Thus, either the proposed administrative measures would be imposed only if the Member concerned admitted absence of compliance, or this proposal entailed a conflict with compliance proceedings as foreseen under the sequencing proposal. The proponents explained that they had considered the relationship of this proposal with sequencing and were not suggesting applying administrative sanctions before there was a multilateral determination of non-compliance. The proponents were ready to discuss this issue with interested Members.

858. It was noted that the list of proposed measures differed somewhat from the set of measures available in the context of Members in arrears. It was also asked whether the measures would be gradual, by initially blocking access only to certain types of documents, for instance. The proponents responded that the various administrative measures would not be compulsory; the complainant could choose which ones to apply. The proponents were ready to discuss this aspect of their proposal with interested participants.

859. A participant voiced concerns over the proposed blocking of chairmanship of WTO bodies: this would need to apply at least on an annual basis, as serving chairpersons could not be replaced during their term with nationals of Members who achieved compliance. The proponents pointed out that the proposal was limited to nominations, and did not affect serving chairpersons.

860. It was suggested that to the extent any link existed, there was a qualitative difference between non-compliance in dispute settlement and non-payment of dues. The latter was entirely under the control of a Member's executive, whereas compliance often involved other branches.

861. The proponents noted that a number of interventions expressed concerns with the proposed text. They would look at these with an open mind in reviewing it.

DS Fund/Litigation Costs

862. The non-paper contains text for a "DSB Fund" under Article 28 of the DSU, to facilitate developing countries' effective participation in WTO dispute settlement. This Fund would be available to developing country complainants and respondents, irrespective of the other disputing party's development status. A proposed "Annex X" to the DSU would address its detailed operation.

863. If a developing country Member could not access the DSB Fund "due to lack of budget", under the proposal, the panel and the Appellate Body would award certain legal costs to such Member. This possibility would be available only in disputes between developing and developed countries – provided that either "the developed country Member's measures have been found inconsistent with the covered agreements" or "a developed Member's claims do not succeed in a dispute against a developing country Member."

Dispute settlement Fund

864. The proponents argued that WTO dispute settlement had become too expensive for developing countries. Some of the costs needed to be shared. The proposed Annex X tried to address questions raised in earlier discussions as to what would happen when the DSB Fund would be exhausted. The Fund would be part of the regular WTO budget, while it could also receive voluntary contributions. The Fund's initial budget would be CHF 4 million, half of which would be a DS operation fund – similar to the Appellate Body operation fund set aside for a sudden surge of disputes. After the first year, the Fund's budget would amount to CHF 2 million *p.a.*, which represented about 1% of the annual regular WTO budget. The Fund would reimburse a developing country's dispute settlement costs for no more than 2 disputes per year, only as regards legal fees and costs, and up to a specific ceiling for each dispute settlement stage. The Fund's operation would be overseen by the Budget and Finance Committee, and reviewed annually by the General Council.

865. One participant expressed its wish to work closely with the proponents on this issue. Another found that the proposal struck the right balance. Some participants asked questions about specific aspects of the proposal's implementation.

866. Several delegations expressed concerns with the proposal, either for technical reasons or because of its perceived negative impact on the Advisory Centre on WTO Law (ACWL). In particular, several participants emphasised that the ACWL had been useful in providing assistance in dispute settlement and dispute avoidance, and it should not be undermined. Instead of creating a parallel system, the reflection should start from, and build upon, the existing mechanism of the ACWL. The ACWL could be strengthened, for instance, by making its funding more stable. Various participants considered the ACWL an institutionally more appropriate forum. Unlike the WTO, the ACWL could differentiate between developing countries in need of dispute settlement assistance and developing countries with major litigation capacity. One participant considered that the DSB Fund would not involve any costs to beneficiaries, so these Members would have no incentive to use the ACWL. According to another participant, if the proposal was accepted, donor governments would start making a choice between the DSB Fund and the ACWL. Ultimately, the question would be whether it was reasonable to contribute also to the ACWL.

867. The proponents explained that their proposal did not intend to weaken the ACWL but to strengthen it. If anything, the work of the ACWL would increase with time - for instance, because it would be used more frequently as a result of the DSB Fund. Further, even ACWL participation cost money: CHF 276,000 was a significant amount.

868. According to the proponents, a solution to the financial problems of developing countries in accessing WTO dispute settlement had to be devised at the WTO, in the DSU. The ACWL was outside the WTO. It was not multilateral as it did not involve all WTO Members. A number of trust funds existed already in the WTO as well as in other international judicial fora, such as the ICJ Trust Fund. WTO Members were already contributing to the WTO budget.

869. It was asked how the proponents had arrived at the reimbursement ceilings in paragraph 5 of Annex X. The proponents responded that they had calculated these by averaging the rates charged by the ACWL to all categories of beneficiary countries. The proponents added that they could provide separate figures for LDCs and developing countries in light of the discussion.

870. One participant noted that in the ACWL, LDCs paid only CHF 34,000 for a dispute, which was significantly lower than the CHF 276,000 evoked by the proponents. In fact, around 90% of the ACWL budget came from its Endowment Fund, which was financed by contributing members, not beneficiaries. This delegation wondered if the proposal's fundamental rationale was a concern with the fees charged by the ACWL. The proponents clarified that they did not have such a concern. Rather, they wanted to introduce a solution that would be part of the multilateral system.

871. A participant asked if in a dispute involving multiple developing country parties, they would all benefit from the DSB Fund. The proponents confirmed that this would be the case.

872. A participant asked whether the DSB Fund would cover costs other than those related to dispute settlement. The proponents answered that they would reflect upon this.

873. A participant asked whether the Budget and Finance Committee would oversee the operation of the Fund only in general or would also verify individual bills submitted for reimbursement. Another participant wondered whether the Secretariat would have any discretion to refuse reimbursing a frivolous or exaggerated bill under paragraph 7 of the proposed Annex X, and whether any recourse would be available against another Member's reimbursement requests.

874. The proponents responded that their proposal would introduce checks and balances. There would be a ceiling on the reimbursable amount at each stage, and reimbursements would be made only upon the presentation of bills for work already done. If the bill was below the ceiling, only the amount on the bill would be reimbursed. The WTO Secretariat had experience with disbursements. In any event, the proponents would reflect on the idea of a challenge against Members' reimbursement requests.

Litigation costs

875. The proponents explained that paragraph (b) (litigation costs) of the proposed Article 28 would be automatically triggered when the DSB Fund under paragraph (a) was unavailable.

876. Some participants suggested that the proposal should allow the reimbursement of litigation costs also in disputes between developing countries. The proponents signalled that developing countries had strongly resisted that idea, and the proposal tried to limit the instances in which litigation costs could be reimbursed.

877. A participant asked whether the triggering criteria for litigation costs were linked to unsuccessful claims or to a finding of inconsistency, and what would happen if only certain claims were successful. Several participants noted that it was often difficult to establish which party lost or won a dispute. The proponents explained that litigation costs would probably be awarded on a pro rata basis of the claims won by a developing country party.

878. It was asked whether the costs of government officials would also be reimbursed under the proposal. It was suggested that ancillary litigation costs also included, for instance, interpretation costs during consultations. The proponents explained that they wished to keep their proposal

simple. Hence, only legal fees and costs would be reimbursed, not other expenses such as the costs of experts and government officials. The proponents recognized that developing countries would incur additional costs in dispute settlement. They also recognized that half of the WTO disputes are settled at the consultation stage. Still, in light of their internal discussions, they had determined that litigation costs during consultations should not be reimbursed. The DSB Fund, however, would cover the consultation stage.

879. A participant noted that it was never simple to establish litigation costs. It questioned whether awarding litigation costs was the most effective use of taxpayers' money, given that the process leading to the award was very complex because costs were difficult to quantify. The proponents responded that awarding litigation costs might be complex but not impossible. A survey had found at least 56 jurisdictions that awarded litigation costs.

_____