RESTRICTED

WT/DSB/M/436

16 December 2019

(19-8671)

Dispute Settlement Body
28 October 2019

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 28 OCTOBER 2019

Chairman: H.E. Dr David Walker (New Zealand)

Table of Contents

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.200)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.175)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.138)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.22)

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.14)

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.9 – WT/DS478/22/Add.9)

1.1. The Chairman noted that there were six 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: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved." Under this Agenda item, he invited delegations to provide up-to-date information about their compliance efforts. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record." He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.200)

1.2. The Chairman drew attention to document WT/DS184/15/Add.200, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 17 October 2019, 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 DSB's recommendations and rulings 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 wished to thank the United States for its latest status report and for its statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.175)

1.6. The Chairman drew attention to document WT/DS160/24/Add.175, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 17 October 2019, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation wished to thank the United States for its status report as well as for its statement made at the present meeting. The European Union wished to refer to its statements made at previous DSB meetings and to reiterate that it wished to resolve this dispute as soon as possible.

1.9. The representative of China said that his country noted that the United States had provided 176 status reports in this dispute. However, these reports were not different from one another, and none of them indicated any progress on implementation. Nearly two decades after the DSB had adopted the Panel Report in this dispute, the United States continued to fail to bring its WTO-inconsistent measures into conformity, as stipulated in Article 21.1 of the DSU. Prompt compliance was essential for the well-functioning of the dispute settlement system. When the United States, the most frequent user and the major beneficiary of the system, had chosen to disregard its implementation obligations for this long, the capacity and the effectiveness of the dispute settlement system to rein in trade distortions was inevitably compromised. China, therefore, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute without further delay.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.138)

1.11. The Chairman drew attention to document WT/DS291/37/Add.138, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the dispute concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. As repeatedly explained by the EU and confirmed by the US delegation during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level. This had resulted in a clear improvement of the situation. It was also important to note that the slow reaction of applicants in certain applications also increased the overall average time needed for risk assessment. On 11 October 2019, a draft authorization[1] for new GM maize had been presented for a vote in the Appeal Committee with a "no opinion" result. It was thereafter for the European Commission to decide on this authorization. During previous DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings in this dispute did not cover that "opt-out Directive". During previous DSB meetings, the United States had also made certain references to the statement made by the EU Group of Chief Scientific Advisors. The EU wished to clarify that this statement focused on the future challenges for products obtained by new mutagenesis techniques. The statement did not state nor imply that Directive 2001/18 would not be "fit for purpose" as regarded "conventional GMOs". The EU acted in line with its WTO obligations. The EU also wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.13. The representative of the United States thanked the European Union for its status report and its statement made at the present meeting. The United States continued to see delays that affected dozens of applications that had been awaiting approval for an extended period. The EU suggested that the fault lied with the applicants. The United States disagreed; US concerns related to delays at every stage of the approval process which resulted from the actions or inaction of the EU and its member States. Even when the EU finally approved a biotech product, EU member States continued to impose unwarranted restrictions on the supposedly approved product. As the United States had noted at prior DSB meetings, the amendment of EU Directive 2001/18, through EU Directive 2015/413, permitted EU member States to restrict or prohibit certain uses of genetically-modified organisms ("GMOs"), even where the European Food Safety Authority ("EFSA") had concluded that the product was safe. At least 17 EU member States, as well as certain regions within EU member States, had submitted requests to adopt such measures with respect to MON-810 maize. The EU's only response was that the member States did not restrict marketing or free movement of MON-810 maize in the EU. This answer did nothing to address US concerns. The restrictions adopted by EU member States restricted international trade in these products, and had no scientific justification. Indeed, this was why the DSB had adopted findings that such restrictions on MON-810 maize were in breach of the EU's WTO commitments. The United States urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific principles, and that decisions were taken without undue delay.

1.14. The representative of the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The EU had different regulatory approaches to non-GMOs and GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. No EU member State had imposed any "ban" on the use of GMOs. Under the terms of the EU Directive and relevant legislation, an EU member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law and were reasoned, proportional, non-discriminatory and based on compelling grounds. The free movement of seeds was embedded in Article 22 of Directive 2001/18/EC which provided that "Member States may not prohibit, restrict or impede the placing on the market of GMOs, as products or in products, which comply with the requirements of this Directive." The EU also wished to note that, according to the provisions of the opt-out Directive (Article 26b, point 8), the measures adopted under the Directive "shall not affect the free circulation of authorised GMOs" in the EU. Currently, the EU Common Catalogue of varieties of agricultural

[1] Maize Bt11 × MIR162 × MIR604 × 1507 × 5307 × GA21.

species included 150 varieties of maize MON-810, to which the United States had referred in its statement under this Agenda item, and all of these varieties were allowed to be marketed in the EU. As of the present meeting, the European Commission had never received any complaint from seed operators or other stakeholders concerning the restriction of marketing of MON-810 seeds in the EU. This confirmed the smooth functioning of the internal market of MON-810 seeds.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.22)

1.16. The Chairman drew attention to document WT/DS464/17/Add.22, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning anti-dumping and countervailing measures on large residential washers from Korea.

1.17. The representative of the United States said that the United States had provided a status report in this dispute on 17 October 2019, in accordance with Article 21.6 of the DSU. On 6 May 2019, the US Department of Commerce had published a notice in the US Federal Register announcing the revocation of the anti-dumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (6 May 2019)). With this action, the United States had completed implementation of the DSB's recommendations concerning those anti-dumping and countervailing duty orders. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to other measures challenged in this dispute.

1.18. The representative of Korea said that his country wished to thank the United States for its status report. Korea again urged the United States to take prompt and appropriate steps to implement the DSB's recommendations for the "as such" measure in this dispute.

1.19. The representative of China said that, as a third party to the original proceeding in this dispute, his country was very concerned that the United States continued to fail to fully comply in this dispute. Its protracted non-compliance, especially in various anti-dumping disputes, had become a systemic issue which should be a concern for the entire Membership. Since the United States showed little willingness to bring its "as such" WTO-inconsistent anti-dumping measures into conformity, Members had no other choice but to flock to the dispute settlement system to relitigate already decided issues. This was not the way the system was supposed to operate, according to what Members had agreed back in 1995. China recalled that Article 21.1 of the DSU explicitly set out the compliance obligation which should be unconditionally observed by all Members. China, therefore, urged the United States to faithfully implement the DSB's recommendations and rulings in all of the disputes in which it was a defending party, including this one.

1.20. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" was "as such" WTO-inconsistent. The United States had also ignored the DSB's recommendation that the United States bring itself into compliance with its obligations. Instead, the United States continued to apply the "as such" inconsistent differential pricing methodology in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters based on its inconsistent methodology. As a result, Canada had been forced to challenge the differential pricing methodology measure in the "US – Differential Pricing Methodology" dispute (DS534) and Viet Nam was currently doing the same in the "US – Fish Fillets" dispute (DS536). Before these Panels, the United States had simply re-litigated the WTO-consistency of its differential pricing methodology and had asked the Panels to ignore the Appellate Body's findings. Canada remained deeply concerned with the continued US failure to comply with the DSB's recommendations and rulings in this dispute. This failure seriously undermined the security and stability of the multilateral trading system.

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

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.14)

1.22. The Chairman drew attention to document WT/DS471/17/Add.14, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning certain methodologies and their application to anti-dumping proceedings involving China.

1.23. The representative of the United States said that the United States had provided a status report in this dispute on 17 October 2019, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.24. The representative of China said that, on 22 May 2017, the DSB had adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report in this dispute, which had found that certain measures taken by the United States were inconsistent with requirements of the Anti-Dumping Agreement, including: (i) the use of zeroing under the W-T methodology was "as such" inconsistent with Article 2.4.2; (ii) the so-called "single rate presumption" as such violated Articles 6.10 and 9.2; and (iii) the "adverse facts available" was a norm of general and prospective application which could be subject to future "as such" challenges. China was very disappointed that, more than two years after the DSB had adopted recommendations and rulings in this dispute, and 14 months after the expiry of the reasonable period of time, the United States continued to fail to bring its WTO-inconsistent measures into conformity. As China had noted at prior DSB meetings, the status reports provided by the United States did not appear to be different from one another, and none could indicate any progress on implementation. When China had sought the authorization to suspend the concessions or other obligations in accordance with the DSU, rather than changing its course, the United States had chosen to further delay the resolution of this dispute by referring the matter to arbitration pursuant to Article 22.6 of the DSU. Without prompt and effective compliance, the WTO-inconsistent measures taken by the United States continued to infringe China's economic interests, distorted international markets and undermined the effectiveness of the dispute settlement system. While China was still waiting for concrete implementation from the United States, China nevertheless stood ready to take further action in accordance with WTO rules to safeguard its legitimate interests. Article 21.1 of the DSU clearly stated that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China urged the United States to take concrete actions and to promptly implement the DSB's recommendations and rulings in this dispute.

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

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.9 – WT/DS478/22/Add.9)

1.26. The Chairman drew attention to document WT/DS477/21/Add.9 – WT/DS478/22/Add.9, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the dispute concerning importation of horticultural products, animals and animal products.

1.27. The representative of Indonesia said that his country had submitted the present report pursuant to Article 21.6 of the DSU. Indonesia wished to refer to its status report made at the previous DSB meeting in relation to the fact that it had completed the enactment process of its new Minister of Agriculture and Minister of Trade Regulations regarding the importation of horticultural products, animals and animal products which were relevant to these disputes. Regarding Measure 18, the draft amendments to the relevant laws along with their academic drafts would be discussed with the President. However, Indonesia was currently in the process of transitioning to a new parliament as well as a new government administration. Indonesia would continue to engage with New Zealand and the United States regarding the DSB's recommendations and rulings in these disputes.

1.28. The representative of New Zealand said that New Zealand wished to thank Indonesia for its status report. New Zealand acknowledged the steps that had been taken by Indonesia and Indonesia's commitment to comply fully with the DSB's recommendations and rulings in this dispute. New Zealand noted that both of the compliance deadlines that had been agreed between the parties

had now expired. New Zealand was seriously disappointed that full compliance had still not been reached and was particularly concerned about: the failure to remove Measure 18; the continued enforcement of limited application windows and validity periods; harvest period import bans; import realization requirements; and restrictions placed on import volumes based on storage capacity. These matters, and others, continued to adversely impact New Zealand exporters. Indonesia was yet to provide a clear explanation of how it would bring these measures into compliance, and the timelines for doing so. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve long-term, commercially meaningful, compliance with the DSB's recommendations and rulings in this dispute.

1.29. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance with WTO rules. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States understood that Indonesia claimed to have "completed its enactment process" of certain regulations, but it was still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remained unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia would complete its process. The United States looked forward to receiving further detail from Indonesia regarding the planned changes to its regulations and laws.

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

2 IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

A. Ukraine – Anti-dumping measures on ammonium nitrate

B. Korea – Anti-dumping duties on pneumatic valves from Japan

2.1. The Chairman recalled that, in accordance with the DSU, the DSB was required to keep under surveillance the implementation of the DSB's recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the DSB's recommendations and rulings. He then proposed that the two sub-items be considered separately.

A. Ukraine – Anti-dumping measures on ammonium nitrate

2.2. The Chairman recalled that, at its meeting on 30 September 2019, the DSB had adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report, pertaining to the "Ukraine – Anti Dumping Measures on Ammonium Nitrate" (DS493) dispute. He then invited the representative of Ukraine to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.3. The representative of Ukraine said that, in accordance with Article 21.3 of the DSU, Ukraine was ready to fully implement the DSB's recommendations and rulings resulting from the Appellate Body Report and the Panel Report in this dispute, and to bring its anti-dumping measures into full conformity with Ukraine's obligations under the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994. Nevertheless, Ukraine had to follow all legal procedures required by its domestic law. Therefore, Ukraine needed a reasonable period of time to implement the DSB's recommendations and rulings as it was necessary for Ukraine to: (i) amend its Law "On the Protection of National Producers Against Dumped Imports" in order to be able to initiate a review on the basis of the DSB's recommendations; and (ii) conduct a review of its anti-dumping measures while taking into account the rulings of the Appellate Body and the Panel. In accordance with Article 21.3(b) of the DSU, Ukraine stood ready to engage in a constructive dialogue in the coming weeks with a view to agreeing on a mutually satisfactory reasonable period of time.

2.4. The representative of Russia said that her delegation wished to thank Ukraine for announcing its intention to comply with the DSB's recommendations and looked forward to discussing with Ukraine the appropriate reasonable period of time for Ukraine's compliance.

2.5. The DSB took note of the statements, and of the information provided by Ukraine regarding its intentions in respect of implementation of the DSB's recommendations.

B. Korea – Anti-dumping duties on pneumatic valves from Japan

2.6. The Chairman recalled that, at its meeting on 30 September 2019, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, pertaining to the "Korea – Anti-Dumping Duties on Pneumatic Valves from Japan" (DS504) dispute. He then invited the representative of Korea to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.7. The representative of Korea said that, on 30 September 2019, the DSB had adopted the Panel Report and the Appellate Body Report in this dispute. Korea welcomed the Appellate Body's rulings that had, for the most part, upheld Korea's position. However, Korea also recognized that there were certain procedural matters and some methodological flaws in the investigating authority's price effect analysis that needed to be addressed through proper implementation. Korea confirmed its willingness to faithfully implement the DSB's recommendations and rulings in this dispute within a reasonable period of time, pursuant to Article 21 of the DSU. In accordance with Article 21.3(b) of the DSU, Korea would discuss this matter with Japan with a view to reaching an agreement on the reasonable period of time for implementation.

2.8. The representative of Japan said that his country welcomed Korea's statement made at the present meeting, which informed the DSB of Korea's intention to implement the DSB's recommendations and rulings in a manner consistent with its WTO obligations. Under Article 21.3 of the DSU, "the requirement is immediate compliance" and "the reasonable period of time is a limited exemption from [this] obligation".[2] Thus, Japan found it regrettable that Korea could not comply with the DSB's recommendations immediately. The Appellate Body in this dispute had ruled in favour of Japan with respect to nearly all of the issues raised in Japan's appeal, and had found Korea's measure inconsistent with the Anti-Dumping Agreement. In particular, Japan's core claims had included the lack of price comparability between Japanese valves with higher values and functions, on the one hand, and Korean low-end domestic valves, on the other hand. The Panel and the Appellate Body had accepted Japan's core claims. Japan urged Korea to take the DSB's recommendations and rulings seriously, to carefully examine the findings and reasoning of the Panel and the Appellate Body, and to take prompt action to bring its WTO-inconsistent anti-dumping measure into full compliance with its obligations. With a view to achieving full and prompt compliance and thus an effective and positive resolution of this dispute, Japan stood ready to discuss this matter with Korea, including with respect to an appropriate reasonable period of time.

2.9. The representative of Korea said that his country considered that nothing in the Panel Report or in the Appellate Body Report suggested that the only way to implement the rulings was to withdraw the relevant measure in its entirety. As Korea had explained at the 30 September 2019 DSB meeting, the Appellate Body's finding of inconsistency was limited to some methodological flaws in the Korean Trade Commission's price effect analysis and a procedural matter. It was simply incorrect to assert that the corollary of the methodological flaws with limited implications found by the Appellate Body was the complete termination of the current anti-dumping measure. Such a bold assertion would call for a fundamental change in the notion under which Members implemented WTO rulings. That being said, the relevant Korean authority would re-open the case file in order to re-assess the original investigation in a manner consistent with the Appellate Body rulings.

2.10. The representative of Japan said that, as Japan had explained in its previous statement under this Agenda item, the Appellate Body in this dispute had ruled in favour of Japan with respect to nearly all of the issues raised in Japan's appeal. The Appellate Body and the Panel had accepted Japan's core claims, which included the lack of price comparability between Japanese valves with higher values and functions, on the one hand, and Korea's low-end domestic valves, on the other hand. In order to maintain the measure at issue, Korea was required to persuasively explain that prices of Japanese imported valves, which were on average 1.5 to 2 times higher than those of Korean domestic valves, were still comparable. Such persuasive explanation could never be achieved

[2] Appellate Body Report, US – Zeroing (Japan) (Article 21.5 – Japan), para.157.

simply by picking some occasional individual import prices, which seemed comparable with domestic prices, without due regard to similarities between transactions such as dates and volumes. As Japan had stated, ensuring price comparability and providing adequate explanations with respect to the continuous overselling by Japanese imports was crucial to the proper causation determination by Korea and, thus, the failure to do so constituted a fundamental flaw in its investigations. Therefore, Japan believed that it was difficult to see how Korea could rectify this fundamental flaw simply by rewriting some part of its injury determination. The only and clearest way for Korea to implement the DSB's recommendations and rulings was to eliminate immediately its anti-dumping measures imposed on pneumatic valves from Japan.

2.11. The DSB took note of the statements, and of the information provided by Korea regarding its intentions in respect of implementation of the DSB's recommendations.

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

A. Statement by the European Union

3.1. The Chairman recalled that this item was on the Agenda of the present meeting at the request of the European Union. He then invited the representative of the European Union to speak.

3.2. The representative of the European Union said that his delegation requested, once again, that the United States stop transferring anti-dumping and countervailing duties to the US industry. Even if the amounts had considerably decreased, the latest report from December 2018 still showed that amounts were still being, in practice, disbursed. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. As long as the United States did not fully stop transferring collected duties, the present item would rightly remain under the surveillance of the DSB. Due to the long-standing nature of this breach, and as a matter of principle, the EU would continue to insist in this respect, independent of the cost resulting from the application of such limited duties. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit implementation reports in this dispute. The EU would continue to place this item on the Agenda of the DSB as long as the United States had not fully implemented the WTO ruling and until the disbursements ceased completely.

3.3. The representative of Brazil said that, as an original party to this dispute, Brazil wished to thank, once again, the European Union for keeping this item on the Agenda of the DSB. After more than 16 years since the adoption of the DSB's recommendations in this dispute, and after more than 13 years following the adoption of the Deficit Reduction Act that had repealed the Byrd Amendment, anti-dumping and countervailing duties were still being disbursed to US domestic petitioners. Brazil called on the United States to comply fully the DSB's recommendations and rulings in this dispute.

3.4. The representative of Canada said that his country wished to thank the European Union for placing this item on the Agenda of the DSB. Canada agreed with the European Union that the Byrd Amendment should remain subject to the surveillance of the DSB until the United States ceased to administer it.

3.5. The representative of the United States said that, as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had implemented the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 12 years ago. Even aside from this, the United States questioned the trade rationale for inscribing this item on the Agenda of the DSB. In May 2019, the EU had notified the DSB that disbursements related to EU exports to the United States had totalled US$ 4,660.86 in fiscal year 2018. As such, the EU had announced it would apply an additional duty of 0.001 percent – that is, one one-thousandth of a percent – on certain imports of the United States, including imports of sweet corn. These values were no doubt outweighed by the associated costs resulting from the application of these countermeasures – or the DSB's taking up this Agenda item. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations, regardless of whether the complaining party disagreed about compliance. The practice of WTO Members – including the

European Union as a responding party – confirmed this widespread understanding of Article 21.6 of the DSU. Accordingly, since the United States had informed the DSB that it had come into compliance in this dispute, there was nothing more for the United States to provide in a status report.

3.6. The DSB took note of the statements.

4 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the United States

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

4.2. The representative of the United States noted that once again the European Union had not provided Members with a status report concerning the "EC – Large Civil Aircraft" (DS316) dispute. As the United States had noted at several recent DSB meetings, the EU had argued – under a different Agenda item – that where the EU as a complaining party did not agree with another responding party Member's "assertion that it has implemented the DSB ruling", "the issue remains unresolved for the purposes of Article 21.6 DSU". Under this Agenda item, however, the EU argued that, by submitting a compliance communication, the EU no longer needed to file a status report, even though the United States as the complaining party disagreed that the EU had complied. At recent DSB meetings, the EU had attempted to reconcile this view with the EU's long-standing, contrary position. The EU argued that the situation in the "US — Offset Act (Byrd Amendment)" dispute differed from that in the "EC – Large Civil Aircraft" (DS316) dispute because, in the "US - Offset Act (Byrd Amendment)" dispute, the dispute had been adjudicated and there were no further proceedings pending. With its statement made at the 30 September 2019 DSB meeting, the EU had said there was no significance to the fact that there were no current proceedings in the "US — Offset Act (Byrd Amendment)" dispute, and the EU had conceded what the United States had been explaining during the past months – the issue of compliance in the "US — Offset Act (Byrd Amendment)" dispute had not been adjudicated. The United States had repealed the Continued Dumping and Subsidy Offset Act of 2000 measure after all of the proceedings in the dispute, and the EU had not brought a challenge to the US claim of compliance. This meant that the EU's position had been reduced to two unfounded assertions, neither of which was based on the text of the DSU. First, the EU had erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". At the 30 September 2019 DSB meeting, the EU had phrased this as "the crucial point for the defending party's obligation to provide status reports to the DSB is the stage of the dispute. In the Airbus dispute, the dispute is at a stage where the defending party does not have an obligation to submit status reports to the DSB". There was nothing in the DSU text to support that argument, and the EU provided no explanation for how it read Article 21.6 of the DSU to contain this limitation. Second, the EU once again relied on its incorrect assertion that the EU's initiation of compliance panel proceedings meant that the DSB was somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations". Yet again, there was nothing in Article 2 of the DSU or elsewhere that limited the DSB's authority in this manner. It was another invention of the EU. The EU should be providing a status report. Yet it had failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party. The US position had been consistent and clear: under Article 21.6 of the DSU, once a responding Member provided the DSB with a status report that announced compliance, there was no further "progress" on which it could report, and therefore no further obligation to provide a report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in the "EC – Large Civil Aircraft" (DS316) dispute.

4.3. The representative of the European Union said that the United States had expressly stated that the EU was taking inconsistent positions under Article 21.6 of the DSU, depending on whether the EU was a complaining party or a defending party in a dispute. The EU disagreed with this assertion of the United States. As the EU had repeatedly explained in past DSB meetings, the crucial point for a defending party's obligation to provide status reports to the DSB was the stage of the dispute. In this dispute, the dispute was at a stage where the defending party did not have an obligation to submit status reports to the DSB. The EU wished to remind Members that in the "EC – Large Civil Aircraft" dispute (DS316), the EU had notified to the WTO a new set of measures in a compliance communication which had been tabled at the 28 May 2018 DSB meeting. The United States had responded that the measures included in that communication did not bring the EU in full compliance

with the DSB's recommendations and rulings. In light of the position of the United States, on 29 May 2018, the EU had requested consultations with the United States, under Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the dispute. Consequently, the EU had asked for the establishment of a compliance panel, which had been established by the DSB on 27 August 2018. That compliance Panel was currently reviewing "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Therefore, there was a compliance proceeding still on-going in this dispute. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU was the very subject matter of this on-going litigation. The EU asked how it could be said that the defending party should submit "status reports" to the DSB in these circumstances. The EU would be very concerned with a reading of Article 21.6 of the DSU that would require the defending party to notify the purported "status of its implementation efforts" through the submission of status reports to the DSB, while dispute settlement proceedings on that precise issue were on-going. The view of the EU was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the surveillance of the DSB.

4.4. The DSB took note of the statements.

5 STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 6.2 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

5.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the United States. He then invited the representative of the United States to speak.

5.2. The representative of the United States said that the United States had requested this Agenda item regarding an important issue, the incorrect legal interpretation by the Appellate Body of Article 6.2 of the DSU[3], which states in relevant part that a panel request shall "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In this statement, the United States would explain that the Appellate Body had added a requirement for the legal basis of a panel request that did not appear in the text. Specifically, the Appellate Body had imposed a requirement to explain "how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[4] This incorrect interpretation had made disputes more complicated by encouraging procedural challenges. That procedural complexity, in turn, resulted in delays in proceedings and created significant uncertainty for the parties to the dispute. This issue thus affected every WTO Member that was a party to a dispute, or considering whether to bring a dispute, and could affect third parties as well.

5.3. The United States said that the Appellate Body's erroneous interpretation had practical effects. This was not an abstract issue; rather, it had effects on every dispute and had recently affected the outcome of one dispute. As Members might be aware, this issue had come up at the 30 September 2019 DSB meeting. Members had considered an appellate report in the "Korea – Pneumatic Valves" dispute (DS504) that vividly demonstrated the consequences of the Appellate Body's incorrect legal interpretation. In that dispute, the panel had found that certain claims in Japan's panel request had been outside the panel's terms of reference. The panel had explicitly reached this conclusion because it had found that the panel request had not adequately explained "how or why" the challenged measure had been inconsistent with the legal provisions Japan had identified, namely certain claims under Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994.[5] In making these findings that Japan's panel request had not brought these claims within the scope of the dispute, the panel had stated that it had been following its understanding of the Appellate Body's approach in prior disputes. This had generated appeals. Despite the fact that the panel had thought it had been doing what the Appellate Body had said to do, the appellate report had *reversed* the panel and had found that claims rejected by the panel had been, in fact, *within* the panel's terms of reference. The appellate report had stated that: "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

[4] EC – Selected Customs Matters (AB), para. 130; China – Raw Materials (AB), para. 226; US – Countervailing Measures (China) (AB), para. 4.9.

[5] See Panel Report, Korea – Anti-Dumping Duties on Pneumatic Valves from Japan (WT/DS504/R), para. 8.1.

basis … sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU".[6] The appellate report had then indicated that, in a number of instances, it had been unable to complete the analysis of the claims. The result was that a number of claims Japan had validly presented in the panel request had not been resolved due to the incorrect interpretation of Article 6.2 of the DSU.

5.4. The United States said that the Appellate Body's interpretation was erroneous and contrary to Article 6.2 of the DSU. When the DSB had considered the appellate report for adoption, the complaining Member had highlighted that a panel's erroneous decision not to rule on the key issues on a jurisdictional ground undermined a primary objective of the dispute settlement system. Another Member had stated that it had agreed "with the AB statement that '[s]pecifically, the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis … sufficient to present the problem clearly'" even while acknowledging that this "was at the heart of the Panel's reasoning".[7] So while some Members had welcomed the Appellate Body's statement that the "how or why" approach had not been intended to change the legal standard in Article 6.2 of the DSU, in effect this Appellate Body approach had done so. The United States recalled that the panel had thought it was faithfully applying the Appellate Body's "how" or "why" interpretation. The panel's regrettable, but understandable, error only confirmed that the Appellate Body's "how" or "why" interpretation had been incorrect, that it had added an element beyond what was required under Article 6.2 of the DSU, and that it had created uncertainty and confusion for the dispute. The erroneous "how" or "why" interpretation by the Appellate Body had not been inadvertent. In at least three prior appeals, the Appellate Body had departed from the text of Article 6.2 and had imposed this additional requirement for panel requests – that is, the element of "how or why" a measure was inconsistent with a provision cited by the complaining party.[8] The relevant text of Article 6.2 was that a panel request "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Neither "how" nor "why" appeared in Article 6.2. Instead, in order to provide the brief summary required by Article 6.2, it was sufficient for a complaining Member to specify in its panel request the legal claims under the WTO provisions with respect to the identified measures. Not surprisingly, by imposing a "how or why" requirement beyond Article 6.2 of the DSU, the Appellate Body's interpretation had provoked more litigation. Responding parties had used the "how or why" approach to raise challenges against a panel's terms of reference in at least 16 proceedings. Over the past two years, over 30 percent of panel reports had addressed Article 6.2 and the Appellate Body's incorrect element of "how or why". These challenges were not because the panel request had failed to identify the measure at issue or the legal basis for bringing the dispute. Rather, responding parties had argued that the Appellate Body's "how or why" approach required complaining parties to do something more. They argued that the complaining party had to include in a panel request the arguments that the complaining party would present to the panel regarding each claim of an inconsistency with a provision of a covered agreement. And some panels, following the Appellate Body's error, had agreed with responding parties. But the DSU was clear that a panel request did not need to include arguments. Instead, the complaining party's arguments were to be made in the submissions, oral statements, and other filings with a panel.[9] Some panels had thus understood the "how or why" approach to require that panel requests go above and beyond what was required under the DSU. Before the Appellate Body had read into Article 6.2 of the DSU the requirement to explain "how" or "why" a measure was inconsistent, this provision had never been understood this way. It was notable that the text for Article 6.2 of the DSU had been drawn from, and did not differ materially from, the 1989 GATT Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These "Montreal Rules" had provided: "The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly".[10] The fact that the Article 6.2 language came from the Montreal Rules suggested that its incorporation in the DSU had not been meant to change the standard that would be applied to panel requests. Panel requests subsequent to the Montreal Rules had not included an explanation of "how or why" the measure at issue had been inconsistent with

[6] Korea – Pneumatic Valves (DS504), para. 5.12.

[7] https://eeas.europa.eu/delegations/world-trade-organization-wto/68177/eu-statement-regular-dsb-meeting-%E2%80%93-30-september-2019_en.

[8] EC – Selected Customs Matters (AB), para. 130; China – Raw Materials (AB), para. 226; US – Countervailing Measures (China) (AB), para. 4.9.

[9] See, e.g., DSU Appendix 3, para. 4: "Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments".

[10] GATT, Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989, Section F(a) ("Montreal Rules").

the GATT 1947 provision at issue. Rather, GATT panel requests had identified the relevant GATT legal provision, or one of its obligations. The practice of Contracting Parties under the GATT 1947 with respect to panel requests, therefore, also demonstrated that the "how or why" approach was in error.

5.5. The United States said that the Appellate Body's erroneous interpretation introduced complexity, delay and expenses and undermined the dispute settlement system. The United States said that, by creating this "how or why" approach, the Appellate Body had encouraged responding parties to engage in procedural arguments as well as preliminary ruling requests, and at least four appeals. In turn, these had added to the complexity, length, and expense of dispute settlement, including additional burdens on complaining parties and third parties. The difficulties arising from the "how or why" approach had been further aggravated by the Appellate Body's approach to "cogent reasons", which the United States had discussed at prior DSB meetings. The "cogent reasons" approach meant that panels had not looked to the text of Article 6.2 of the DSU in reviewing terms of reference challenges. Instead, as in the "Korea – Anti-Dumping Duties on Pneumatic Valves from Japan" (DS504) dispute, some panels had relied upon and had followed appellate reports advancing the erroneous "how" or "why" interpretation. In the most recent appellate report, the Appellate Body appeared to have sought to back away from the "how" or "why" approach by reversing the panel report. However, while the United States welcomed the recognition that the panel had erred by applying the "how or why" approach, the appellate report had not explicitly disavowed that approach. This might have been an instance where the Appellate Body had determined that an earlier Appellate Body interpretation had been incorrect but for whatever reason the Appellate Body was not willing to state that explicitly. The problem was that this left Members and panels confused as to what approach prevailed and therefore which approach to follow. To the United States, the text of the DSU prevailed. Neither "how" nor "why" appeared in Article 6.2 of the DSU; therefore, this "how" or "why" approach was not rooted in the text of the DSU. The United States strongly believed that adherence to the text of the DSU and all the WTO agreements was necessary to maintain Members' confidence that the agreements they had reached would be respected and to maintain the effectiveness of the dispute settlement system.

5.6. In conclusion, the United States said that the Appellate Body in its reports had added a requirement for the legal basis of a panel request that did not appear in the text of the DSU. Specifically, through its interpretation of Article 6.2 of the DSU, the Appellate Body had imposed a requirement to explain "how or why" a measure was inconsistent with a provision cited by the complaining party. This incorrect interpretation had real, practical effects. It had made disputes more complicated by encouraging procedural challenges, which in turn resulted in delays in proceedings and significant uncertainty for Members who were, or could be, parties to a dispute. While the Appellate Body recently appeared to have attempted to back away from this approach, it had done so in a manner that created confusion and more uncertainty, without any assurance that the difficulties that had been identified would be alleviated. This was yet another instance demonstrating that the panels and the Appellate Body needed to follow the text that Members had agreed to, rather than departing from that text and undermining the WTO dispute settlement system.

5.7. The representative of Japan said that his country wished to thank the United States for its statement made at the present meeting. Japan agreed that the phrase "how or why", referred to in some of the past Appellate Body reports, had no basis in the text of Article 6.2 of the DSU and, hence, did not create a legal standard different than the text of this provision. In this regard, the Appellate Body in the "Korea – Pneumatic Valves" dispute (DS504) had correctly clarified that "the use of the phrase 'how or why' in these cases does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU".[11] Moreover, Japan was sympathetic with the concern expressed by the United States that certain prior panels and certain Members had misunderstood the phrase "how or why", which had added unnecessary complexity to disputes by encouraging procedural challenges and which had created significant uncertainty for parties to a dispute. In particular, when a panel erroneously used the terms "how or why" as an additional requirement divorced from the text of Article 6.2 of the DSU, it left certain matters unresolved, thus undermining one of the objectives of the DSU to "achiev[e] a satisfactory settlement of the matter in accordance with the rights and obligations under" the DSU. As the Appellate Body Report in the "Korea – Pneumatic Valves" dispute (DS504) emphasized: "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement" set out in the

[11] Appellate Body Report, Korea – Pneumatic Valves, para.5.7.

text of Article 6.2 of the DSU.[12] The Appellate Body's clarification had fully reflected the arguments put forward by Japan in the appellate proceedings in that dispute.[13] When called on to examine the terms of reference, panels had to faithfully follow and apply the legal standard set out in Article 6.2 of the DSU. Japan again thanked the United States for raising this matter of systemic importance.

5.8. The representative of Canada said that his country wished to thank the United States for its statement regarding Article 6.2 of the DSU, and for sharing its views on the Appellate Body's treatment of this issue in the "Korea – Pneumatic Valves" dispute (DS504). To comply with Article 6.2, a panel request had to "identify the specific measures at issue", and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". These requirements played a critical role in the conduct of any dispute settlement proceeding. They instructed Members on how to frame their panel requests, thereby determining the scope of the panel's jurisdiction. They also served an important due process objective, in helping the respondent understand the nature of the complaint against it sufficiently in advance to enable the latter to prepare a defence. Regarding the obligation to identify with sufficient clarity the legal basis of the complaint, Canada agreed with the Appellate Body that the panel request had to "plainly connect" the measure(s) with the provision(s) of the covered agreements that the complaining party claimed to be infringed.[14] Canada also agreed that, while, at a minimum, a panel request had to identify the specific provision(s) claimed to have been violated, there could be circumstances in which merely identifying those provisions would not satisfy the legal standard in Article 6.2.[15] For example, if a provision included multiple obligations, rather than a distinct obligation, the request might need to indicate which of those obligations provided the basis for the claim of a violation in order to meet the legal standard contained in Article 6.2 of the DSU.[16] Ultimately, however, the question of whether the mere listing of a WTO provision was sufficient for the purposes of meeting this legal standard had to be examined on a case-by-case basis. Such an examination also had to take into consideration the important due process objective of Article 6.2, including whether the ability of a respondent to defend itself had been prejudiced by the simple listing of the provisions alleged to have been breached.[17] The Appellate Body had made it very clear that the DSU did not require that arguments be included in a panel request. The Members knew how to proceed in this regard. To this end, Canada encouraged WTO Members to exercise restraint in making claims under Article 6.2 by limiting such claims to disputes in which there was a real risk of material prejudice to a Member's ability to defend its measures.

5.9. The representative of China said that his country wished to thank the United States for placing this item on the DSB Agenda. Article 6.2 of the DSU played a pivotal role in WTO dispute settlement proceedings. It created an important threshold regarding panel requests and served a dual function. First, it helped establish the terms of reference of a panel which delimited the scope of jurisdiction over a dispute. Second, it fulfilled a due process objective by providing adequate notice to the respondent as well as to the third parties regarding the nature of a dispute. To meet the requirements set out in Article 6.2 of the DSU, among other things, a panel request had to identify the specific measures at issue and to provide a brief summary of the legal basis sufficient to present the problem clearly. China had recognized that, over the years, panels and the Appellate Body had developed jurisprudence on this important matter. For instance, the degree of specificity required for identifying the measure at issue had to be assessed on a case-by-case basis[18], and a brief summary of the legal basis of the complaint was required to explain succinctly how or why the measure at issue was considered to be violating the WTO obligations at issue.[19] China also wished to note that, in recent years, it appeared to be a general practice for Members to request for preliminary rulings on the conformity of a panel request with respect to the requirements set out in Article 6.2 of the DSU. Against that backdrop, the importance of the jurisprudence regarding Article 6.2 could not be underestimated. Notably, by clarifying and facilitating the understanding of the threshold set out in Article 6.2, WTO adjudicators remained very conscientious regarding the jurisprudence they had developed. For example, a recently adopted Appellate Body report explicitly

[12] Appellate Body Report, Korea – Pneumatic Valves, para.5.12.

[13] As affirmatively noted by the Appellate Body, "Japan argues that the Panel improperly relied on the phrase 'how or why' used by the Appellate Body in certain disputes to create 'its own arbitrary standard' requiring a complainant 'to show not only a 'claim', but also the 'argument' in support of that claim'". Appellate Body Report, Korea - Pneumatic Valves, para.5.22.

[14] Appellate Body Reports, Korea – Pneumatic Valves (Japan), para. 5.9.

[15] Appellate Body Reports, Korea – Pneumatic Valves (Japan), para. 5.9 and Korea – Dairy, para. 14.

[16] Appellate Body Reports, China – Raw Materials, para. 220.

[17] Appellate Body Report, Korea – Dairy, para. 127.

[18] Appellate Body Report, US – Carbon Steel, para. 127.

[19] Appellate Body Report, EC – Selected Customs Matters, para. 130.

stated that "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis … sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU".[20] In other words, this jurisprudence simply served as a useful analytical tool to distinguish relevant nuances related to the interpretation of Article 6.2 of the DSU which provided security and predictability to Members as provided for in Article 3.2 of the DSU. At the present meeting, China had heard various comments from Members on this important Article which reflected Members' collective interests in maintaining and further improving the current dispute settlement system. Having said so, Members had to keep this objective in sight during their discussions. While the viability of the existing two-tier system was facing an unprecedented threat, and rather than exchanging on rhetoric that would distract and divert Members from solving this most urgent matter, it was important to recall that the priority of Members should be to discuss what concrete actions should be taken to unblock the AB selection processes without further delay.

5.10. The representative of Mexico said that her country wished to thank the United States for including this item on the Agenda of the DSB. Article 6.2 of the DSU set out two obligations: (i) to identify the specific measures at issue; and (ii) to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. These two elements constituted the terms of reference of the panel and were relevant in establishing its jurisdiction, but they also fulfilled a due process objective by providing the respondent and third parties with sufficient information on the nature of the complainant's arguments to enable them to respond accordingly. Mexico agreed with the interpretation of the Appellate Body that, in assessing whether a panel request was sufficiently precise to comply with Article 6.2 of the DSU, panels had to carefully scrutinize the panel request, read as a whole, and on the basis of the language used therein. Moreover, a panel "must determine compliance with Article 6.2 on the face of the panel request as it existed at the time of filing". The Appellate Body's finding that the mere listing of articles in a panel request could be insufficient to meet the standard in Article 6.2 of the DSU had generally arisen in instances where the provision at issue contained multiple and different obligations. Mexico believed that the obligation under Article 6.2 of the DSU was clear with regard to the requirements for submitting a panel request.

5.11. The DSB took note of the statements.

6 INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. Request for the establishment of a panel by the United States (WT/DS585/2)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 30 September 2019 and had agreed to revert to it, should a requesting Member wish to do so. He then drew attention to the communication from the United States contained in document WT/DS585/2 and invited the representative of the United States to speak.

6.2. The representative of the United States said that the United States had explained that the US actions taken on imports of steel and aluminium pursuant to Section 232 were to address a threat to its national security. Every sovereign had the right to take action it considered necessary for the protection of its essential security. This inherent right had not been forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right had been enshrined in Article XXI of the GATT 1994. The actions of the United States were completely justified under that Article. What remained inconsistent with the WTO Agreement, however, was the unilateral retaliation against the United States by various WTO Members including India. These Members pretended that the US actions under Section 232 were so-called "safeguards", and claimed that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. Just as these Members appeared to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregarded them. The additional, retaliatory duties were nothing other than duties in excess of India's WTO commitments and were applied only to the United States, contrary to India's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter, with standard terms of reference.

[20] Appellate Body Report, Korea- Pneumatic Valves, Para.5.12.

6.3. The representative of India said that India was disappointed that the United States had chosen to move forward with its second request for the establishment of a panel against India's measures concerning additional duties on certain products from the United States. As India had explained in its statement made at the 30 September 2019 DSB meeting in response to the US request for the establishment of a panel, the measures at issue in this dispute were consistent with Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. India's measures in this dispute were a permitted and proportionate response to the measures adopted by the United States pursuant to Section 232 regarding steel and aluminium products. India considered that the Section 232 measures on steel and aluminium products imposed by the United States were nothing but safeguard measures to protect the United States' domestic industry disguised in the garb of national security. Further, India had provided ample time to the United States to resolve issues concerning its Section 232 measures, but the United States had not agreed to any positive solution. As a result, India had been constrained to impose additional duties to suspend concessions and other obligations referred to in Article 8.2 of the Agreement on Safeguards. India's re-balancing measures were in direct response to the unwarranted restrictions imposed by the United States against Indian steel and aluminium exports. India was committed to removing its re-balancing measures as soon as the United States had removed its illegal tariffs against Indian steel and aluminium products. India would rigorously defend the measures at issue and was confident that it would prevail in this dispute.

6.4. The representative of the European Union said that his delegation had made a statement in relation to the first panel request made by the United States in this dispute at the 30 September 2019 DSB meeting. The EU had also touched upon the same overall subject multiple times in the past year in connection with panel requests that had been submitted by the United States in relation to other WTO Members (besides India) and their respective suspensions of concessions. The latter came in response to the US safeguard measures on steel and aluminium. In reaction to the statement of the United States during the 30 September 2019 DSB meeting, the EU wished to stress that the United States remained wrong in suggesting that Article XIX of the GATT and the Safeguards Agreement were not relevant to the US actions under Section 232 of their domestic legislation, and that those actions, as national security actions, were fully justified under Article XXI of the GATT. The EU insisted that the US measures, objectively speaking, were safeguards and that other WTO Members therefore had the right to suspend GATT obligations. The EU looked forward to continuing to defend, before the established panels, its right and the right of other WTO Members, including India, to suspend equivalent obligations. Likewise, the EU felt committed to keep defending the rules-based multilateral trading system.

6.5. The representative of China said that, as his country had noted at prior DSB meetings, this dispute related to a WTO Member's re-balancing measures in response to Section 232 measures, which were indeed disguised safeguard measures adopted by the United States. China recalled that nine Members had initiated dispute settlement proceedings regarding these Section 232 measures and that seven panels were currently scrutinizing the matter. The unprecedented number of complaints could suggest a general opposition against US unilateralism. As one of the co-complainants regarding this same matter, China supported other Members who wished to safeguard their legitimate interests by adopting re-balancing measures in accordance with WTO rules.

6.6. The representative of the United States said that India's approach for the retaliatory action at issue made clear that, like the United States, it did not consider the Safeguards Agreement to be applicable in this dispute. For example, India had not addressed whether its action was in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there had been an absolute increase, the right to suspend substantially equivalent concessions under the Safeguards Agreement could not be exercised for the first three years of the safeguard measure. The United States did not understand how India could claim to be following the Safeguards Agreement without actually following what the Safeguards Agreement said. There was no doubt that Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions and had not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable.

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

6.8. The representatives of Brazil, Canada, China, the European Union, Guatemala, Japan, Malaysia, Mexico, Norway, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

7 MOROCCO – DEFINITIVE ANTI-DUMPING MEASURES ON SCHOOL EXERCISE BOOKS FROM TUNISIA

A. Request for the establishment of a panel by Tunisia (WT/DS578/2)

7.1. The Chairman recalled that the DSB had considered this matter at its meeting on 30 September 2019 and had agreed to revert to it, should a requesting Member wish to do so. He then drew attention to the communication from Tunisia contained in document WT/DS578/2 and invited the representative of Tunisia to speak.

7.2. The representative of the Tunisia said that her delegation had addressed a communication, dated 19 September 2019, to the DSB requesting the establishment of a panel to examine the matter of definitive anti-dumping measures taken by Morocco on school exercise books from Tunisia. Tunisia, once again, requested the establishment of a panel after Morocco had opposed the establishment of a panel at the 30 September 2019 DSB meeting. Tunisia wished to note that consultations regarding this dispute had taken place on 11 and 12 June 2019 at the WTO. Ahead of these consultations, Tunisia had submitted a questionnaire to Morocco with 71 questions on the allegations listed in Tunisia's request for consultations dated 27 February 2019. The parties had addressed most of these questions during these consultations and had then held a committee meeting in order to find a mutually satisfactory solution to this dispute. However, these exchanges had not led to a settlement of this dispute. Tunisia believed that discussions during the consultations had seemed to confirm that the concerns of Tunisia were well-founded as regarded anti-dumping, the initiation of the investigation, the analysis of the dumping, injury and the causal link, as well as regarding the procedure. Thus, Tunisia had decided to bring this dispute before a panel. In light of past experience with Morocco, its brother country, this was the option that would best protect the legal interests of Tunisia since the dispute had not been resolved through direct exchanges between the two countries. Tunisia, once again, requested that the DSB establish a panel to examine this matter. Tunisia wished to note that this request was without prejudice to the right of the parties to ask for good offices, conciliation or mediation under Article 5 of the DSU.

7.3. The representative of Morocco said that his delegation wished to express strong regret at Tunisia's decision to, once again, request the establishment of a panel in this dispute regarding anti-dumping measures on school exercise books from Tunisia. Morocco believed that these measures were applied in accordance with its obligations under Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994. As Morocco had indicated to Tunisia during prior exchanges with regard to this dispute, the matter at hand was limited to technical aspects which should not have led to a formal dispute at the WTO. During the consultations, Morocco had showed flexibility and had proposed constructive and equitable solutions in order to resolve this dispute. Morocco wished to underscore that the allegations made by Tunisia touched on the ability not only of Morocco's anti-dumping authorities, but also of similar authorities of other developing countries, to defend themselves in the future against distortions caused by larger trading partners. Given Morocco's willingness to continue to address this dispute through amicable negotiations and to avoid litigious matters, Morocco could not accept the establishment of a panel at the present meeting, and hoped that both parties could have more time to find a mutually satisfactory solution to this matter and to resolve it on an amicable basis. Morocco underscored that, between the 30 September 2019 DSB meeting and the present meeting, Morocco had not been contacted by Tunisia in order to have consultations or to engage in mediation. It was regrettable that Tunisia had already decided to resort to panel proceedings without giving a sufficient amount of time for consultations to resolve this matter.

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

7.5. The representatives of Brazil, Canada, China, the European Union, Japan, the Russian Federation and the United States reserved their third-party rights to participate in the Panel's proceedings.

8 UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. Recourse to Article 22.2 of the DSU by China (WT/DS437/30)

8.1. The Chairman drew attention to the communication from China contained in document WT/DS437/30. He then invited the representative of China to speak.

8.2. The representative of China said that, at its meeting on 15 August 2019, the DSB had adopted the compliance panel report in this dispute, as modified by the Appellate Body report. China recalled that the DSB had ruled that the US measures at issue were inconsistent with the relevant provisions of the SCM Agreement and had recommended that the United States bring its measures into conformity with its obligations under that Agreement. At the 15 August 2019 DSB meeting, the United States had not indicated its intention to implement the DSB's recommendations and rulings in this dispute. In response to the continued US non-compliance with the DSB's recommendations and rulings, China had requested the DSB's authorization to suspend concessions or other obligations with respect to the United States at a level equivalent to the nullification or impairment suffered as a result of the failure by the United States to comply with the DSB's recommendations and rulings. China understood that the United States had objected to the level of the proposed suspension and the matter had been referred to arbitration in line with Article 22.6 of the DSU. China, once again, urged the United States to take concrete action, to respect WTO rules and faithfully implement the DSB's recommendations and rulings in this dispute in order to fully comply with its obligations under the covered agreements.

8.3. The representative of the United States said that, on 17 October 2019, China had requested that the DSB authorize China to suspend concessions and related obligations under the covered agreements. By letter dated 25 October 2019, the United States had objected to the level of suspension of concessions or other obligations proposed by China. Under the terms of Article 22.6 of the DSU, the filing of such an objection automatically resulted in the matter being referred to arbitration. Article 22.6 did not refer to any decision by the DSB, and no decision was therefore required or possible. Consequently, because of the US objection under Article 22.6, the matter had already been referred to arbitration. Nevertheless, although unnecessary, the DSB could take note of that fact and confirm that it could not therefore consider China's request for authorization.

8.4. The DSB took note of the statements and that the matter raised by the United States in document WT/DS437/31 has been referred to arbitration, as required by Article 22.6 of the DSU.

9 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ANGOLA; ARGENTINA; AUSTRALIA; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CANADA; CENTRAL AFRICAN REPUBLIC; CHAD; CHILE; CHINA; COLOMBIA; CONGO; COSTA RICA; CÔTE D'IVOIRE; CUBA; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; ESWATINI; THE EUROPEAN UNION; GABON; THE GAMBIA; GHANA; GUATEMALA; GUINEA; GUINEA-BISSAU; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KENYA; REPUBLIC OF KOREA; LESOTHO; LIECHTENSTEIN; MADAGASCAR; MALAWI; MALAYSIA; MALI; MAURITANIA; MAURITIUS; MEXICO; MOROCCO; MOZAMBIQUE; NAMIBIA; NEW ZEALAND; NICARAGUA; NIGER; NIGERIA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; QATAR; RUSSIAN FEDERATION; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SINGAPORE; SOUTH AFRICA; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TANZANIA; THAILAND; TOGO; TUNISIA; TURKEY; UGANDA; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.14)

9.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He drew attention to the proposal contained in document WT/DSB/W/609/Rev.14. He then invited the representative of Mexico to speak.

9.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.14, said that the delegations in question had agreed to submit the joint proposal dated 19 September 2019 to launch the AB selection processes. Her delegation, on behalf of these 116 Members, wished to make the following statement. The increasing and considerable number of Members submitting this joint proposal reflected a common concern

with the current situation in the Appellate Body that was seriously affecting its functioning and the overall dispute settlement system against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out in the joint proposal before the DSB at the present meeting. This proposal sought to: (i) start six selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy resulting with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December 2017; a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; a fifth process to replace Mr. Ujal Singh Bhatia, whose second term would expire on 10 December 2019; and a sixth process to replace Mr. Thomas R. Graham whose second term would expire on 10 December 2019; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issues its recommendation within 60 days after the deadline for nominations of candidates. The proponents were flexible in the determination of the deadlines for the AB selection processes, but believed that Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

9.3. The representative of the European Union said that his delegation wished to refer to its statements made on this matter at previous DSB meetings, starting in February 2017, almost three years ago. WTO Members had a shared responsibility to resolve this issue as soon as possible, and to fill the outstanding vacancies in the Appellate Body, as required by Article 17.2 of the DSU. The EU wished to thank all Members that had co-sponsored the proposal to launch the AB selection processes and invited all other Members to endorse this proposal. The EU also wished to recall that concrete proposals had been submitted to the General Council with a view to unblocking the AB selection processes. The EU welcomed the report and the draft General Council decision presented by Amb. Walker as Facilitator to the General Council on 15 October 2019. The EU believed that this was a sound and balanced way to move the process forward towards its objective, which was to unblock the AB selection processes. The EU invited all Members to engage constructively in these discussions so that the AB vacancies could be filled as soon as possible.

9.4. The representative of the United States thanked Amb. Walker for the continued work on these issues. As the United States had explained at prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States has explained repeatedly, for more than 16 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO Members. If WTO Members said that they supported a rules-based trading system, then the United States asked how Members could permit the WTO Appellate Body to break the rules Members had agreed to in 1995. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system and would continue its efforts and its discussions with Members and with Amb. Walker to seek a solution on these important issues.

9.5. The representative of Ecuador, speaking on behalf of the Group of Latin American and Caribbean countries (GRULAC) that were Members of the WTO, said that his delegation wished to draw attention to the fact that currently 116 Members supported the proposal contained in document WT/DSB/W/609/Rev.14. This growing number attested to the deep concern among Members of this Organization as to the current impasse in the AB selection processes. The disagreement regarding the functioning of the Appellate Body did not provide legitimate grounds for blocking the AB selection processes. Pursuant to Article 17.2 of the DSU, vacancies had to be filled as they arose. This was an obligation of WTO Members, and Members were currently in breach of that obligation. The need to improve the functioning of the dispute settlement system could not serve as an obstacle to its continued operation. The December deadline was rapidly approaching and there was an urgent need to find a solution to this problem. Ecuador thanked Amb. Walker for his efforts as Facilitator in the informal process on AB matters, especially with regard to the draft General Council decision contained in document JOB/GC/222, which had been presented to Members on 15 October 2019. Ecuador reaffirmed its support for the informal process on AB matters and its willingness to continue to contribute to the efforts of Members that sought, as a matter of priority, to bring about the unblocking of the AB selection processes.

9.6. The representative of Norway said that the Membership could sometimes disagree on certain matters. The purpose of multilateral forums such as the WTO was to discuss such matters and to make compromises. Norway recognized that some Members were, in practice, more influential than others because of their size, geography, tradition, and their ability to take good initiatives. These factors were all taken into account, almost automatically, in the art of diplomacy which had brought Members trade rules, stability, economic growth and a dispute settlement system which was, most of the time, well respected. Obviously, the system was not perfect. And, some Members more than others would argue that there were flaws in this system. Norway listened to different views and was familiar with the diplomatic codes that guided Members' discussions. What Norway had not been familiar with was a desire to deliberately destroy the system. What was perhaps the most incomprehensible part for Norway was that there was nothing at this point to stop this destruction. Norway urged the United States to unblock the AB selection processes. Norway wished to remind the United States that it had been a major architect behind a system that had done so much good. Norway invited Members to cooperate in good faith, once again, so as to save, and perhaps also improve, this system that Members had created.

9.7. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings on this matter and wished to reiterate Australia's serious concerns regarding the DSB's inability to commence the AB appointment processes. Australia welcomed the recent progress in the General Council's informal process on AB matters and welcomed the draft instrument for Members' consideration as a positive step forward. Australia hoped that this could lead to unblocking the AB selection processes. In this regard, Australia recognized the significant contributions of many Members to the discussions and the leadership of Amb. Walker as Facilitator. However, Australia was clear-eyed about the hard work required for the rest of 2019 to address key concerns regarding the functioning of the Appellate Body. Australia was strongly committed to the work ahead and encouraged Members to continue solutions-focused, active engagement and to demonstrate the necessary flexibility to agree pragmatic solutions in the interests of all Members.

9.8. The representative of Switzerland said that her delegation wished to refer to its statements made at previous DSB meetings on this matter. The situation was alarming and Switzerland expressed deep regret at the DSB's continued inability to launch the AB selection processes. Switzerland wished to thank Amb. Walker for his report on the informal process on AB matters, including his proposal of a draft General Council decision, which had been presented to the Members at the 15 October 2019 General Council meeting. This was an important step towards concrete solutions. Once again, Switzerland urged all Members, especially the Member that had raised concerns, to engage constructively in order to solve this impasse without further delay.

9.9. The representative of New Zealand said that his country wished to reiterate its support for the co-sponsored proposal and noted with regret that the Appellate Body would now inevitably experience a "technical dip" due to the time required for the completion of the AB selection processes. New Zealand continued to encourage all Members to engage constructively with a view to urgently addressing the situation.

9.10. The representative of Hong Kong, China said that his delegation wished to refer to its statements made at previous DSB meetings on this matter. Hong Kong, China wished to reiterate its serious concerns regarding the current impasse and the resulting damage to the dispute settlement system. Hong Kong, China urged all Members to take prompt action to unblock the AB selection processes without further delay.

9.11. The representative of Chinese Taipei said that his delegation wished to thank Amb. Walker for his efforts as Facilitator in the informal process on AB matters. Chinese Taipei, once again, wished to refer to its statements made at previous DSB meetings. Chinese Taipei remained committed to finding a solution to the current impasse and urged all Members to engage constructively to this end.

9.12. The representative of Korea said that his country supported the statement made by Mexico, which was based on the joint proposal contained in document WT/DSB/W/609/Rev.14. Korea also appreciated the efforts made by Amb. Walker as Facilitator in order to find solutions through the informal process on AB matters, including the draft instrument put forward at the 15 October 2019 General Council meeting. Korea hoped that the impasse concerning the AB selection processes would be resolved as soon as possible.

9.13. The representative of China said that China wished to echo the statement made by Mexico on behalf of 116 Members, which represented more than 70 percent of the entire Membership. China

expressed deep regret that the collective efforts of Members to launch the AB selection processes had, once again, been frustrated by the United States. It was unequivocal that filling the vacancies of the Appellate Body was a legal obligation set out in Article 17.2 of the DSU and which should be fulfilled unconditionally. Nothing could justify the blockage of the AB selection processes. Nevertheless, Members should remain realistic and accommodative in addressing this pressing crisis, which had been created by the United States. Numerous solution-oriented meetings had been conducted in different configurations. A dozen reform proposals had been tabled and debated both within and outside the informal process on AB matters. More recently, a concrete reform proposal made by Amb. Walker as Facilitator had been submitted to the General Council for further consideration. While a certain degree of progress had been achieved, Members still could not reach any concrete solution to unblock the deadlock. In particular, the persistent lack of constructive engagement from the United States had prevented any meaningful discussion on those serious efforts made by Members. Given the urgency of this matter, rather than asking why such a situation had occurred, it was more important to discuss what concrete actions the DSB should take in order to move forward. It was fair to say that the current two-tier dispute settlement system served the whole Membership well. Although the WTO dispute settlement system could be further improved on various fronts, its overall performance had outperformed its international counterparts and had greatly contributed to a conducive global trading environment, which could not have been achieved otherwise. Regrettably, the paralysis of the Appellate Body would most likely upend the entire dispute settlement system. Without a functioning Appellate Body, the security and predictability Members had enjoyed for more than two decades would eventually vaporize. The dispute settlement system would further tilt the balance in favour of power rather than rules. Given its capacity constraints and power asymmetry, developing Members would take the biggest hit. Time was running out, but there was still hope. China would continue to constructively engage in the informal process on AB matters and stood ready to further contribute to the solution-oriented discussion with a view to unblocking the AB selection processes deadlock expeditiously and preserving the essential features of the current dispute settlement system.

9.14. The representative of Canada said that the number of WTO Members behind the proposal presented by Mexico and contained in document WT/DSB/W/609/Rev.14 was a clear testimony to the importance that Members collectively accorded to a fully functioning Appellate Body as an integral part of the dispute settlement system. Canada remained committed to working with other interested Members, including the United States, with a view to addressing concerns and undertaking the AB selection processes expeditiously. Canada expressed deep regret that the DSB had not complied with its obligation under Article 17.2 of the DSU to appoint Appellate Body members to fill the vacancies. The text of the DSU was clear: "[v]acancies shall be filled as they arise". This requirement did not provide for any exception or justification not to fill the vacancies as they arose.

9.15. The representative of Singapore said that his delegation wished to reiterate its serious systemic concerns on the failure to launch the AB selection processes. Amb. Walker, at the 15 October 2019 General Council meeting, had observed that even if the AB selection processes were unblocked immediately, the time required to carry out these AB selection processes were such that the Appellate Body would inevitably fall below the number of members required for the Appellate Body to hear a new appeal as of 11 December 2019. The urgency of the matter could not be overstated. Singapore remained committed to supporting Amb. Walker as Facilitator in the informal process on AB matters, and wished to urge all Members, especially those who had raised concerns, to actively engage in finding concrete solutions. The AB selection processes should be allowed to proceed unconditionally in the meantime. Singapore would continue to engage constructively and collaboratively towards resolving this impasse.

9.16. The representative of Indonesia said that as the 10 December 2019 deadline was fast approaching, Members were not far away from the gateway of multilateral trading system paralysis. As one of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14, Indonesia wished to reiterate its encouragement to all Members to immediately begin the AB selection processes in order to avoid such paralysis.

9.17. The representative of Mexico, speaking on behalf of the 116 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14, expressed regret that, for the twenty-eighth occasion, Members had still not been able to start the AB selection processes and had continuously failed to fulfil their duty as Members of this Organization. The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body could not serve as pretext to impair and disrupt the work of the Appellate Body. There was no legal justification for the current blocking of the AB selection processes, which was causing concrete nullification and impairment for

many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members shall comply with their obligation under the DSU to fill the AB vacancies. By failing to act at the present meeting, Members would maintain the current situation, which was seriously affecting the workings of the Appellate Body against the best interest of all Members.

9.18. The representative of Mexico said that her country wished to emphasize that the number of co-sponsors, currently standing at 116, represented the interest of Members in (i) complying with the obligation to fill vacancies as they arose, in accordance with Article 17.2 of the DSU; (ii) addressing the concerns expressed regarding the deadlock that had prevailed for more than two years; and (iii) promoting the dispute settlement system. Mexico encouraged all other Members to also co-sponsor the proposal contained in document WT/DSB/W/609/Rev.14. In 2019, 16 requests for consultations had been submitted, and 15 panels had been established, including at the present meeting. This was a demonstration of the confidence that Members placed in the WTO dispute settlement system and its importance for the multilateral trading system. The current situation was of greater urgency and concern than ever before. Forty-three days were left before the Appellate Body would be paralysed and, consequently, all the current disputes would be affected by the lack of a fully-functioning dispute settlement system. Appellate review was an essential part of the dispute settlement system and, as Members had stated many times at DSB meetings, this was a right of Members resulting from the Uruguay Round. Mexico regretted that 164 Members were deprived of this right. Mexico believed that the progress achieved in the informal process on AB matters under the auspices of the General Council, which Amb. Walker had led as Facilitator and in which more than a dozen proposals had been put forward, represented an unequivocal commitment by the Members to address these concerns. This should be reason enough to immediately begin the AB selection processes and to de-link this matter from any other concerns. Mexico wished to reiterate its readiness to work towards a solution.

9.19. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this matter. India wished to reiterate its serious concerns regarding the DSB's inability to comply with its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members to fill the vacancies. The situation was such that the highest instance in the dispute settlement system would no longer exist in December 2019. India asked how under these circumstances the dispute settlement system would operate. This was as a serious concern for all Members. Therefore, India called on all Members to engage constructively to immediately start the AB selection processes as a priority.

9.20. The representative of Brazil said that Members were a little over one month away from the date when the Appellate Body would be reduced to one member and, therefore, unable to hear appeals from panel reports. To appeal panel reports was a right of each WTO Member under the DSU. Maintaining a fully functioning, fully composed Appellate Body was an obligation of the Members of the WTO, and it was an obligation that they were failing to meet. It was thus understandable that Members would seek means consistent with the DSU to overcome this impasse, as such a situation could have a concrete impact on the resolution of their own disputes. Brazil was prepared, as it had always been the case, to engage with all Members in order to arrive at a solution that could properly address any concerns. This had to be done now, in a truly solution-oriented manner. It was well passed time to think of the end-game in this matter.

9.21. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings. Japan continued to support the informal process on AB matters led by Amb. Walker. The active engagement of all WTO Members was essential.

9.22. The representative of Nigeria said that Nigeria expressed deep regret that the DSB had failed to launch the AB selection processes. Nigeria wished to reiterate its statements made at previous DSB meetings on this matter. Nigeria commended the efforts of Amb. Walker as Facilitator in trying to resolve this matter under the auspices of the General Council. The increasing number of co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14 demonstrated the seriousness and urgency of this matter. Nigeria continued to encourage all Members to engage constructively in trying to resolve this issue.

9.23. The representative of Qatar said that his delegation wished to refer to its statements made at previous DSB meetings on this matter. Qatar wished to express its appreciation for the efforts of Amb. Walker as Facilitator regarding the informal process on AB matters. Qatar aligned itself with the statement made by Mexico on behalf of 116 Members. Qatar expressed regret that the DSB, as

of the present meeting, had failed to initiate the AB selection processes. Qatar recalled that Members had a shared obligation to promptly fill the vacancies of the Appellate Body, as required by Article 17.2 of the DSU. The clear text of that provision indicated that such responsibility had to be fulfilled unconditionally. To avoid unintentional consequences, Qatar called on all Members to act in a cooperative manner in order to break the impasse in the AB selection processes without further delay and wished to emphasize that the discussion on improving the DSU should not be a reason to delay the AB appointments. Qatar was ready to work on solutions with all Members, while preserving the essential features of the WTO dispute settlement system, including the Appellate Body.

9.24. The Chairman thanked all delegations for their statements. As in the past, the DSB would take note of the statements expressing the Members' respective positions, which would be reflected in the minutes of the present meeting. As Members were aware, under the auspices of the General Council, he had agreed to assist the Chair of the General Council, as Facilitator, in an informal process of focused discussions on Appellate Body matters. He recalled that, on 15 October 2019, he had provided a fourth progress report to the General Council on his informal consultations. This report had been circulated to all Members in document JOB/GC/222. He also recalled that, as part of that report, he had put forward a draft General Council Decision on the functioning of the Appellate Body for Members' consideration, on his own responsibility as Facilitator. The text of this draft decision had been based on the proposals submitted by Members and the extensive discussions in the informal process as well as the feedback that he had received since July 2019. As he had stated at the General Council meeting on 15 October 2019, it remained for Members to determine how to take this matter forward. He would continue to assist the Chair of the General Council and Members, in his capacity as Facilitator, in order to find a workable and agreeable solution to improve the functioning of the Appellate Body and to avoid deadlock come December 2019. As he had noted in the 15 October 2019 General Council meeting, and as several Members had mentioned at the present meeting, the time taken for AB selection processes was such that the Appellate Body would suffer what he had termed a "technical dip" as of the middle of December 2019. He further stated that as well as any disputes that might emerge in the future, there were a number of appeals which were already in the pipeline, and he would be consulting Members who had such appeals in the pipeline ahead of 10 December 2019 in order to understand how Members might deal with such appeals. He would revert to the DSB on that matter at the 22 November 2019 DSB meeting.

9.25. The DSB took note of the statements made.

10 NORWAY-EUROPEAN UNION INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU (JOB/DSB/1/ADD.11/SUPPL.1)

A. Statement by Norway

10.1. The representative of the Norway, speaking under "Other Business", said that Norway and the EU wished to take this opportunity to inform the Membership about the notification of the Interim Appeal Arbitration Arrangement that had been entered into by Norway and the EU. Taking into account the current situation in the Appellate Body, it appeared increasingly necessary to take steps to ensure that Members maintained a well-functioning dispute settlement system in line with what Members all had agreed to in the DSU. The bilateral arrangement between Norway and the EU had been notified to the DSB on 21 October 2019, and it had been circulated on the same day as document JOB/DSB/1/Add.11/Suppl.1. This arrangement was based on the model previously notified by Canada and the EU. Therefore, regarding the content of the arrangement, Norway wished to refer to the presentation made by Canada and the EU at the 30 September 2019 DSB meeting. Norway also invited any Member who had questions or comments to contact them bilaterally.

10.2. The DSB took note of the statements.