RESTRICTED

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(16-4566) Page: 1/31

Dispute Settlement Body
23 May 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 23 MAY 2016

Chairman: Mr. Xavier Carim (South Africa)

Prior to the adoption of the Agenda[1]

Table of Contents

[1] See page 2.

Prior to the Adoption of the Agenda

The representative of India said that his country was compelled to raise an issue prior to the adoption of the Agenda. India first wished to refer to its earlier communication to the Chair and the United States on 18 May 2016. In that communication, India had expressed its objection to the omission from the Agenda of the present meeting of the status report pertaining to the dispute "US – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India" (DS436). India noted that this was inconsistent with Article 21.6 of the DSU. The DSB had not agreed or decided at its previous meetings that this item should be removed from the Agenda. Therefore, this came as an unpleasant shock for India. India disagreed with the statement made by the United States at the 22 April 2016 DSB meeting that it had complied with the DSB's recommendations in the DS436 dispute. While the United States might have taken some steps with regard to the CVD determinations, however it was abundantly clear that no steps had been taken to address the inconsistency of another measure, the US domestic law that had been found to be inconsistent with the provisions of the SCM Agreement. India wished to reiterate that the issue of the US implementation of the DSB's recommendations in the DS436 dispute was not resolved because the United States had not fully complied with the DSB's recommendations in this dispute. From a procedural perspective, India also noted that prior to the May DSB meeting, the United States had not filed a status report in accordance with its binding obligation under the last sentence of Article 21.6 of the DSU, compelling India to raise this issue prior to the adoption of the Agenda. This was not a minor procedural issue but a serious systemic issue for the dispute settlement mechanism. India urged that the omitted item relating to the DS436 dispute be restored on the Agenda under the item on surveillance of implementation of recommendations adopted by the DSB until the United States fully (and not partially) complied by submitting status reports to the DSB. Doing otherwise would be rendering Article 21.6 of the DSU ineffective and seriously undermining the surveillance mechanism under the DSU.

The representative of the United States said that his country objected to India's intervention regarding the DS436 dispute. India had not met the 10-day rule for inscribing an item on the DSB's Agenda. Further, there was no consensus to adopt the Agenda with such an item. Further, as noted in the previous DSB meeting, USDOC's recent determinations fully complied with the findings of the Panel and Appellate Body in this dispute regarding subsidization and the calculation of countervailing duty rates.

The representative of India said that his country found it strange that a claim of partial compliance without even addressing the DSB's recommendations and rulings could absolve a Member from providing further status reports in this dispute. It was interesting to note that the United States had adopted a different standard for implementing the DSB's rulings and recommendations in another dispute before the DSB at the present meeting. A look at item 1A of the Agenda demonstrated the point. It related to a dispute of over a decade with Japan that involved both "as applied" and "as such" findings in the context of anti-dumping. While the United States had claimed compliance in respect of the USDOC determinations, it had continued submitting status reports to the DSB for over 13 years now with respect to US anti-dumping duty statute. Therefore, the United States had not "fully" complied with the DSB's recommendations and rulings in that case. This did not warrant, and rightly so, the removal of the item from the Agenda. If the yardsticks involving two different complainants were different, this did not augur well for the dispute settlement system. Another recent dispute that may be relevant to highlight in the present context was the "United States – Section 211 Omnibus Appropriations Act of 1998" (Havana Club) dispute that had been under surveillance in the DSB until 25 January 2016. The United States, as announced at that meeting, had stopped providing status reports on this matter. However, it was important to note that the complainant in this dispute, the European Union, had stated at the 25 January 2016 DSB meeting that the EU had not considered the matter to be resolved within the meaning of Article 21.6 of the DSU. In order to resolve the matter, it had stated that the United States would have to repeal Section 211. Further, although the matter had not been resolved, in view of the positive developments, and for the time being, the EU had not considered it necessary for the United States to provide monthly reports for inclusion on the Agenda of regular DSB meetings. However, the EU had reserved all its rights in relation to this issue. In light of the US statement that it was not in full compliance, it was understood that should this item be re-inscribed on the Agenda by the United States, upon request by the EU, it would be placed under Agenda item 1. In the present dispute, India had not agreed to such removal. Furthermore, the

United States had not fully complied with the DSB's recommendations. India urged the DSB to include the item on the DSB's Agenda and requested the United States to submit status reports as per Article 21.6 of the DSU. India looked forward to the United States submitting a status report at the next DSB meeting. India also continued to maintain that this item must remain on the DSB's Agenda and India would raise the issue at the forthcoming DSB meeting until the United States achieved full compliance.

The representative of the European Union recalled that, at its previous meeting, the DSB had agreed to revert to this matter. Therefore, this matter should not be discussed at this point. He was puzzled about this situation because if the DSB had collectively agreed to revert to this matter, it was surprising to have this discussion prior to the adoption of the Agenda. He believed that the facts should be clarified.

The representative of the United States said that his country was likewise deeply puzzled by India's counterproductive interventions on this matter. The United States was ready to confer with India to discuss its concerns. However, as noted before, India had failed to meet the 10-day rule to inscribe an item on the Agenda. Therefore, its statements at the present meeting were highly misplaced. The United States looked forward to discussions with India about this matter.

The representative of India said that his country looked forward to working with the United States in preparation for the next DSB meeting.

Also prior to the adoption of the Agenda

The item concerning the Panel Report in the dispute on: "European Union – Anti-Dumping Measures on Biodiesel from Argentina" was removed from the proposed Agenda following the EU's decision to appeal the Panel Report.

The DSB took note of the statements and adopted the Agenda, as amended.

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti–dumping measures on certain hot–rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.160)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.135)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.98)

D. United States – Anti–dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.46)

E. United States – Countervailing duty measures on certain products from China: Status report by the United States (WT/DS437/18/Add.1)

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

A. United States – Anti–dumping measures on certain hot–rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.160)

1.2. The Chairman drew attention to document WT/DS184/15/Add.160, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that his country had provided a status report in this dispute on 12 May 2016, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for its statement and its status report submitted on 12 May 2016. Japan referred to its previous statements that this issue should be resolved as soon as possible.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.135)

1.6. The Chairman drew attention to document WT/DS160/24/Add.135, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that his country had provided a status report in this dispute on 12 May 2016, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.98)

1.10. The Chairman drew attention to document WT/DS291/37/Add.98, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.11. The representative of the European Union said that two GMOs[2] had been voted with no opinion result in the Standing Committee on 25 April 2016 and were scheduled for a vote at the Appeal Committee on 2 June 2016. More generally, and as stated many times before, the EU recalled that the EU's approval system was not covered by the DSB's recommendations and rulings.

1.12. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. As the United States had noted repeatedly at past DSB meetings, EU measures affecting the approval and marketing of biotech products

[2] Maize Bt11 × MIR162 × MIR604 × GA21 and cut flowers carnation line SHD-27531-4.

remained of substantial concern to the United States. Unfortunately, the situation was only getting worse and was having a dramatic impact on trade. Significant delays in the consideration of biotech products were restricting US exports of agricultural products to the EU. Shipments of corn had been restricted for many years and now, trade in US exports of soybean was being affected. As it had noted in April, the United States had serious concerns regarding the EU's treatment of approval applications for three varieties of biotech soybeans. These varieties were critical for US farmers because they included important technologies that promoted weed control. Yet, the approval of these varieties was stalled in the EU system. In particular, the EU's scientific body had concluded extensive scientific reviews of these soybean varieties in June and July 2015. The reviews had confirmed that these biotech products were safe for use in the EU. The EU, however, continued to delay the final approval of these products. The United States urged the EU to complete these approvals as soon as possible. These delays on soybean approvals were currently restricting contracts for sales of US soybeans to the EU. These delays not only harmed US farmers, but would also affect European farmers – who needed US soybeans to feed their livestock. In short, the EU's unjustified delays were ignoring the needs of both US and EU farmers. The United States again asked the EU to ensure that its biotech approval measures were consistent with its obligations under the SPS Agreement.

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

D. United States – Anti–dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.46)

1.14. The Chairman drew attention to document WT/DS404/11/Add.46, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain shrimp from Viet Nam.

1.15. The representative of the United States said that his country had provided a status report in this dispute on 12 May 2016, in accordance with Article 21.6 of the DSU. As the United States had noted at past DSB meetings, in February 2012 the US Department of Commerce had modified its procedures in a manner that addressed certain findings in this dispute. The United States would continue to consult with interested parties regarding matters related to the other recommendations and rulings of the DSB.

1.16. The representative of Viet Nam said that her country thanked the United States for its statement and its status report in this dispute. Viet Nam continued to expect the relevant parts of the DSB's rulings and recommendations in this dispute to be implemented by the United States in the context of the implementation of the second shrimp dispute (DS429). Any delay in implementation of the DS429 dispute may also delay the implementation of relevant parts of the DS404 dispute.

1.17. The representative of Cuba said that her country supported the statement made by Viet Nam. Cuba was concerned about the lack of compliance with the DSB's recommendations and rulings in this dispute. Cuba urged the United States to comply with the DSB's rulings and recommendations in this dispute.

1.18. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela took note of the US status report of 12 May 2016 and wished to refer to its previous statements made under this Agenda item. Venezuela reiterated the importance of prompt compliance with the DSB's recommendations and rulings. The prolonged lack of compliance undermined Members' trust in the dispute settlement system. Venezuela urged the United States to take necessary measures in order to settle this dispute and to report to the DSB on the measures and actions it intended to take in order to resolve this matter.

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

E. United States – Countervailing duty measures on certain products from China: Status report by the United States (WT/DS437/18/Add.1)

1.20. The Chairman drew attention to document WT/DS437/18/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US countervailing duty measures on certain products from China.

1.21. The representative of the United States said that his country had provided a status report in this dispute on 12 May 2016, in accordance with Article 21.6 of the DSU. The United States recalled that the findings in this dispute involved fifteen separate countervailing duty (CVD) determinations by the US Department of Commerce. On 14 December 2015, the US Trade Representative had requested USDOC to issue new determinations as necessary to render the challenged measures consistent with the recommendations and rulings of the DSB. The United States had completed the implementation process with respect to nine separate investigations, as well as with respect to one "as such" finding in this dispute. Specifically, the US Department of Commerce had issued new final determinations with respect to eight separate CVD investigations, and the US Trade Representative had completed the implementation process by directing USDOC to implement these determinations. In one other investigation covered by the DSB's recommendations and rulings, the US Department of Commerce had revoked the CVD order, making unnecessary any determination in that proceeding. The United States had also completed implementation with respect to the one "as such" finding adopted by the DSB. As detailed in the status report, the US Department of Commerce had withdrawn the approach addressed by that finding prior to the DSB's adoption of the reports in this dispute. On 26 April 2016, the US Department of Commerce had completed new final determinations with respect to two additional CVD investigations. On 19 May 2016, the US Department of Commerce had completed new final determinations with respect to the remaining four CVD investigations. The United States was working to complete the remaining steps in the implementation process as soon as possible.

1.22. The representative of China said that his country thanked the United States for its status report concerning US implementation of the DSB's recommendations and rulings in this dispute. China wished to make a few brief comments. The United States acknowledged that it had not implemented the DSB's recommendations and rulings within the reasonable period of time. Unfortunately, this was not the first time that the United States had failed to adhere to the reasonable period of time in disputes relating to the application of trade remedies by the USDOC. The United States had failed to adhere to the reasonable period of time in the dispute: "United States – Anti-Dumping and Countervailing Duties" (DS379), as well as in disputes brought by other Members concerning US anti-dumping and countervailing duty measures. China was particularly troubled by the fact that the United States had not adhered to a reasonable period of time that had been established pursuant to arbitration under Article 21.3(c) of the DSU. The entire point of initiating arbitration under Article 21.3(c) was that the parties were unable to agree upon the reasonable period of time. By the express terms of the DSU, the decision of the Arbitrator was "binding". By not implementing the DSB's recommendations and rulings within the reasonable period of time established by the Arbitrator, the United States had violated not only China's substantive right to obtain compliance with the covered agreements, but also its procedural right to have the reasonable period of time established through binding arbitration. Arbitration under Article 21.3(c) served no purpose if Members felt free to disregard the Arbitral award, as the United States had done in the present case. It was not as if the reasonable period of time established through arbitration was somehow unreasonable. The reasonable period of time of 14 months and 16 days granted by the Arbitrator was already significantly longer than the reasonable period of time that China had considered appropriate in this case. The reasonable period of time granted by the Arbitrator was only two weeks less than the 15 months that Article 21.3(c) established as a guideline for the maximum amount of time that an arbitrator should ordinarily grant, and yet the United States had still failed to adhere to it. It was now 16 months past the DSB's adoption of the Panel and Appellate Body Reports in this matter, and the United States had yet to implement the recommendations and rulings contained in the Reports.

1.23. China was further troubled by the fact that there had been long periods of time over the past 16 months in which the USDOC had made no apparent progress towards achieving compliance. The USDOC had not even initiated its Section 129 compliance proceedings until nearly

three and a half months after the DSB had adopted the Panel and Appellate Body Reports in this matter.

1.24. The USDOC had issued questionnaires and had obtained responses to those questionnaires between May and July 2015, but had not issued the first of its preliminary determinations until late February 2016. One had to wonder what steps the USDOC had been taking towards compliance during the entire second half of 2015. The USDOC had issued the last of its preliminary determinations on 7 March 2016, but only got around to issuing the last of its final Section 129 determinations on Thursday of the previous week. Notwithstanding its arguments to the arbitrator as to why it had required an extraordinarily long amount of time to bring itself into compliance, the United States appeared to have gone about the process in an entirely desultory fashion. China was regrettably left with the impression that the United States attached a low priority to complying with the DSB's recommendations and rulings in this matter or, worse, had actively sought to prolong the period during which it remained out of compliance with the covered agreements. Either way, the conduct of the United States in this matter was incompatible with the DSU's overarching goal of obtaining a "prompt settlement" of disputes between Members. China called upon the United States not only to implement the DSB's recommendations and rulings in this dispute as quickly as possible, but also to ensure that the USDOC complied with the reasonable periods of time in future disputes relating to US trade remedy determinations, whether those reasonable periods of time were established by agreement or through arbitration. Adherence to reasonable periods of time was essential to the proper functioning of the dispute settlement system. It was incumbent upon each Member to ensure that its domestic authorities carried out their work so as to permit the Member to comply with the DSB's recommendations and rulings no later than the expiration of the reasonable period of time established in each case.

1.25. As for the substance of the Section 129 determinations that the USDOC had issued thus far, China deeply regretted that those determinations would not bring the United States into compliance with the SCM Agreement. It was for this reason that China had sought consultations with the United States earlier that month. With regard to the issue of "public body", the USDOC continued to misapprehend the DSB's rulings concerning the proper interpretation of Article 1.1(a)(1) of the SCM Agreement. Most importantly, the USDOC had failed to give effect to the Appellate Body's observation that the central inquiry in respect of whether a particular entity was a "public body" was whether that entity "is vested with authority to exercise governmental functions".[3] With regard to the issue of benchmark "distortion" under Article 14(d) of the SCM Agreement, the USDOC had, for all intents and purposes, ignored the DSB's finding that the question of "distortion" was a question of whether the government possessed and had exercised market power so as to cause benchmark prices to be artificially low. The USDOC's new approach to the question of "distortion" bore no resemblance whatsoever to the requirement under Article 14(d) that the adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good…in the country of provision". The USDOC's approach to the issues of public body and benchmark "distortion" should be of concern to all Members. In recent years, the USDOC had routinely countervailed the alleged provision of inputs for less than adequate remuneration on the basis of its erroneous interpretations of Articles 1 and 14. These unlawful "inputs for LTAR" determinations had become central to the USDOC's countervailing duty practice. More generally, the USDOC had been finding benchmark prices all over the world to be "distorted" by one factor or another and resorting to out-of-country benchmarks on that basis, making routine what was meant to be a rare exception to the preference for using domestic market prices in the country of provision. The USDOC had taken a small opening in the interpretation of Article 14(d), established by the Appellate Body in the "US – Softwood Lumber IV" dispute, and used it as the basis for establishing an entire system of artificially inflated countervailing duty margins. It was past time for these abuses to stop. China would conduct the consultations with the United States under Article 21.5 of the DSU to discuss the above-mentioned and other concerns that China had with the USDOC's implementation measures. China looked forward to the US effective engagement in resolving this dispute.

1.26. The representative of the United States said that his country regretted that China questioned the US commitment to implementing the DSB's recommendations and rulings in this dispute. The record showed that China had no basis for doing so. Due to China's decision to bring one single, combined dispute challenging multiple CVD determinations on multiple grounds, rather

[3] Appellate Body Report, "US – Anti-Dumping and Countervailing Duties" (China), paragraph 318; Appellate Body Report, "US – Carbon Steel" (India), n. 515.

than 15 separate disputes each covering one CVD and advancing multiple claims, this single dispute was one of the most extensive to be faced by the dispute settlement system. Nonetheless, through the expenditure of extensive administrative resources, the United States had managed to complete implementation with respect to the majority of the CVD proceedings within the reasonable period of time. As had been explained, the United States was committed to completing the remaining work as soon as possible. Regarding China's consultations request, the United States had received China's consultations request and was preparing to engage with China. In reviewing this request, however, it appeared that China was seeking to rewrite WTO rules and to prevent action to counteract its injurious subsidization, which was the subject of significant global concerns. The United States considered that its redeterminations complied with WTO rules, and would continue to implement according to WTO rules as it took action against Chinese economic distortions.

1.27. The representative of China said that the United States had frequently referred to this dispute as one of the largest disputes in the history of the dispute settlement system, pointing to the fact that the DSB made findings of inconsistency in respect of 15 different countervailing duty determinations. While it was true that there were 15 different countervailing duty determinations at issue in this dispute, the fact was that the DSB's findings related to the USDOC's repeated application of the same unlawful standards and methodologies for evaluating the existence and extent of a subsidy. This dispute was not a dispute about 15 distinct CVD determinations. Like the zeroing disputes before it, this dispute was a dispute about the same unlawful standards and methodologies, applied over and over again. The USDOC's preliminary Section 129 compliance determinations bore this out. With regard to the two central issues in this dispute, "public body" under Article 1.1(a)(1), and benchmark "distortion" under Article 14(d), the USDOC had issued purportedly "new" rationales that applied across the board to all of the countervailing duty determinations in question. Just as the USDOC had applied a single, uniform standard in the "public body" and "distortion" determinations that had been the subject of the original DSB's recommendations and rulings, the USDOC had once again applied a single, uniform standard in its re-examination of those two issues. The dispute between the United States and China was, fundamentally, a dispute about the consistency of these standards with the requirements of the SCM Agreement. Thus, despite the attempt by the United States to portray this dispute as a dispute of enormous scope and complexity, the truth was that it was a relatively straightforward dispute concerning the interpretation and application of Articles 1.1 and 14(d) of the SCM Agreement. In any event, the nature of the dispute and the extent of the US compliance obligations in this matter were factors that the Arbitrator had already taken into account in establishing the reasonable period of time. There simply was no excuse for the failure of the United States to implement the DSB's recommendations and rulings within that time-frame.

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

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

A. Statements by the European Union and Japan

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

2.2. The representative of the European Union said that the EU wished to inform the DSB that the authorized level of retaliation against the United States had been adjusted as from 1 May 2016. The regulation containing EU measures had been published on 28 April 2016 and had been circulated to the DSB. The EU, once again, requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports in this dispute.

2.3. The representative of Japan said that, since the distributions under the CDSOA had been continuing, Japan, once again, urged the United States to stop the illegal distributions in order to resolve this long-standing dispute. As it had stated at previous DSB meetings, Japan was of the

view that the United States was under obligation to provide the DSB with a status report in this dispute, in accordance with Article 21.6 of the DSU.

2.4. The representative of India said that his country shared the concerns of the EU and Japan. The WTO-inconsistent disbursements continued unabated to the US domestic industry. India was of the view that this item should continue to remain on the DSB's Agenda until such time that full compliance was achieved in this dispute.

2.5. The representative of Canada said that his country wished to refer to its previous statements made under this Agenda item. Canada's position had not changed.

2.6. The representative of China said that her country thanked the EU and Japan for placing this item on the Agenda of the present DSB meeting. China urged the United States to fully comply with the DSB's rulings in this dispute.

2.7. The representative of Brazil said that her country thanked the EU and Japan for keeping this item on the DSB's Agenda. Brazil, as one of the parties to these disputes, was of the view that the United States was under an obligation to discontinue the disbursements that still took place under the Continued Dumping and Subsidy Offset Act of 2000. Brazil noted that the United States would argue that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, and therefore that there was no need for the item to be kept on the DSB's Agenda. But what was important in this dispute was that, as of now, disbursements, in the millions of dollars, continued to be made. The fact that these disbursements may be related to investigations initiated before the repeal of the Act did not mean that they were somehow excluded from compliance obligations. Since the DSB had confirmed the illegal nature of the disbursements under the Byrd Amendment more than ten years ago, any disbursement to petitioners should have been discontinued. Only then would compliance be achieved in this dispute.

2.8. The representative of the United States said that, as his country had noted at previous DSB meetings, the Deficit Reduction Act, which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000, had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU, Japan, and other Members had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, over eight years ago. The United States therefore did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Indeed, as these very WTO Members had demonstrated repeatedly when they had been a responding party in a dispute, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance.

2.9. The DSB took note of the statements.

3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

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

3.2. The representative of the United States said that his country continued to have serious concerns that China had failed to bring its measures into conformity with its WTO obligations. The United States recalled that the DSB had adopted its recommendations and rulings in this dispute in August 2012, and the reasonable period of time had expired in July 2013. But, as the United States had noted at past meetings of the DSB, China continued to impose its ban on foreign

suppliers of electronic payment services ("EPS") by requiring a license, while at the same time failing to issue the specific measures or procedures for obtaining that license. Meanwhile, China's domestic supplier continued to do business as usual. The United States previously had taken note of an April 2015 State Council decision, which indicated China's intent to open up its EPS market following issuance of implementing regulations by the People's Bank of China and the China Banking Regulatory Commission. That decision, however, had been issued over a year ago, and, to date, China had not issued the implementing regulations. As required under its WTO obligations, China must adopt the implementing regulations necessary for allowing the operation of foreign EPS suppliers in China. Furthermore, once adopted, any regulations must be implemented in a consistent and fair way. The United States continued to seek the prompt issuance and implementation of all measures necessary to permit foreign EPS suppliers to do business in China. The United States also expected that the applications of foreign EPS suppliers would be approved without delay.

3.3. The representative of China said that her country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made at previous DSB meetings under this Agenda item. China wished to emphasize that it had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute. China hoped that the United States would reconsider the systemic implications of its position.

3.4. The DSB took note of the statements.

4 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

A. Statement by the Philippines

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

4.2. The representative of the Philippines said that her country had frequently expressed its deep concern about a series of compliance issues that remained outstanding in this dispute, over four years after the expiry of Thailand's implementation deadline. Throughout that four-year period, the Philippines had consistently sought a bilateral resolution to these issues. Unfortunately, Thailand had not addressed the Philippines' concerns. Accordingly, earlier in May 2016, the Philippines had formally requested consultations, as communicated to Members in document WT/DS371/17. Consultations were scheduled to take place the following week in Bangkok. Consistent with the terms of the sequencing arrangement agreed between the parties, the Philippines looked forward to reporting on the results of those consultations to the DSB.

4.3. The representative of Thailand said that his country wished to inform the DSB that the consultations, as requested by the Philippines, were scheduled and that it would be premature to comment on the matter which would be the subject of consultations. Thailand looked forward to constructive discussions leading to a mutually satisfactory outcome to this dispute.

4.4. The DSB took note of the statements.

5 APPOINTMENT OF ONE APPELLATE BODY MEMBER

A. Statement by the Chairman

5.1. The Chairman said that he wished to briefly reiterate what had already been stated in the fax from the Selection Committee, which he had circulated on behalf of the Selection Committee on 12 May 2016. He recalled that a Selection Committee had been established by the DSB at its meeting on 25 January 2016 and had been requested to carry out a selection process on the appointment of a new Appellate Body Member to replace Ms. Yuejiao Zhang whose second term of office would expire on 31 May 2016. The Selection Committee had also been requested to make its recommendation on a replacement before 12 May 2016 in time for the DSB meeting of 23 May 2016. In carrying out that request, the Selection Committee had conducted thorough interviews with seven nominated candidates on 7 and 8 April 2016 with a view to identifying those individuals who possessed the qualifications and expertise as required by the DSU for Appellate

Body members. As part of the selection process, the Committee had met individually with 50 delegations to hear their views on the candidates. The Committee had also received in writing the views of 23 delegations. Throughout the process, the Committee had based its work on the guidelines, the rules and procedures contained in the DSU, and documents WT/DSB/1 and WT/DSB/70 governing the selection and appointment of Appellate Body members. As he had indicated in his fax, the Selection Committee regretted that despite its best efforts, it was not in a position to recommend a candidate that would enjoy the consensus of the entire Membership. Nevertheless, the Selection Committee had not given up on the possibility that it may still find a consensus on one of the seven candidates and, therefore, would need more time to consult further on this matter.

5.2. The representative of Australia said that his country wished to express its sincere appreciation for the work of the Selection Committee to date in interviewing candidates and holding confessionals with WTO Members. While it was disappointing that the Selection Committee was not yet in a position to recommend a candidate to the DSB at the present meeting, Australia would certainly urge the Committee to continue its work. Australia was pleased with the high-quality range of candidates put forward to fill the vacancy on the Appellate Body. The quality of the candidates reflected the importance of the work of the Appellate Body. As the Selection Committee continued its important work, including in consultation with Members, Australia would encourage all Members to place priority on the proper functioning of the Appellate Body and to show flexibility in helping find a candidate who could fill the opening on the Appellate Body with consensus support. Australia also, in that context, emphasised the importance of merit in considering the most suitable replacement.

5.3. The representative of Japan said that his country thanked the Chairman for his statement reporting on the state of play in the selection process for appointment of a new Appellate Body member. Japan wished to express its appreciation for the hard work that the Selection Committee had devoted thus far and to the Chairman's leadership on this very important matter. Japan took note of the Chairman's statement, and in particular, his report on the Selection Committee's continued efforts to seek a consensus on one of the seven candidates and the need to give more time to the Selection Committee to do so. The 2016 selection process was highly competitive, given that all seven candidates were highly qualified. This had made the task of the Selection Committee extremely challenging. Japan understood that the Selection Committee required further consultations to find a candidate who could be appointed by the DSB by consensus. That being said, as the Chairman was well aware, three appeals had been pending before the Appellate Body and a new appeal had just been filed. Given its heavy workload, the dispute settlement system could not afford the luxury of having an unfilled vacancy for the extended period of time. The dispute settlement system was one of the main features and pillars of the rules-based multilateral trading system. All Members agreed that the high-quality work and proper functioning of the Appellate Body, which served as the final adjudicator in the WTO dispute settlement, ultimately depended on the qualities and qualifications of individuals who would serve in the office. In that regard, Japan would emphasize that an individual's quality and qualification should be the guiding principle in the selection and appointment of an Appellate Body member. The task of the Appellate Body was too important to be entrusted to someone who was selected based on anything other than his or her merits. Japan trusted that the Selection Committee would continue to carry out its work fairly, impartially, independently and promptly and to successfully recommend the best possible candidate who could not only enjoy the blessing of the entire Membership in this selection process, but also someone with the ability and talent to produce highest-quality reports and to serve as a broad representative of the entire Membership. Japan wished to express its sincere appreciation to Ms. Yuejiao Zhang for her eight years of distinguished service as an Appellate Body member. During her term, Ms. Zhang had made tremendous contributions to the work of the Appellate Body and to the rules-based multilateral trading system. Japan wished her all the best in the future endeavours.

5.4. The representative of the European Union said that the EU noted the link between this Agenda item and the issues to be addressed under the next Agenda items, and in particular the workload issue to be raised under "Other Business". The EU stressed that a fully operational Appellate Body was essential for the proper functioning of the WTO dispute settlement system. The EU thanked the Selection Committee for its work concerning the appointment of a new Appellate Body member, for the post to be vacated by Ms. Yuejiao Zhang. The EU had carefully reviewed the merits of all candidates. In particular, the EU appreciated the opportunity of meeting the candidates, which enabled it to form a view on their expertise and qualities. On that basis, the EU

believed that the Membership had a sufficient choice among the candidates to appoint a person of the highest calibre and in line with the requirements of Article 17.3 of the DSU. Therefore, the EU thanked the Selection Committee for its continued efforts to seek a consensus on this matter.

5.5. The representative of Guatemala said that his country thanked the Chairman for his report. Guatemala noted that this was not the first time that a Selection Committee was not in a position to recommend a candidate because it considered that no candidate would enjoy the consensus of the entire Membership. This was problematic and the DSB needed to take prompt action on this matter. He noted that Article 17.3 of the DSU provided that the Appellate Body shall comprise of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally". It was customary that the Selection Committee carried out a selection process for which it conducted thorough interviews with all nominated candidates, with a view to identifying those individuals who possessed the qualifications and expertise required by the DSU. Following the interviews, the Selection Committee also carried out "appropriate consultations" with Members, pursuant to document WT/DSB/1. Once the interviews and consultations were finalized, the Selection Committee had to make a recommendation to the DSB. Subsequently, the DSB then appointed a new Appellate Body member. In no document or legal provision had Guatemala found that the task of the Selection Committee was to ensure that a candidate would enjoy the consensus of the entire Membership. Guatemala was of the view that "appropriate consultations" with Members should be focused on the merits, personal qualifications and credentials of the candidates. It was for the DSB (and not for the Selection Committee) to decide whether a candidate would enjoy the consensus of the entire Membership. It was also for the DSB to discuss with Members objecting the appointment of the recommended candidate and the reasons for their objection. From the explanation given by the Selection Committee, it seemed that there were objections to the majority, if not to all candidates. The DSB would not know this with any degree of precision. Members objecting to the candidates would remain anonymous, maintaining an incentive for any Member to object to any future candidate. The reasons for objection would also remain unknown, which created a perfect incentive for any Member to object a candidate for reasons other than the qualifications and expertise required under the DSU. Perhaps, it was time to start serious discussions about the interpretation of document WT/DSB/1 and to separate the mandate of the Selection Committee and the responsibilities of the WTO Members and the DSB.

5.6. The representative of China said that his country attached great importance to, and highly appreciated the work of, the Appellate Body. In that regard, China wished to thank the Selection Committee for its hard work over the past months. China was firmly convinced that the qualifications of the candidates met the requirements of Article 17.3 of the DSU and that they would add value to the system. At the same time, China wished to reiterate that the representative balance of the level of development in the composition of the Appellate Body was clearly stipulated in the 1995 DSB decision on the establishment of the Appellate Body. China firmly believed that the representative balance of Appellate Body membership between developed and developing-country Members should be fully maintained and duly respected. China would continue to work with the Selection Committee in its further work in order to complete the process for the appointment of a new Appellate Body member.

5.7. The representative of Hong Kong, China said that Hong Kong, China appreciated that the Selection Committee had been working hard to seek consensus. Hong Kong, China was disappointed that the appointment process had to be extended, especially since it believed that all seven candidates for the current appointment exercise were highly qualified. Hong Kong, China shared the concern that a prolonged vacancy would affect the efficient operation of the Appellate Body, which had a very heavy workload. Hong Kong, China was ready to work constructively with the Chairman and other Members in order to find a satisfactory solution as soon as possible.

5.8. The representative of the United States said that his country thanked the Chairman and the other members of the Selection Committee for their hard work to date. The United States wished to also thank the Members who had nominated candidates, and appreciated the willingness of candidates to meet with delegations and discuss their candidacy. The United States looked forward to hearing from the Selection Committee as its work continued.

5.9. The representative of Mexico said that his country thanked the Selection Committee. He said that as a former member of the Selection Committee he was well aware of how difficult the work of the Selection Committee could be. It was not an easy task, in particular since there were seven

candidates. Mexico had interviewed all the seven candidates and considered that they were very qualified. Mexico understood the complications inherent in this situation and believed that it was the DSB's responsibility to decide who was to be the next Appellate Body member. However, if the Selection Committee were to present Members with seven candidates, this would politicize the process much more than if the Committee continued to work as it did at present, by seeking to fill this vacancy with the candidate who possessed the best qualification and merits. Like the EU, Mexico also considered that this Agenda item and the next one were closely linked and noted that there was a heavy workload in front of the Appellate Body. If Members did not promptly resolve both this issue under this Agenda item and the next, they would find themselves in an extremely complicated situation. Mexico, therefore believed that all Members must make every effort to support the Selection Committee to enable it to reach a conclusion as soon as possible.

5.10. The representative of Indonesia said that his country thanked the Chairman for his statement on the selection process for the appointment of a new Appellate Body member to replace Ms. Yuejiao Zhang of China, whose second term of office would soon expire. Indonesia had been closely following the process carried out by the Selection Committee. In that respect, Indonesia wished to express gratitude to the Selection Committee which had dedicated its utmost energy and effort to carry out the selection process in a transparent and inclusive manner. Indonesia acknowledged that it was a very difficult task for the Selection Committee to select one of the Appellate Body candidates based on several criteria and parameters that had been set for that purpose. The adherence to the principles of independence and impartiality as well as the high qualifications and competence that had been well-demonstrated by candidates during the selection process had made the work of the Selection Committee even more challenging. It was regrettable to learn, however, that after in-depth interviews of candidates and consultations with Members, the Selection Committee was unable to recommend a candidate to be appointed by the DSB. In that respect, Indonesia agreed with the Chairman that the Selection Committee should be given more time to further consult with Members, with a view to finding consensus on one of the seven candidates. Indonesia also encouraged Members to demonstrate their constructiveness and flexibilities in the upcoming consultations to be held by the Selection Committee, so as to find a solution. Indonesia believed that it was in the interest of all Members and in the interest of the well-functioning of Appellate Body as well as the dispute settlement mechanism, to ensure that the principles of the multilateral trading system, as embodied in the WTO agreements, were fully upheld.

5.11. The representative of Brazil said that his country had met with all the candidates for the Appellate Body vacancy and had the opportunity to assess their abilities in light of the DSU requirements. There was no need to emphasize the crucial importance of the DSB for the proper functioning of the WTO. Brazil hoped that the successful outcome of this selection process could be achieved soon so that the current workload problem did not get even more critical.

5.12. The DSB took note of the statements.

6 THE ISSUE OF POSSIBLE REAPPOINTMENT OF ONE APPELLATE BODY MEMBER

A. Statement by the Chairman

6.1. The Chairman recalled that at the 22 April 2016 DSB meeting, he had announced that the issue of possible reappointment of one Appellate Body member would be on the Agenda of the present meeting. He said that he would wish to update delegations on the current status. He recalled that, in accordance with the DSB's decision of 25 January 2015, contained in document WT/DSB/70, the DSB Chairman was requested to carry out consultations on the possible reappointment of Mr. Seung Wha Chang for a second four-year term. Since then, both his predecessor and he had carried out informal consultations with interested delegations on this matter. As a result of those consultations, at the April 2016 DSB meeting, he had announced his intention to host a very informal meeting on 10 May 2016 to enable delegations to pose questions to Mr. Chang. A total of 26 delegations, including several EU member States, had participated in that meeting. At the outset of the meeting, he had read out the ground rules for the process, based on the process conducted in 2015 by the previous DSB Chairman. Following his introductory remarks, two delegations had made statements regarding the nature of the meeting and had expressed their views on the issue of reappointment, as set out in Article 17.2 of the DSU. Subsequently, several delegations had posed questions to which Mr. Chang had given his replies, and the meeting was then concluded. The following day, on 11 May 2016, the Chair was informed

by one delegation that it would be unable to support Mr. Chang's reappointment. That delegation's position and reasons had been made public. Delegations would have also received a communication by fax from the Chairman of the Appellate Body, dated 19 May 2016, which included a letter that the Appellate Body members had sent the DSB Chair with their views on these recent developments. If this present situation remained unchanged and if there was no agreement amongst Members on the matter of reappointment, Mr. Chang's term as an Appellate Body member would expire on 31 May 2016. He then invited delegations to make statements.

6.2. The representative of the United States said that his country thanked the Chairman for his work in carrying out consultations on the possible reappointment of one Appellate Body member, Mr. Chang. As Members may have been aware, after a careful review of Mr. Chang's service on the Appellate Body, the United States had concluded that it did not support reappointing him to a second term, and it would object to any proposal to reappoint him. The United States thanked Mr. Chang for his willingness to meet with WTO Members to discuss his service on the Appellate Body. The United States commended his willingness to make efforts to serve the world trading system for the past four years. Unfortunately, however, the United States did not consider that his service reflected the role assigned to the Appellate Body by WTO Members in the WTO agreements. Any failure to follow scrupulously the role Members had assigned through these agreements undermined the integrity of, and support for, the WTO dispute settlement system. In its statement at the present meeting, the United States would elaborate on the US position and address questions that had been raised in useful discussions the United States had had with other WTO Members. As an initial matter, it was important to underscore that reappointment was not automatic. He recalled that Article 17.2 of the DSU provided that each member of the Appellate Body "may be reappointed once". Action by the DSB to reappoint required a consensus of WTO Members.[4] Numerous WTO Members, from the very early years of the WTO, and prior DSB Chairs, had made the point that reappointment was not automatic.[5] Rather, it was a decision entrusted to Members, and it was an important responsibility. Given the critical role the dispute settlement system played in the WTO, and the Appellate Body's role within that system, the United States considered that this was not a decision for Members to take lightly. With respect to the reappointment under consideration, the United States had reviewed carefully the member's service on the divisions for the various appeals and had conducted significant research and deliberation. Based on this careful review, the United States had concluded that his performance did not reflect the role assigned to the Appellate Body by Members in the DSU.

6.3. The role of the Appellate Body as part of the WTO's dispute settlement system was to decide appeals of panel reports to help achieve "[t]he aim of the dispute settlement mechanism [,…] to secure a positive solution to a dispute", as set out in DSU Article 3.7.[6] The DSU reminded panels and the Appellate Body not once, but twice, that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".[7] Yet the reports on which this member had participated did not accord with the role of the Appellate Body. The United States had previously explained at DSB meetings its concerns with the adjudicative approach in a number of appellate reports with which he had been involved. That is, setting aside the substance of the reports, the United States had been troubled and had raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system in these reports. These concerns had arisen in disputes in which the United States had been a party and in those in which it had not. Although the representatives of Members were no doubt aware of those systemic concerns raised by the United States in past DSB meetings, the United States considered it would be useful to summarize briefly the comments

[4] DSU, Article 2.4 ("Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.").

[5] See, e.g., Minutes of 27 October and 3 November 1999 DSB Meeting, WT/DSB/M/70, pages 34-35; Minutes of 21 and 23 July 2003 DSB Meeting, WT/DSB/M/153, paragraph 99; Minutes of 20 June 2005 DSB Meeting, WT/DSB/M/192, paragraphs.57 and 58; Minutes of 25 November 2013 DSB Meeting, WT/DSB/M/339, paragraphs 1.1, 1.4 and 1.7; and Minutes of 25 November 2015 DSB Meeting, WT/DSB/M/370, paragraphs 7.1, 7.5 and 7.9.

[6] DSU, Article 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."); see idem, Article 3.4 ("Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.").

[7] DSU, Articles 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."), 19.2 ("In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

it had made in the DSB in relation to four of those reports. The United States would therefore circulate in the room documents containing those previous statements.

6.4. First[8], in the recent DS453 Appellate Body Report in the financial services dispute between Panama and Argentina, more than two-thirds of the Appellate Body's analysis, 46 pages, was in the nature of *obiter dicta*. The Appellate Body had reversed the Panel's findings on likeness and had said that this reversal rendered moot all the Panel's findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS.[9] Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations had served no purpose in resolving the dispute, they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis was comprised simply of advisory opinions on legal issues. The Appellate Body was not an academic body that may pursue issues simply because they were of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it was not the role of panels or the Appellate Body to "make law" outside of the context of resolving a dispute[10], in effect, to use an appeal as an occasion to write a treatise on a WTO agreement. But that was what the report had done in this appeal.

6.5. Second[11], in DS430, a dispute in which the United States had been the complaining party and had prevailed, the United States noted that the Appellate Body Report had engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal, and had even expressed "concerns" in that discussion on findings of the Panel that had not been raised by either party in the appeal. Furthermore, during the hearing, the Appellate Body had devoted considerable time to an issue that the parties and the third parties had agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings. The questioning was of such concern that the United States had felt compelled to devote its entire closing statement to urging the Appellate Body not to opine on that non-appealed issue.[12] It was not the role of the Appellate Body to engage in abstract discussions or to divert an appeal away from the issues before it in order to employ resources on matters that were not presented in, and would not help resolve, a dispute.

6.6. A third example had occurred in DS437.[13] The United States had explained its concerns that the Appellate Body Report suggested a view of dispute settlement that departed markedly from that set out in the DSU and reflected in numerous prior reports. There, the Appellate Body report had rejected a party's appeal, but then went on to reverse the Panel Report and to find a breach on the basis of an argument and approach entirely of the Appellate Body's creation. This approach suggested that panels and the Appellate Body were to conduct independent investigations and apply new legal standards, regardless of what either party actually argued to the panel or Appellate Body. But that was not right. Under the DSU, panels and the Appellate Body were to consider the evidence and arguments put forward by the parties to make an objective assessment of the matter before it. The Appellate Body is not there to make the case for either party or to act as an independent investigator or prosecutor. Fourth, in DS449[14], the Appellate Body Report had taken a very problematic and erroneous approach to reviewing a Member's domestic law, risking turning the WTO dispute settlement system into one that would substitute the judgement of WTO adjudicators for that of a Member's domestic legal system as to what was lawful under that Member's domestic law. It was inappropriate for a WTO adjudicator to say it would decide the

[8] Statement by the United States at 9 May 2016 DSB Meeting, https://geneva.usmission.gov/wp-content/uploads/2016/05/May-9-DSB.pdf.

[9] General Agreement on Trade in Services ("GATS").

[10] "US – Wool Shirts and Blouses" (AB), WT/DS33/AB/R and Corr. 1, at 19.

[11] Statement by the United States at 19 June 2015 DSB Meeting, https://geneva.usmission.gov/wp-content/uploads/2015/06/Jun19.DSB_.Stmt_.as-delivered.Public.pdf; Minutes of 19 June 2015 DSB Meeting, WT/DSB/M/364, paragraphs 7.7.

[12] Closing Statement of the United States at the Oral Hearing in "India – Measures Concerning the Importation of Certain Agricultural Products from the United States" (AB-2015-2 / DS430) (20 March 2015), https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Oral.Stmt.Closing.pdf.

[13] Statement by the United States at 16 January 2015 DSB Meeting, https://geneva.usmission.gov/wp-content/uploads/2015/01/Jan16.DSB_.Stmt_.as-delivered.Fin_.Public.pdf; Minutes of 16 January 2015 DSB Meeting, WT/DSB/M/355, paragraphs 1.10-1.14.

[14] Statement by the United States at 22 July 2014 DSB Meeting, https://geneva.usmission.gov/wp-content/uploads/2014/07/July22-DSB-Stmt-as-delivered.pdf; Minutes of 22 July 2014 DSB Meeting, WT/DSB/M/348, paragraphs 7.6-7.8.

"right" result under a Member's law, in the abstract, while ignoring key constitutional principles of that Member's domestic legal system, but that was what the Appellate Body had done. It was notable that the panel had used a correct approach of examining the constitutional principles of the domestic legal system, but the Appellate Body report had ignored that analysis and instead had spent 60 pages making its own analysis of domestic law.

6.7. These US DSB statements had conveyed the US deep concern with the adjudicative approach used in those reports. The United States also was concerned about the manner in which this member had served at oral hearings, including that the questions posed had spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties. As had been mentioned, the US closing statement in the hearing in DS430 was addressed precisely to this concern. It was not difficult to ascertain from the questions posed by a member of a division at an oral hearing that the member was associated with the views expressed in an Appellate Body report related to those questions. Together, the appeals in which the member had participated indicated that he had not been willing to adhere to the proper role of the Appellate Body. This was something that should be of concern to all WTO Members. Many delegates had recognized in recent conversations, as well as others over the years, that WTO adjudicators should be focused on addressing those issues necessary to resolve the dispute. It was important to keep in mind that WTO Members could not have confidence in a system where WTO adjudicators overstepped the boundaries agreed by WTO Members in the DSU and the WTO Agreement. It was also important to consider whether these types of actions had contributed to the complexity of the disputes and had thereby exacerbated the workload problems facing the Appellate Body that had made it difficult for Members to get their trade disputes resolved in a timely manner. In conversations with delegations, the United States had heard a suggestion that WTO Members should not consider the reports signed by a particular Appellate Body member in considering whether that individual should be reappointed. The letter faxed to delegations by other Appellate Body members also raised this issue. There was something quite ironic about the idea that WTO Members should not be able to even consider the reports signed by an Appellate Body member in forming a view on the quality of that member's service. The only function of the Appellate Body, as set out in Article 17 of the DSU, was to consider an appeal and issue a report. As to the suggestion that an individual Appellate Body member's service should not be linked to the specific appeals in which that member had participated, the United States would ask – what better basis for forming views on that service could there be? Was it really being suggested that WTO Members should ignore the actual, most relevant evidence of how someone was conducting themselves as an Appellate Body member?

6.8. The United States had also heard an argument that it was inaccurate to hold an individual Appellate Body member accountable for the reports that he signed because others had also signed the same report. The suggestion appeared to be that because more than one person expressed the same views, none of the members should be held responsible for endorsing those views. This was not how the system worked and did a disservice to each Appellate Body member who had worked hard to be sure that a report accurately reflected their views. In fact, in a number of instances an Appellate Body member had provided separate, individual views in a report. The United States did not see how holding a member accountable for the views they had endorsed and their actual service carried a risk for the trust WTO Members placed in the independence and impartiality of the Appellate Body. To the contrary, WTO Members' trust was not built on a vacuum. It was based on the actual performance of the Appellate Body. It would help build and maintain trust if each WTO Member had confidence that each member of the Appellate Body was adhering to the mandate that WTO Members had given to the Appellate Body. Furthermore, the United States had heard a few delegations suggest that reappointment should be treated as though it were automatic in order to avoid interfering with the "independence" of the Appellate Body. As the United States had already explained, from the very first time an Appellate Body member was being considered for reappointment, WTO Members had been clear that reappointment was not automatic. Prior DSB Chairs had reiterated this. The United States was disappointed at the suggestion that the DSU should now be re-interpreted to reduce the role of the DSB and WTO Members in the WTO dispute settlement system. This was not a suggestion the United States could support or a way to sustain confidence in the WTO or its dispute settlement system. He recalled that Article 17.3 of the DSU provided that an Appellate Body member was to be "unaffiliated with any government" and was not to participate in any disputes that would create a direct or indirect conflict of interest. If this was what was meant when referring to the "independence" of the Appellate Body, then it was difficult to see how the authority of the DSB to decline to reappoint a member would cause that member to become affiliated with any government or to develop a conflict of interest in a dispute.

Moreover, WTO Members had charged WTO adjudicators to be "independent and impartial" through the Rules of Conduct Members had adopted.[15] Thus, to be independent was a responsibility of each Appellate Body member, and that obligation was compatible with and, in the words of the Rules, "strengthen[s]" the "operation of the DSU" and "in no way modif[ies]" the DSU.[16] Thus, Appellate Body members fulfilled their responsibility to act independently by serving in their individual capacity, unaffiliated with a government, and by avoiding any conflicts of interest. These values were not and could not be affected by WTO Members fulfilling their responsibility under the DSU to decide whether to reappoint an Appellate Body member by assessing that member's service in terms of the role assigned to the Appellate Body in the WTO agreements.

6.9. It was also worth noting that the type of assessment for a reappointment was not unique. An assessment of an individual who may serve on the Appellate Body for an additional four years at the reappointment stage was similar to the type of interaction and assessment that occurred whenever a candidate for the Appellate Body was first considered for appointment. Carrying out this responsibility with respect to reappointment did not affect the independence and impartiality of that individual any more at this stage than it did with an appointment to the Appellate Body in the first instance. The United States wanted to be very clear on one point, the US position on this issue was not one based on the results of those appeals in terms of whether a measure was found to be inconsistent or not. The United States was a frequent user of the WTO dispute settlement system and recognized that there could always be legitimate disagreement over the results. Instead, the concerns raised were important, systemic issues that went to the adjudicative approach and proper role of the Appellate Body and the dispute settlement system. The US position was based on the approach chosen by the Appellate Body in each appeal on which this member had served and whether that approach accorded with the role that WTO Members had assigned to the Appellate Body in agreeing to the DSU. To put this issue in perspective, the United States would ask each DSB Member the following question: if a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body reports that did what the reports the United States had discussed did – that is, the candidate would issue reports where more than two-thirds of the report were *obiter dicta* on issues not necessary to resolve the dispute, the candidate would issue reports engaging in abstract interpretation and raise concerns on matters not under appeal, the candidate would reject an appeal by a party but then reverse a panel and find a breach on a basis not argued by that party, and the candidate would issue reports substituting the Appellate Body's judgement for what was lawful under a Member's domestic law for the view of that legal system itself – would your government support that candidate for appointment? The United States would think most WTO Members would say no. But if such a candidate was not suitable for appointment in the WTO dispute settlement system, the United States did not think the candidate was any more suitable for reappointment. It was for this reason that the United States would not be able to accept this reappointment.

6.10. The United States along with other delegations had received the letter on this issue from other Appellate Body members. The United States had already addressed the points in that letter, which was sent even before the United States had explained its views to the DSB, as it was doing at the present meeting. The United States considered that the action by these Appellate Body members to interject themselves in a decision in which they had no role was, to say the least, unfortunate. The DSU assigned the decision on the appointment or reappointment to WTO Members in the DSB, not to the Appellate Body. The Appellate Body members' letter acknowledged this in its final paragraph, yet they sent this letter directly to WTO Members and in advance of the present discussion anyway. The United States could well understand that these Appellate Body members wished to show their appreciation for a colleague. However, the fact that these Appellate Body members were seeking to provide views on this issue was, regrettably, another instance in which Appellate Body members were acting outside the role assigned to them by WTO Members in the DSU. In closing, the United States wished to thank all Members for their careful attention to these remarks. As mentioned, the United States had been raising with Members these concerns with the operation of the WTO dispute settlement system, and in particular with the adjudicative approach of certain Appellate Body reports over several years. The United States appreciated the engagement it had had with delegations already and looked forward to engaging further with all

[15] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Rules of Conduct"), WT/DSB/RC/1, paragraph II.1 (Governing Principle).

[16] Rules of Conduct, paragraph I (Preamble), paragraph II.1 ("These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.").

Members on these critical issues of how to reinforce the aim and proper adjudicative approach of the dispute settlement system.

6.11. The representative of Korea said that his country thanked the Chairman for his briefing on the current situation. Korea also expressed its appreciation to the United States for presenting its position in great detail. In fact, Korea had learned a couple of weeks ago that the United States would not support the reappointment of Prof. Seung Wha Chang to the Appellate Body. Korea was surprised because until then, as far as it had understood, no other Member had raised any issue with the reappointment of Prof. Chang. Indeed, it seemed to be a widely-held view that he had served the Appellate Body and the WTO honourably over the past four years. The other members of the Appellate Body had also firmly attested to the integrity, impartiality and character of Prof. Chang, as seen in their joint letter of 18 May 2016 addressed to the DSB Chair. Korea had asked the United States to reconsider its position. Korea was therefore extremely disappointed that the United States had confirmed its opposition at the present meeting. Korea was not arguing that Appellate Body members had a right or a privilege to be reappointed. WTO Members had a right to agree or disagree with the reappointment of any Appellate Body member. However, in view of the importance of the Appellate Body as a WTO institution, if this right to disagree were ever to be exercised, it should be for compelling and legitimate reasons. The United States was telling Members in effect that it opposed the reappointment of Prof. Chang because it believed that Prof. Chang had restricted the rights or expanded the obligations of WTO Members through the Appellate Body decisions in which he had been involved. Korea was of the view that this US position was very inappropriate and at the same time raised serious systemic concerns. First, an Appellate Body member should not be singled out for any criticism directed at the Appellate Body for its reports. As the Appellate Body members had confirmed in their letter, an Appellate Body decision could not be attributed to a particular member, because it was the decision of the Appellate Body. In that respect, Korea also wished to recall that Article 17 of the DSU provided that the proceedings in the Appellate Body shall be confidential and opinions expressed in the Appellate Body reports shall be anonymous.

6.12. Second, this opposition was, to put it bluntly, an attempt to use reappointment as a tool to rein in Appellate Body members for decisions they made on the bench. Its message was loud and clear: "If Appellate Body members made decisions that did not conform to US perspectives, they were not going to be reappointed". Needless to say, if the US position was allowed to prevail, it would seriously undermine the independence and integrity of the Appellate Body. First-term Appellate Body members may have to reflect more on how their rulings would be viewed by major Members rather than on the merits of the cases. It would also create a dangerous precedent that other WTO Members may be tempted to follow. The Appellate Body members, in their joint letter, warned as follows: "[W]e are concerned about the tying of an Appellate Body member's reappointment to interpretations in specific cases, and even doing so publicly. The dispute settlement system depends upon WTO Members trusting the independence and impartiality of Appellate Body members. Linking the reappointment of a member to specific cases could affect that trust". Korea agreed. For an adjudicator to be truly independent, he or she must have assurance that his or her decisions, made in good conscience, would not result in what was effectively removal from office. The US opposition contravened this most fundamental judicial principle. This alone should be sufficient grounds for Members to reject the US opposition. Yet there was another aspect of its position, one that was no less significant, which concerned Korea deeply. It related to how Members addressed differing viewpoints in this institution. The United States claimed that the Appellate Body rulings that Prof. Chang had been involved with went beyond the Appellate Body mandate, which was to adjudicate appeals and clarify existing provisions of the covered agreements without adding to or diminishing the rights and obligations provided in those agreements. The United States at the present meeting presented a few cases where it believed that the Appellate Body had made decisions not consistent with its mandate. Korea was ready to discuss the US position, because on some elements it may agree with the US position, and on others it may disagree with the US position. But Korea did not believe that this was the right time or place to engage in legal discussions on whether the US views were correct. The key issue to address at the present meeting was how to deal with this concern in a systemic way and consider whether it was appropriate to link this issue to reappointment. The request that the Appellate Body should remain within the boundary of its mandate was in itself legitimate. Yet to argue that some Appellate Body decisions had not been consistent with the Appellate Body mandate and opposed reappointment of an Appellate Body member who had participated in those decisions on that basis concealed one important fact. There were diverse views among WTO Members on the role and jurisdiction of the Appellate Body, as was often seen in the different

responses of Members to Appellate Body decisions. In other words, there was no agreement on where exactly were the boundaries of the Appellate Body mandate. Under these circumstances, the positive and constructive way forward would be to continue efforts on building consensus through discussions. Instead, the United States had chosen the very different path of imposing its own perspective on WTO Members and the Appellate Body through the removal of an Appellate Body member. That approach was misguided. Replacing Appellate Body members would not eliminate differences in views regarding the consistency of specific Appellate Body decisions with its mandate.

6.13. Korea wished to propose that Members launch a discussion devoted to the question of the boundaries of appellate review with the goal of finding a common understanding. Korea believed that this was the right way to address the concerns of Members, including the United States, while maintaining the integrity and independence of the Appellate Body. This course of action may not produce answers immediately. However, Members needed to resist the temptation for an immediate fix that would in the end cause severe harm to the WTO dispute settlement system. Members had an instructive experience in this regard. When the Appellate Body had adopted an additional procedure regarding *amicus curiae* briefs during the appeal in the "EC – Asbestos" (DS135) dispute, a large majority of Members had thought that the Appellate Body had crossed its limits. They had brought this issue to the General Council at its meeting on 22 November 2000. The outcome of the General Council discussions was communicated to the Appellate Body. The Appellate Body in turn respected the predominant view of the Membership, and withdrew its attempt to accept the *amicus curiae* submissions. Korea did understand and respect the intention of the United States to raise an important issue relating to the dispute settlement system. Good intentions, however, did not justify a wrong course of action. Korea could not find justification in the US opposition to reappoint Prof. Chang. Korea urged the United States to reconsider and withdraw its opposition. Korea's first priority was to restore an environment where the sitting and incoming Appellate Body members could do their jobs properly without looking over their shoulders. Korea requested that the DSB continue discussions on reappointment so that Members may find a solution that would safeguard the integrity of the Appellate Body. Korea was ready to discuss this matter and any other systemic concerns raised by Members in constructive ways. Korea looked forward to working with all Members, including the Unites States, to find ways to make the dispute settlement system better.

6.14. The representative of the European Union said that the EU was seriously concerned about the US veto against the reappointment of Mr. Chang on the basis of his alleged track record on the Appellate Body -- alleged because rulings of the Appellate Body were made in a collegiate manner. This was unprecedented and posed a very serious threat to the independence and impartiality of current and future Appellate Body members. In the EU's view, in order to ensure the independence of the Appellate Body, reappointments should be more or less automatic if the Appellate Body member indicated that they were available to server for a second term of office. In particular, the reappointment process needed to be conducted in a way that respected this independence. This implied that Appellate Body members could not be scrutinized on the basis of the positions they may or may not have taken when performing their judicial function. The ground rules the DSB Chairman had read out on 10 May 2016, which were accepted by all Members, attested to that. The EU supported the reappointment of Mr. Chang for a second four-year term, and had hoped that this reappointment could still take place. However, on the basis of what had just been said, that hope was now in vain. The situation was very serious and arguably the damage had already been done. The events of the past days may taint any future reappointment process. Therefore, the EU believed that it was of utmost importance that a systemic solution be found to this problem. The Appellate Body must remain fully operational and the independence and impartiality of its members must be preserved. In the EU's view, the repetition of the current crisis in future reappointment processes would be untenable. The EU looked forward to discussing with other Members solutions to the systemic problem caused by the events of the past few days.

6.15. The representative of Mexico said that his country thanked the United States for the explanations it had provided, although those explanations had not, in the least, allayed Mexico's concerns. The situation created by the United States had extremely troubling systemic implications. The impartiality and independence of the Appellate Body were vital in a system governed by the rule of law. Mexico was one of the main users of the dispute settlement system, but it would be just as concerned if it were not, as the system was being put at risk. As it had stated on previous occasions, although the reappointment of Appellate Body members was not automatic, Mexico believed that there were only limited circumstances in which reappointment

would not take place. The very important reason for not reappointing an Appellate Body member - apart from an Appellate Body member not wishing or being unable to continue, or if one Member wished to nominate another candidate for the post - would be if there was consensus among the Membership that an Appellate Body member was not fulfilling his/her duties. In reality there were no rules regarding reappointments, there were only guidelines. In November 2015, the former DSB Chairman had set the ground rules with regard to meetings between the WTO Membership and Appellate Body members for renewal. These rules had been applied by the current DSB Chair on 10 May 2016. Those rules in no way provided for the dismissal of an Appellate Body member. It was, however, surprizing that Appellate Body decisions in some cases were being attributed to one Appellate Body member, while such decisions were made by the division assigned to each case, comprising three Appellate Body members, and were discussed by all the members of the Appellate Body in accordance with the principle of collegiality. The Appellate Body operated with checks and balances. It was dangerous for the system to have these checks and balances undermined by threats to the independence of members and threats that members would have to be re-examined halfway through their terms. Mexico called upon Members to act with maturity and moderation and to avoid putting the DSB and the system at risk. There were many aspects of the dispute settlement system that had to be reviewed and many had been discussed in the DSB Special Session. For 16 years, Members had been discussing possible changes to the DSU, including to the Appellate Body, but there had never been any discussion on possible rules for reappointments. The reappointment of Appellate Body members had never been discussed in the DSU negotiations. Suddenly Members found themselves confronted with this issue when an Appellate Body member was vetoed by one Member. Mexico, once again, was very concerned that the "cherry on the cake" or the "jewel in the crown", was being put at risk.

6.16. The representative of Brazil said that his country noted that the issue facing the present meeting was not simply another regular item on the DSB's Agenda. This item concerned one very important pillar of the WTO and the principles on which the Appellate Body rested, namely, the independence and impartiality of its members. These fundamental principles must be preserved, as all Members knew that *pessima est principii corruptio, ex quo alia dependent* ("worst of all is the corrosion of the principles on which the rest depend"). What was at stake was whether all Members could continue to use the dispute settlement system, and the Appellate Body, with confidence regarding its legal competence, independence, impartiality and integrity. The underlying question which must be addressed was how could a member of the Appellate Body discharge properly and independently its functions if worried, tempted or put under pressure to satisfy specific opinions of Members throughout its mandate, so as to be reappointed? Brazil recalled that reappointments came after a selection process that had become over time a true drilling process by numerous WTO Members. Brazil had always believed that if reappointments to a second mandate at the Appellate Body were not automatic, in view of Article 17.2 of the DSU, they should be understood as quasi-automatic. Only a specific set of objective circumstances could justify the non-reappointment, such as health conditions, malfeasance, a member's desire not to continue, etc. Brazil recalled that this quasi-automatic nature of the reappointment process had been the rule in the WTO for many years. This important feature was also attested to Brazil by several of the original members of the Appellate Body. The reasons heard, however, for the objection to the reappointment of an Appellate Body member were of a very distinct nature and had nothing to do with the circumstances mentioned previously. They were very far from what would be considered acceptable reasons, directed as they were towards the alleged excesses or errors in some Appellate Body reports. These reasons were thus directed to the content of the decisions. Moreover, these criticisms were attributed to one specific member of a division tasked to decide a case, a division which was composed of three members; who, in turn, were part of the Appellate Body composed of seven members. As Members were aware, these seven members were collegially responsible for each report. In the letter sent to the DSB Chairman the previous week, the seven members of the Appellate Body sensibly reminded Members that "our reports are reports of the Appellate Body". In Brazil's view, there was nothing wrong in finding faults with a report, in criticizing certain lines of reasoning in some decisions. There was also nothing wrong in expressing one opinion or its opposite about the Appellate Body being judicially active, about it restricting or expanding rights of WTO Members. Similarly, there was a myriad of different opinions about the Appellate Body completing the analysis or refraining from doing so; about the Appellate Body engaging too much in *obiter dicta* or sticking to the strict confines of an issue. There were ongoing discussions about the complexity of the issues being brought to the assessment and decision of the Appellate Body, the workload and the concern for the high-quality reports; parties and third parties to a dispute complained about too many questions being posed in

the hearings and reports that were becoming too long. This list, this "cahier de doléances", could go on and on.

6.17. This kind of debate was to be expected and it was healthy that Members put forward constructive opinions with a view to making the system work better. In fact, the DSB, among other fora, was the modern and privileged "agora" of discussion, the forum where Members could jointly exercise their right to praise or criticize, harshly if needed be, the Appellate Body and the panels, or even one another. This 20 year-old "agora" was no minor achievement for the international trade community. It should be preserved and used as the privileged "locus" to expose Members concerns and discuss their points of view. What did not seem to be fitting, however, was to object to the reappointment of a member for a second term of office on the grounds that certain legal decisions, by certain individuals in a collegial body, were wrong or not satisfactory or, worse, because they did not correspond to a Member's specific interests or expectations. That was counter to the independence which was inherent in any decision-making instance, whichever legal nature one may wish to assign to it. If the alleged reasons for objection were of that calibre, then the integrity of the WTO's main adjudicatory body was clearly jeopardized. One illuminating way of demonstrating the flawed bias of that position was to submit its explanatory core to the famous Kantian saying, also useful among nations: "act according to that principle whereby you can, at the same time, wish that it should become universal law". It was evident that if all Members had acted according to the logic and arguments used in the present instance not to reappoint the member of the Appellate Body in question, that body would soon be transformed into a tool of Members' own interests, something that could not be the universal law Members strived for, the general rule, which allowed for trustworthy and impartial decision-making in an international forum. The single most important element which sustained the system was trust, which, if the current state of affairs persisted, could begin to erode. But trust could be used to shore up one position or its opposite, and was of such a flimsy nature that even rumours about its integrity may suffice to taint its reputation. Trust, therefore, could not be contingent upon having one's own position always prevailing, nor on an unrealistic expectation of receiving immaculate, perfect reasoning in each and every dispute. Trust and legitimacy resulted from the competence and independence shown by the adjudicators selected by Members and in the more and more complex disputes brought by Members. While Members would all agree that trust was a cornerstone of the system, they could not agree that trust was only found to exist when the adjudicatory body confirmed its conceptual or legal convictions. It was also true that in a pluralistic environment such as the WTO, one was bound to find different but legitimate concepts of institutions and how they should operate. It was in this realistic context that Members must be reminded that the Appellate Body worked for the broad and diverse WTO Membership and that its decisions were above any specific interest of any particular Member.

6.18. One should ask what it was that Members could do in this situation. First, Members could start by asking themselves what kind of body they wanted to be in charge of their disputes, some of which were critical to their national interests. Members could also ponder on the implications of submitting "sitting members" of the highest adjudicatory instance of the WTO to unilateral appraisals about the final outcome of each dispute and its conduct. No Member was barred, either, from imagining, by implication, what the reasons in favour of reappointment could mean. Furthermore, as Members all searched for the best way to address the current situation, Brazil wished to more concretely suggest a number of points for Members' joint consideration. Brazil was suggesting these points simply by way of *obiter dicta*, as food for thought. Considering that Article 17.2 of the DSU established that "each member may be reappointed once", and no clear rules indicated the circumstances that could justify non-reappointment, WTO Members could consider amending the DSU to the effect that a single 6 or 7-year mandate for Appellate Body members be established, so as to close the loophole for undue interference and pressure, and to ensure an adequate working environment for the Appellate Body members, who, once selected, belonged to the Membership, and should not be subject to undue pressure from any Member. At the same time, provided that independence and impartiality were thus safeguarded throughout the mandate of Appellate Body members, Members could weigh the pros and cons of introducing a regular "moment of interaction" between WTO Members and the Appellate Body, disconnected from the moment of reappointment, as a means of allowing for the legitimate interests of Members to convey their views on matters of concern regarding dispute settlement. This could become an opportunity for an exchange of opinions on several issues, as long as the adequate rules of procedure were formulated. Moreover, as the introduction of a single mandate would require amendment to the DSU, Members could assess the possibility of tackling other situations, related to the functioning of the Appellate Body, so as to contribute to maintaining the efficiency Members

had grown accustomed to over the years, as well as to preserving the quality and independence of the adjudicatory process. Brazil was certain that Members would realize the seriousness of the current situation and would know how best to preserve the Appellate Body. In the end, if none of the above suggestions, or other options Members may come up with were implemented, the alternative may boil down to choosing between independence or reappointment. Brazil invited all Members to consider the alternatives carefully, keeping in mind what a recently departed Appellate Body member had expressed when asked about encroachment on independence and impartiality of Appellate Body members: "this Rubicon cannot be crossed".

6.19. The representative of Egypt said that her country recognized the centrality of the WTO dispute settlement system in providing security and predictability to the multilateral trading system. Egypt had the highest respect for the work of the Appellate Body and confidence in the integrity, independence and impartiality of its members. Egypt was deeply concerned about the systemic implications of the opposition to the reappointment of an Appellate Body member for reasons related to interpretations in specific cases, and strongly cautioned against any action that may be interpreted as reprisal. Furthermore, Egypt believed that linking the reappointment of Appellate Body members to legal issues on which they had ruled may undermine the confidence and the independence and impartiality of the Appellate Body members. Egypt called for a prompt resolution of this matter so as to ensure the efficient and effective functioning of the dispute settlement system.

6.20. The representative of India said that like other Members who had expressed their concerns at the present meeting, his country wished to express its serious concern about the developments related to the reappointment of Mr. Chang to the Appellate Body. A successful dispute settlement mechanism was grounded on an independent and impartial Appellate Body. The process of reappointment and the basis for opposition to the reappointment undoubtedly had serious consequences for the independent functioning of the Appellate Body. The issue was not whether the reappointment was automatic. The issue was on what grounds reappointment had been opposed. India found the alleged reasons in this particular context troubling. India wished to raise a few points, some of them reiterations of points that had been made by other Members at the present meeting, that all Members needed to reflect on in relation to the present situation Members found themselves in. First, on the issue of a division, the Appellate Body hears appeals in divisions of three members each. As per Rule 3(1) of the Working Procedures for Appellate Review, decisions relating to an appeal shall be taken by the Appellate Body as a whole. Thus, the decision was the decision of the division as a whole and the division had full authority and freedom to hear and decide an appeal. Therefore, attributing a particular adjudicative approach to a particular member of a division was unfathomable. If a question was raised on the legal approach of a particular Appellate Body member in a division hearing an appeal, did it imply that all other members of that division were also responsible for that allegedly erroneous approach? This had serious implications for the working of the Appellate Body itself. Second, on the issue of the Appellate Body as a collegium, as per Rule 4(1) of the Working Procedures, to ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the members, the Appellate Body members shall convene on a regular basis to discuss matters of policy, practice and procedure. Therefore, opposing the reappointment of an Appellate Body member on an approach or legal interpretation followed allegedly by one member constituted a serious questioning of the functioning of the Appellate Body.

6.21. Third, on the issue of the basis for opposing reappointment, the opposition to the reappointment on the basis of the reasons/approach provided in particular disputes signified, in India's view, a critical threat to an independent, neutral and impartial Appellate Body. India did not intend to go into the alleged reasons and disputes at this juncture at the present meeting. However, the opposition to reappointment on the basis of positions, legal interpretations and approaches taken by the Appellate Body in specific cases undermined the very basis of an independent, rules-based judicial body. The Appellate Body derived its mandate from the DSU. Members may have diametrically opposing views on whether the mandates had been adhered to or not. WTO Members may have, and indeed did have as was evident in the discussions in the DSB, differing views on how the Appellate Body must interpret the covered agreements or approach an appeal. However, if these views became the basis for considering the reappointment and ultimately opposing reappointment, then this was a slippery slope that Members were entering. What were the contours and limits of the reasons to oppose a reappointment? For example, could a developing-country Member, in another context, oppose the reappointment of a particular member on the basis that that Appellate Body member's interpretation had consistently

not been in accordance with the flexibilities and circumstances of developing countries that the DSU and the covered agreements provided? Members could well imagine that many such approaches and reasons could very well exist. If they became reasons for opposing reappointment, it was a very serious existential question for the functioning of an impartial and independent dispute settlement mechanism. Fourth, regarding addressing the legal approach of the Appellate Body, India believed that the DSB was the appropriate forum in which the reports of the Appellate Body were considered and the adjudicative approach of the Appellate Body was to be discussed. In practice this did happen. Whether Appellate Body reports had added to or diminished the rights and obligations of WTO Members was a valid issue for discussion. Members may have diverse views on what constituted diminishing or adding to the rights and obligations. It also depended on specific contexts of the disputes themselves. Members, and not only disputing parties, did have conflicting views on the approach taken by the Appellate Body. India witnessed extensive discussions in the DSB during the adoption of reports. This, in its view, was the right approach which preserved the independence of the Appellate Body, but at the same time provided an opportunity to Members to express contrarian views. By making the adjudicative approach as the basis for reappointment was essentially providing a strong signal that the Appellate Body members who did not follow a particular approach or an adjudicative view, or who did not share the views of particular Members in the way they needed to approach the covered agreements, may not be considered for reappointment. This could, in the long run, have a chilling effect on the way Appellate Body members decided appeals and could undermine the system. India considered the opposition to the reappointment of Mr. Chang unfortunate. While there may be systemic issues to be discussed and longer-term solutions to be found, India echoed the concerns raised by Korea and other Members and expressed its support for the reappointment of Mr. Chang to the Appellate Body. India hoped that the matter would be resolved and the opposition to his reappointment would be withdrawn signifying Members' collective trust in an independent and impartial Appellate Body.

6.22. The representative of Switzerland said that his country shared the concerns expressed by the previous speakers that the objection to the reappointment of Mr. Chang raised important systemic questions. The issue before Members pertained to the way the Appellate Body should function and to what exactly its role under the DSU and the WTO system should be. Switzerland understood that the objection to Mr. Chang was not about his professionalism, but rather it questioned the performance of the Appellate Body as an institution. Switzerland thought it was highly problematic to address such issues on the occasion of reappointment instead of raising it in an open and transparent debate among Members in the DSB. An additional concern for Switzerland was that the objection against Mr. Chang had been related to specific disputes while the proceedings of the Appellate Body should be confidential. Switzerland was of the view that this incident directed at a member of the Appellate Body, and its concrete work, could be detrimental to the high-standing of the Appellate Body as a trusted and independent adjudicatory body fully committed to the rule of law. To Switzerland, the opposition to Mr. Chang's reappointment came as a surprise and at an unfortunate moment. A very short time between the objection to reappointment and the end of Mr. Chang's term of office did not allow for a thorough discussion on such an important point of criticism and invited speculation about possible reasons for such a move. In Switzerland's view, this undermined trust and was not healthy for the system. Switzerland remained of the view that the reappointment of Mr. Chang would be in the best interest of the WTO and the multilateral trading system.

6.23. The representative of Colombia said that his country wished to express its concern regarding the situation arising from the objection to the reappointment of one Appellate Body member, Mr. Chang. Colombia had listened carefully to the arguments put forward by the United States and considered some of the US reasoning to be sound. Nevertheless, Colombia wished to point out that the Appellate Body members had a strictly legal mandate. In Colombia's view, it was important to ensure that they enjoyed the greatest possible degree of independence and impartiality. Consequently, this veto could set a negative precedent for future appointment processes of Appellate Body members by making their reappointment contingent upon their actions. Colombia recognized the right of Members to make their views known in the multilateral trading system. However, in Colombia's view, Members must continue to have recourse to mechanisms that were appropriate for that purpose, such as the DSB and the Ministerial Conference. Colombia underscored the importance of giving fresh impetus to the DSU negotiations in the context of the DSB Special Session, which was the appropriate forum for Members regarding their concerns in relation to the dispute settlement system.

6.24. The representative of Nigeria said that his country attached high priority to the integrity, impartiality and independence of the Appellate Body. This was important for the credibility of the rules-based system. There was no ambiguity as to the mandate of the Appellate Body, which was primarily to adjudicate appeals and clarify the existing provisions of the WTO Agreements without adding to or diminishing the rights and obligations provided in the covered Agreements. It was Nigeria's expectation that this clear mandate would continue to be fulfilled without any hindrance. It was in that context that Nigeria wished to stress the critical importance of making the independence and impartiality of the Appellate Body effective. Nigeria, therefore urged Members to expeditiously find solutions to the current impasse for the smooth operation of the Appellate Body as well as its integrity in the vital interest of the multilateral trading system.

6.25. The representative of Chinese Taipei said that, in Chinese Taipei's view, the possibility of not being able to reach a consensus at the present meeting on Mr. Chang's reappointment to the Appellate Body was regrettable. As Members knew, the dispute settlement system was one of the central pillars of the WTO. At a time of protracted difficulties for the WTO's negotiating arm in the Doha Round, the judicial arm of the WTO assumed even greater importance. The Appellate Body stood as the final adjudicator of disputes and played a key role in "providing security and predictability of the multilateral trading system". It was therefore in the interests of all WTO Members, and especially at this crucial time, to ensure the institution's proficiency, independence and impartiality. Regarding the case at hand, while Chinese Taipei perfectly understood that the reappointment of Appellate Body members was not automatic, it was also of the view that Members should be extremely cautious and exercise self-restraint when considering whether or not a reappointment should be blocked. Barring certain exceptional circumstances, such as ethical misconduct or a serious medical condition affecting the candidate's ability to perform the function, the reappointment, in principle, should take place. The Appellate Body's decisions on appeal were drafted by a three-member division, with consultations taking place later among all seven members. Chinese Taipei could see no reasonable basis for exclusively attributing a particular legal view, or views, expressed in the Appellate Body's reports to one single Appellate Body member. Thus, Chinese Taipei was most concerned that any objection to a reappointment which was based on the Appellate Body's legal views in certain disputes may be an intervention in the core of authority of the institution. It could also have a chilling effect on the individual Appellate Body members, and could seriously undermine the institution's independence in carrying out its prime responsibility, which was: "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". In fact, the WTO agreements provided Members with certain mechanisms by which they could comment on or even change the Appellate Body's decisions. For example, Article 17.4 of the DSU preserved Members' right to express their views on the Appellate Body's reports. Under Article IX:2 of the WTO Marrakesh Agreement, Members may, through the Ministerial Conference or the General Council, make authoritative interpretations to bind the Appellate Body in future cases. Moreover, Members were able to amend the WTO Agreements through the procedure provided in Article X of the Marrakesh Agreement. In summary, although Chinese Taipei fully recognized the importance of ensuring that the Appellate Body adhered to its legal mandate and the principle of the rule of law, it thought that linking the reappointment of an individual Appellate Body member to the legal views expressed by the Appellate Body in specific disputes would be the least constructive and effective approach to adopt for this purpose. Chinese Taipei remained of the view that the reappointment of Mr. Chang as an Appellate Body member was in the best interest for all WTO Members.

6.26. The representative of Singapore said that his country urged Members, in discussions relating to the Appellate Body, to prioritize the smooth functioning of the WTO dispute settlement system. Singapore was concerned that any protracted delay in the appointment and reappointment of Appellate Body members would leave the Appellate Body short of two members after 31 May 2016. Members should not allow for a shortage of Appellate Body members that led to exacerbated delays in the resolution of current and future appeals. While the appointment of the most suitable persons for the Appellate Body was a crucial decision for the WTO and time was required for that process, Singapore hoped that the appointment and reappointment issues could be expeditiously addressed based on objective criteria and on candidates' credentials. The appointment or reappointment to the Appellate Body had to be done in accordance with the DSU. Singapore urged Members with strong views on the current two instances of appointment and reappointment to balance the various considerations and engage with Members to address mutual concerns with a view to arriving at a consensus on the way forward.

6.27. The representative of Guatemala said that his country thanked the United States for its explanations and shared the concerns expressed by the previous speakers. Guatemala recognized that the renewal of the terms of office of Appellate Body members was not automatic. In general, any WTO Member had the right to object to any renewal of a term. Objection in itself was not unlawful and should not be regarded as an affront to the WTO dispute settlement system. On the other hand, objection to the renewal of an Appellate Body member's term was unquestionably a decision with serious systemic implications and was not to be taken lightly. In Guatemala's view, there were very few reasons that would justify a non-reappointment of an Appellate Body member, and those reasons called for careful consideration by all Members. For example, Guatemala believed that non-renewal of a term would be warranted if it were determined that an Appellate Body member had not fulfilled his or her obligations under the code of conduct. This was not the case in this instance, far from it. Guatemala's understanding was that the US reason for objecting to Mr. Chang's reappointment was its disagreement with certain Appellate Body decisions, which the United States regarded as going beyond the provisions of the covered agreements. Guatemala did not consider this to be justifiable and sufficient cause for objection. In fact, Guatemala was concerned about the motives and the form in which the United States had objected to the renewal of Mr. Chang's term.

6.28. First, it was regrettable that the United States had chosen to communicate its decision to the public at large without first informing WTO Members. The US decision, from Guatemala's viewpoint, was unexpected to say the least. The United States thus had closed any prospect of prior discussion and serious exchange of views with the rest of the Membership on the motives for, and the systemic implications of, its decision. Second, the objection was based on the opinion of a single Member, the United States, which regarded certain Appellate Body decisions as being contrary to the covered agreements. However, as was the case with any judicial decision, there would always be those in favour and those against. This was precisely why there was an independent collegial Appellate Body, which was responsible for interpreting and applying the relevant legal provisions. Guatemala had no reason whatsoever to mistrust the work and judgement of the Appellate Body. Third, Guatemala found it difficult to accept the singling out of Mr. Chang and considered it unjustified, given the way in which the Appellate Body decided appeals. Fourth, discussions concerning the scope of Appellate Body decisions should take place in the DSB. It did not seem appropriate to express disagreement with such decisions by way of non-renewal of Appellate Body members' terms. Guatemala expressed its full support and confidence in the Appellate Body and its members, including Mr. Chang. Guatemala was more than willing to have a constructive discussion with Members in order to avoid this kind of situation, including, for example, on the possibility of making a single six-or seven-year term of office for Appellate Body members.

6.29. The representative of Norway said that his country was of the view that Article 17.2 of the DSU was quite clear. Reappointments were made by the DSB and were not automatic. Since there was no reference to negative consensus, reappointments were made by consensus decisions. Members therefore did have the right to block reappointments, whether Members liked it or not. Norway did not share the view suggested by some Members that reappointments were semi- or quasi-automatic. That being said, blocking reappointments of Appellate Body members may be unfortunate from a systemic perspective, even if Members had the right to do so. Norway did recognize that blocking reappointments of Appellate Body members based on Appellate Body decisions in which they had participated, may possibly undermine the independence of the Appellate Body in the sense that its members may be overly cautious in the execution of their functions. At the same time, this argument should perhaps not be pushed too far. Appellate Body members were appointed for four years and could not, according to the wording of the DSU, expect to be reappointed. Appellate Body members should therefore perform their function independently and to the best of their abilities in their first term without being motivated by a wish to be reappointed. Norway had taken note of Korea's and Brazil's suggestions to have systemic discussions on the institutional structure and role of the Appellate Body. Norway wished to indicate its willingness and openness to participate and discuss any proposals. Norway noted with great concern that the Appellate Body may soon be left with two vacancies and a significant workload in the near future. Norway encouraged all Members to show the utmost flexibility in order to fill the upcoming vacancies as soon as possible.

6.30. The representative of Argentina said that his country was concerned about the discussion which, 20 years after the establishment of the WTO dispute settlement system, seemed out of proportion. The workings of the dispute settlement system were based on several "pillars" which,

despite being few in number, had proved to be highly effective. One of those pillars was the commitment undertaken by Members to call on the DSB to resolve any conflicts that might arise among Members, on the basis of the DSU provisions. Another pillar was the establishment of the bodies and institutions necessary for the system to operate in a manner consistent with those principles, in other words, the DSB, panels and the Appellate Body, including the rules and procedures governing their composition and renewal, as well as those regulating the adoption of the reports and appeal proceedings. The third pillar concerned the supremacy of Members as fundamental and indispensable actors in the mechanism of creating rights and obligations. This was evidenced by, among other WTO legal provisions, Article 3.2 of the DSU, which established that the dispute settlement system could not add to or diminish the rights and obligations of Members. Hence, Members could not be substituted in their capacity to decide on the obligations to which they were subject or the rights to which they were entitled, without any implication that influence may be exerted on the mandate of the adjudicating bodies in their task of assisting the DSB or on the system's objective of interpreting and clarifying the provisions in force, in an objective, impartial and independent manner.

6.31. Argentina had taken note of the US decision to object to Mr. Chang's reappointment to a second four-year term of office in the Appellate Body. Argentina held Mr. Chang in the highest professional esteem, having had the honour of his service as a member of an Appellate Body division over the past few years in disputes that involved Argentina as the defendant. Argentina therefore regretted that the United States had decided not to support him, and it did not agree with that decision. Nonetheless, Argentina did not see a single legal or other reason to prevent Members from expressing their opinions about the rulings of the WTO's adjudicating bodies, including the Appellate Body, or about their members, and therefore it defended the right of all Members to do so. Argentina in fact noted that the United States had made public its opinion about the reappointment in question. It had also stated, before the DSB when the reports in the most recent case heard by the Appellate Body were adopted, that its opinion concerning *obiter dicta* in that case was without prejudice to the legal interpretation behind them.[17] Argentina did not regard the opinions of Members as a threat to the system. Nor did Argentina consider that either panels or the Appellate Body should feel constrained by those opinions. The criteria for serving on one body or the other, as laid down in Articles 8.1 and 17.3 of the DSU, respectively, required that the members of both bodies had the capacity to rise above the influence of Members. The Appellate Body had been, and was, a key player in the establishment and consolidation of the dispute settlement system which, albeit subject to improvement, had demonstrated its efficiency and high-quality legal expertise in resolving disputes among WTO Members. Commitment to a rules-based system and the involvement of Members in all aspects of the system had played an equally vital part. It was Members' collective obligation to preserve and improve that system by strictly complying with the rules.

6.32. The representative of Paraguay said that his country wished to express its concerns about the way in which the reappointment of Appellate Body members was being addressed. The success and legitimacy of the dispute settlement system was based, among other things, on the impartiality, independence and collegiate nature of the work of the Appellate Body. This was how the Appellate Body discussed the cases before it and took decisions as a single body. It was not the views expressed by one single Appellate Body member. Paraguay noted that one Member was not happy with the Appellate Body reports. However, linking that to the appointment or reappointment of Appellate Body members was a matter of concern to Paraguay. Such an approach could have an adverse effect on the future of the Appellate Body and could cause difficulties for the Secretariat. Furthermore, it would undermine the confidence in the system. Paraguay hoped that the appointment procedures currently under way would be addressed in an expeditious manner and that the DSB would take the necessary decisions as soon as possible.

6.33. The representative of Australia said that his country agreed that under the DSU, a decision to appoint an Appellate Body member for a second term required the consensus of the DSB. In light of the views expressed at the present meeting, it appeared that there was no such consensus in relation to the reappointment of Mr. Chang. In considering the best way forward in light of this development, Australia remained open to discussions with other Members both as to the most appropriate procedural approach to filling upcoming vacancies, and to addressing the systemic issues a number of delegations had raised at the present meeting. On the procedural issues, the appointment process needed to support the effective functioning of the Appellate Body and

[17] Statement by the United States under Agenda item 2. DSB meeting of 9 May 2016.

maintain its integrity and standing. It was also important that Members did not face gaps on the Appellate Body, given the workload pressures that Members were all aware of. On the systemic issues, Australia took the view that while it agreed that reappointment was not automatic, Australia considered that the timing and rationale given by any Member for not reappointing an Appellate Body member should be carefully considered and articulated, respecting the independence of the Appellate Body. In Australia's view, non-reappointment should only be exercised in exceptional circumstances. Australia encouraged all Members to work cooperatively to resolve this situation in a timely manner, and in a way which preserved the effective functioning of the Appellate Body.

6.34. The representative of Uruguay said that his country noted that Members were faced with a situation that should never have arisen and was sending negative signals about the Appellate Body and the way in which it operated. The last thing the WTO as an institution needed at this time was precisely to become caught up in this kind of imbroglio, which was not positive either from a systemic perspective or for its image. It was clear that the decision to reappoint an Appellate Body member was taken by the DSB by consensus. However, it was difficult to understand the signals sent with regard to the institutional process under which the Appellate Body operated because it was a jurisdictional and institutional function that, in each case, concluded with a recommendation by the Appellate Body. The outcome, and implicitly the process which led to this outcome, must be accepted by Members. The process precisely afforded, or should afford, opportunities for arguments to be put forward or points of view expressed. If problems existed in relation to the quality of panel or Appellate Body reports, they should be dealt with by the DSB. Uruguay also had many doubts concerning the relevance or purpose of the letter circulated by the Appellate Body members, which, while Uruguay might agree with in substance, was an unusual communication, to say the least. In Uruguay's view, this issue of appointments must be resolved as soon as possible. Failure to do so carried with it the potential for significant harm to the system.

6.35. The representative of Japan said that his country took note of the statements made by previous speakers. The United States had explained its own reasons and rationales behind its action in its statement made at the present meeting. Japan was not ready to comment on those rationales, except to say that the US action was extraordinary, exceptional in nature, and had no precedent, and any act by a WTO Member of this nature and magnitude must be exercised with extreme caution. On its part, Japan did not have any objection to the reappointment of Mr. Chang, who had served faithfully and honourably on the Appellate Body for the past four years. Other Members had expressed their systemic concerns about the US action and its possible impact on the independence of the Appellate Body. Certainly, Japan agreed that as an adjudicative body the independence and impartiality of the work of the Appellate Body must be fully respected because this would ensure the credibility and proper functioning of the WTO dispute settlement system. Yet, the DSU meant what it said and nothing in the text of the DSU suggested that the reappointment was pre-determined or a forgone conclusion. Some Members had suggested the need to change the DSU so as to ensure the "independence" of the Appellate Body. All of these suggestions should be worthy of being reflected upon by the Membership. However, the problem was not simply about the propriety of the system of reappointment, or the length of the term of office. The heart of the issue laid in divergent views on the proper roles of the Appellate Body and its institutional relationship with the Membership. While nobody questioned the importance of judicial "independence", the Appellate Body was part of the much larger institutional structure of the WTO and in that context there appeared to be disagreement as to the degree and nature of such "independence", whether, how and to what extent the power and authority of the Appellate Body should or could be circumscribed, and whether and how the Appellate Body could or should discipline itself in exercising its authority. In other words, there was a tension between the notion of the "separation of powers", on the one hand, and that of "checks and balances", on the other, if such notions ever existed in the WTO institutional framework, and the question was how to strike the right balance. In short, there was no easy fix to the problem revealed because the issue was deeply rooted in the differences in opinions with respect to the place of dispute settlement in the WTO regime at large. As difficult and fundamental as it may be, the issue could only be addressed and solved by WTO Members themselves. As a responsible WTO Member, Japan was ready to engage in constructive discussions with interested Members on this issue of systemic importance that concerned and affected all WTO Members.

6.36. The representative of Viet Nam said that her country thanked the United States for its clarification and explanation. Viet Nam understood that any Member had the right to support or oppose an appointment or reappointment of an Appellate Body member. However, Viet Nam also

shared the concerns of many other Members regarding the justifiability of some of the reasons for the opposition to the reappointment of Mr. Chang. In Viet Nam's view, it was difficult to find a provision in the DSU and other relevant rules on linking the conditions for reappointment with decisions made in specific disputes. Making such a linkage may undermine the impartiality and independence of the Appellate Body and the dispute settlement system. Such action may become a dangerous precedent that other WTO Members may be tempted to follow and would threaten the impartiality and independence of not only the Appellate Body members but the trust in the institution. The independence and impartiality of the Appellate Body and the dispute settlement system should be respected and protected. Viet Nam urged the DSB to find a solution as soon as possible, in particular, in light of the dispute settlement workload.

6.37. The representative of Hong Kong, China said that Hong Kong, China thanked the Chair for his report and his efforts in working towards finding a solution. At the present meeting, Hong Kong, China was not in a position to comment on the way forward. However, from a systemic point of view, Hong Kong, China would not wish to see the objection to a reappointment being raised so close to the expiry of the term of office, which adversely affected the work of the Appellate Body. Given that reappointments were not automatic, in future it may be helpful to allow more time for concluding the consultation process prior to the expiry of the term, and to have a clear understanding as to how the vacancy would be filled if there was no consensus on the reappointment. As a general principle, Hong Kong, China believed that the selection or reappointment of Appellate Body members should be based on merit and be guided by Article 17.3 of the DSU. It was important that Members fully respected the independence of the Appellate Body in order for the Appellate Body to function effectively and objectively without fear.

6.38. The representative of New Zealand said that her country wished to affirm the importance of an independent and impartial Appellate Body. The Appellate Body formed a key part of an effective rules-based dispute settlement system which protected the interests of all Members, both big and small. While recognising that the reappointment of Appellate Body members was not automatic, New Zealand emphasized that consensus should only be blocked in rare and exceptional circumstances. There was also an important practical dimension to this issue. The Appellate Body could not effectively fulfil its function without seven members, and it was regrettable that the timing of the blocking of this reappointment consensus risked another vacant seat on the Appellate Body. These practical considerations were of particular importance now, at a time when the dispute settlement system was under increased workload pressure. New Zealand therefore urged all Members to be pragmatic in their approach to these matters and to find prompt solutions to ensure that any Appellate Body vacancies were filled as soon as possible.

6.39. The representative of Turkey said that, as it had been underlined by many delegations, the renewal of the mandate of the Appellate Body members was not an automatic procedure, and every Member had the right to break the consensus on the issue. In that context, Turkey took note of the statement made by the United States. Turkey, however, shared the essence of the views and arguments mentioned by previous speakers regarding the US objection to the reappointment of a member of the Appellate Body. Turkey attached utmost importance to the preservation of the independence and impartiality of the Appellate Body members and considered that positions which could damage these two main criteria, which should guide the Appellate Body members, would have negative implications on the smooth functioning of the important body.

6.40. The representative of the Russian Federation said that her country considered it necessary to register its views on the matter which was of systemic importance and concern for the entire Membership. All Members affirmed their adherence to the rules and procedures set out in the DSU. The DSU stipulated that the WTO dispute settlement system was a central element in providing security and predictability to the multilateral trading system. Any action compromising the functioning of the dispute settlement system dealt a heavy blow to the heart of the WTO as a whole. Russia strongly believed that independence of those vested with the duty to preserve the rights and obligations of Members under the covered agreements was a *sine qua non* condition for the effective functioning of the dispute settlement system. If Members' rights and obligations were to be preserved, the Members, first and foremost, needed to guard the independence of WTO adjudicators. At the same time, Russia recognized that Members may have their concerns, legitimate or otherwise, over the functioning of the dispute settlement system. Russia encouraged an open dialogue about such concerns which should be carried out in a transparent manner. In Russia's view, Members should strive to resolve such concerns through multilateral discussions

aimed at eliminating the existing deficiencies, if any, by improving the legal framework rather than through *ad hoc* means that could put at risk the independence of the individuals exercising dispute settlement functions. Russia urged the Members involved to abstain from any action destabilizing the WTO dispute settlement system and stood ready to engage in any effort that the Membership may deem necessary to avoid, prevent or address any situations that could compromise the independence of WTO adjudicators and the functioning of the dispute settlement system.

6.41. The representative of Canada said that his country had listened with great interest to this discussion and noted that there was a fair degree of consensus on certain issues. First, there seemed to be a general recognition, and Canada agreed with this, that reappointment of an Appellate Body member required a positive consensus of the DSB, and that any Member therefore had the prerogative not to join that consensus. Canada did not consider either that reappointment was automatic or that it was done on the basis of negative consensus, in other words, that a consensus would be required not to reappoint. Second, in common with other delegations, Canada shared the concerns about the ostensible grounds provided by the United States for refusing to join consensus on Mr. Chang's reappointment. Despite great efforts by the United States to distinguish the rationale for its concern about the reports in question from the specific outcome of those disputes, it remained a grave concern to Canada that linking reappointment to specific interpretations sent a dangerous message that reappointment may depend on an Appellate Body member being associated with interpretations that satisfy one of the parties. For that reason, as others had said, this action should not be seen as a precedent to be repeated in anything other than exceptional circumstances in future reappointment exercises. Canada wished to address two aspects, distinguishing between the short term issues and the longer term systemic issues. First, it was clear that there was no consensus to proceed with this reappointment, and no evidence that one would emerge. The immediate issue for the DSB was therefore the expiry on 31 May 2016 of the terms of two members of the Appellate Body, one having completed two terms and the other a single term, right at a time when the institution was heading into another period of high demand.

6.42. The DSB was collectively responsible for ensuring that the Appellate Body returned to a full contingent within the shortest possible time-frame. To do that, Members would have to set aside their philosophical differences and work pragmatically to find a prompt solution to ensure a well-functioning system. But Canada did recognize that important differences existed among Members. Members would also need to address the longer term systemic issues. In doing so, Canada was not convinced that it would be possible or desirable to attempt collectively to identify a list of circumstances in which the DSB was justified in not reappointing an Appellate Body member. The consensus decision-making rules were adequate to deal with that. But this situation raised important matters of broad systemic significance to all Members, most of which had been simmering for many years, and were not going to be resolved in this reappointment process. While Members needed to redouble their efforts to address those underlying issues, this would only result from a methodical and longer-term process. Some Members called into question whether the renewal of term appointments served the interests of the system. They may doubt whether the need to be reappointed affected the analysis of an Appellate Body member in his or her first term. As a result, some had called for a single, non-renewable term of a longer duration for Appellate Body members. That could be a solution. On the other hand, to the extent that Canada understood, some of the US concerns were about its dissatisfaction with the way the Appellate Body sometimes interpreted and implemented its own mandate. This too reflected grievances of a systemic nature. Other Members may share the view that this needed to be acknowledged and addressed in some way. As a result, Members were not going to resolve the reappointment question without also finding a solution to concerns about the proper scope of the Appellate Body's mandate. Both would need to be addressed if Members were to find a way forward that preserved the legitimacy, integrity and well-functioning of the system. Members also needed to take care not to conflate the issues of the adjudicative independence from Members as disputing parties, on the one hand, and the institutional accountability of adjudicators to Members, on the other, which was also part of the architecture of the DSU. In that regard, Canada appreciated the indication in the letter from the Appellate Body that it seemed to have overcome some of its reticence and was open to further discuss the scope of its mandate. Canada had heard at the present meeting that a number of Members looked forward to such a discussion. Members had to recognize that it would not be possible to find a final resolution to these systemic issues in the context of this specific reappointment process. Canada was grateful to have been in the capable hands of the DSB Chairman to lead Members through this discussion. Canada stood ready to participate in any further consultations to develop solutions to both the immediate reappointment issue and the longer term resolution of the systemic and structural issues.

6.43. The representative of China said that his country regretted to learn that there was no consensus on Mr. Chang's reappointment. The Appellate Body played a fundamental role in the WTO dispute settlement mechanism, which was an important and central pillar of the multilateral trading system. In order to enhance the security and predictability of the rules of international trade embodied in the WTO Agreements, it was critical to safeguard the independence and impartiality of Appellate Body members. China took note of the Appellate Body's communication of 18 May 2016 with respect to the recent statement of opposition to the reappointment of Mr. Chang. The Appellate Body's voice should not be neglected. For the benefit of the entire Membership, China invited Members to carefully assess the systemic impact of this matter, in order to maintain the efficiency, impartiality, stability and predictability of the system.

6.44. The representative of Indonesia said that as all Members were aware, Mr. Chang's term of office as an Appellate Body member would shortly expire. According to the DSU, an Appellate Body member may be re-appointed for a second four-year term. In that respect, the DSB had started the necessary process for the reappointment of Mr. Chang for his second term. Indonesia had systemic concerns about linking the reappointment of an Appellate Body member to the Appellate Body's reports or decisions. Indonesia fully shared other Members' views that Appellate Body reports were made in collegiality by all Appellate Body members and could not be attributed to any single AB member. In that respect, linking the reappointment of Appellate Body members to the Appellate Body's reports or decisions in specific disputes may carry the risk of undermining the trust that WTO Members placed in the independence and impartiality of the Appellate Body members. Indonesia was concerned that if this issue was not resolved it would have a systemic impact on the functioning of the Appellate Body and the dispute settlement system. Indonesia therefore called Members' attention to resolving this issue promptly, in light of the current workload faced by the dispute settlement system.

6.45. The representative of Honduras said that her country had taken note of the concerns expressed by Members at the present meeting. Honduras believed that this situation had serious systemic implications. Honduras, therefore, hoped that a solution could be found as soon as possible with regard to such an important WTO body.

6.46. The representative of Thailand said that his country did not often made statements in the DSB meetings, but having listened to, and having considered the issue, Thailand wished to comment since this was an issue of principle. The trust that all Members had placed in the dispute settlement system was based on the independence and the impartiality of WTO panelists and the Appellate Body members. Thailand upheld those principles. Thailand understood that reappointment was neither a right nor automatic but this matter should be based on the qualifications and capability of the member and must not be linked with the Appellate Body's decisions on specific cases. A linkage, established between the reappointment of an Appellate Body member and the decisions in specific cases, would certainly affect the trust placed on the Appellate Body and the dispute settlement system, which was considered to be the important pillar of the WTO system. Thailand therefore supported further consultations on this matter with a view to finding a solution so as to have two new members of the Appellate Body without any delay.

6.47. The representative of Iceland said that his country noted that the role of courts and the interaction between the legislature and the judiciary had been a constant debate amongst scholars for centuries. All Members should have known at the time of establishment of the Appellate Body that it would gain a life of its own. Members could not have both an independent Appellate Body and at the same time demand a judicial style or approach dictated according to Members' will or traditions. There were limits and there should be limits to the mandate of the Appellate Body. It might, in the short term, have been feasible for the Appellate Body to introduce new principles into the WTO legal system. However, Members could not be blind to the fact that judicial activism could easily undermine the democratic legitimacy of the system and make it even more difficult for the WTO's negotiating arm to yield results. The US concerns were legitimate and *obiter dictum* statements could have exceeded some limits. However, Members should not link such concerns with the appointment or reappointment of an Appellate Body member. Such a link posed great systemic concerns to Iceland. Members should be mindful that not just one member rendered decisions, there were at least three. In Iceland's view, all Members should be reminded of the fact that the Appellate Body members were serving in their individual capacity, and not as representatives of their countries.

6.48. The representative of Oman said that her country had a systemic concern and interest in this matter and wished to take part in any consultations or discussions on these matters in order to find an appropriate solution.

6.49. The Chairman said that there were many thoughtful statements made at the present meeting which had raised profound issues and questions that would deserve further consideration. He informed delegations that the statements made would be reflected in the minutes of the meeting. It was clear that Members were faced with a complex and difficult situation and it was apparent that Members would have to continue to reflect and consult further on this matter. He encouraged delegations to consult with each other and consider how to proceed in light of the current difficulties faced. He informed delegations that he would be away from Geneva from 25 to 28 May and again from 31 May to 3 June. On his return, he would make himself available to meet with delegations and consider any suggestions they may have on these matters in the week beginning 6 June 2016.

6.50. The DSB took note of the statements.

7 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

7.1. The Chairman, speaking under "Other Business", said that he wished to make a report to provide the DSB with information about the Appellate Body's workload, the number of disputes before panels, in the panel queue, and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. On appeals, the Appellate Body was currently dealing with four appeals.[18] In addition, two panel reports were expected to be circulated in the next three months that may also be appealed.[19] These would be followed soon by the report of the Panel in the extremely complex compliance proceedings in the "EC and Certain Member States – Large Civil Aircraft" (Airbus) dispute, which had been issued to the parties in March and was expected to be circulated to Members by early September. Given the limited number of staff available in the Appellate Body Secretariat, as of the second half of 2016 there was likely to be a waiting period until all these appeals could be staffed and Appellate Body Members could turn to dealing with them. On panels/arbitrations, currently, there were 17 active panels (including one panel under Article 21.5 of the DSU) that had not yet issued a final report to the parties. He noted that he was counting multiple disputes that were being considered simultaneously by the same panel as one. For example, "Australia – Tobacco Plain Packaging", which in fact comprised four active disputes, was counted as a single panel in his report. In addition, suspended panels had not been counted. As of the present day, there were two composed panels awaiting staff to assist them[20], both of which had been composed after 31 October 2015 when the Director-General had undertaken to staff all panels in the queue at that time. As of the present day, there were five panels at the composition stage. In addition, one matter had been referred to arbitration under Article 22.6 of the DSU, which was currently awaiting staff to assist the arbitrator.

7.2. The DSB took note of the statement.

[18] DS456 "India – Solar Cells"; DS464 "US – Washing Machines"; DS461 "Colombia – Textiles"; and DS473 "EU – Biodiesel".
[19] DS475 "Russia – Pigs"; DS485 "Russia – Tariff Treatment".
[20] DS490/DS496 "Indonesia – Iron" or "Steel Products"; and DS491 "US – Coated Paper" (Indonesia).