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Dispute Settlement Body
28 September 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 28 SEPTEMBER 2020

Chairman: H.E. Mr. Dacio Castillo (Honduras)

Prior to the adoption of the Agenda: (i) The Chairman welcomed all delegations participating in person as well as those delegations that were listening-in remotely. He recalled that, as had been done at past DSB, he would not be offering the floor to delegations participating remotely; and (ii) The item concerning the adoption of the Panel Report in the dispute on: "United States – Countervailing Measures on Softwood Lumber from Canada" (DS533) was removed from the proposed Agenda following the decision of the United States to appeal the Panel Report.

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1.1. The Chairman noted that there were seven 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.208)

1.2. The Chairman drew attention to document WT/DS184/15/Add.208, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti–dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 17 September 2020, 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 most recent status report and 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.183)

1.6. The Chairman drew attention to document WT/DS160/24/Add.183, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 17 September 2020, 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 thanked the United States for its status report and its statement made at the present meeting. His delegation wished to refer to the EU's statements made at previous DSB meetings under this Agenda item. The EU wished to resolve this case as soon as possible.

1.9. The representative of China said that the United States continued to fail to fully comply in this dispute. More than two decades after the DSB had adopted recommendations and rulings in this dispute, this dispute remained unresolved. The 184 US status reports provided thus far were not different from one another and none of them indicated any progress on implementation. China believed that as a result, the United States continued to fail to accord the minimum standard of protection required by the TRIPS Agreement. The United States had also become the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement. The clear text of Article 21.1 of the DSU required Members to promptly bring their WTO-inconsistent measures into conformity so as to ensure effective resolution of disputes. China

urged the United States to faithfully honour this legal obligation and complete the implementation of 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.146)

1.11. The Chairman drew attention to document WT/DS291/37/Add.146, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that at the on-line meeting of the Standing Committee on GM Food and Feed held on 15 September 2020, the European Commission had presented for a vote three authorizations representing 27 possible GMOs.[1] Due to COVID-19, the voting was carried out by written procedure and would be finalized by 1 October 2020. The next meeting of the Standing Committee on GM Food and Feed was planned for 7 October 2020. At that meeting, the European Commission would present for a vote five measures (two new GMOs and three renewals representing a total of 11 GMOs).[2] Voting would again be carried out by a written procedure ending 14 days later. The EU continued to progress with the authorizations where the European Food Safety Authority (EFSA) had finalized its scientific opinion and had concluded that there were no safety concerns. The EU had a solid record on the authorization of GMO requests: in 2019, 18 decisions had been adopted to authorize 65 new GMOs for feed and food, six GMOs had been renewed and one GM cut flower had been authorized. 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 at all stages of the authorization procedure. The United States frequently referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover that "opt-out Directive". The EU acted in line with its WTO obligations. The EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States understood that the EU had held a meeting of the Standing Committee on genetically modified food and feed on 15 September 2020. The United States looked forward to receiving an update regarding the outcomes of that meeting. The United States also understood that the next Standing Committee was tentatively scheduled for the first week of October 2020. The United States would welcome confirmation of the date and agenda for that meeting. However, the United States continued to see persistent delays that affected a number of applications that had been awaiting approval for an extended period – delays that existed long before COVID-19 restrictions had come into effect. The EU had previously suggested that, with respect to these delays, the fault was with the applicants. The United States disagreed; US concerns related to delays at every stage of the approval process resulting from the actions or inactions of the EU and its member States. Currently, approximately 20 applications were pending risk management decisions in the Standing Committee on biotech and two awaited final approval by the European Commission. Three of these applications had been going through the EU approval system for over 10 years. The United States urged the EU to adopt final approvals for those products that had completed evaluation by the Standing Committee. The United States also urged the Standing Committee and the European Commission to issue final approvals for those products that had successfully received an EFSA positive opinion, yet remained under the Committee's "internal procedures". As the United States had stated at the 28 August 2020 DSB meeting, the United States did not acknowledge the EU's claims that there was no ban on genetically engineered (GE) products in the EU. Rather, the EU had failed to lift all of the WTO-inconsistent member-State bans covered by the DSB's recommendation. The DSB adopted findings that, even where the EU had approved a

[1] Soybean SYHT0H2, Maize MON 87427 x MON 89034 x MIR162 x NK603 (stack + 10 possible sub-combinations = 11 GMOs), Maize MON 87427 x MON 87460 x MON 89034 x MIR162 x NK603 (stack + 14 possible sub-combinations = 15 GMOs.

[2] 2 new authorizations (soybean MON 87751 x MON 87701 x MON 87708 x MON 89788, only stack approval, no sub-combinations, and maize MON 87427 x MON 89034 x MIR162 x MON 87411, approval of stack and 6 sub- combinations) and 3 renewals (maize MIR604, maize MON 88017, maize MON 89034).

particular product, in many instances EU member States had banned those products for certain uses without a scientific basis. This included not only the two member States subject to panel findings – Austria and Italy. There were seven additional member States that had previously maintained bans on cultivation and had since opted out of cultivation under the EU's legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland. There were also nine member States that had not previously banned cultivation of MON-810 but had since opted out of cultivation under the EU's legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, Slovakia, and Slovenia. Further, Austria and Italy appeared to maintain bans on other products subject to specific panel findings. The EU's only response, which it continued to repeat, was that the member States did not restrict marketing or free movement of MON-810 in the EU. As the United States had noted at the 28 August 2020 DSB meeting, this answer did nothing to address US concerns. The United States also disagreed with the EU's response that opt-out procedures taken by member States were "proportional, non-discriminatory and based on compelling grounds". The restrictions adopted by EU member States restricted international trade in these products and had no scientific justification. Furthermore, despite the assertions of the EU during the 28 August 2020 DSB meeting, this situation existed regardless of whether or not the European Commission received "complaints" from seed operators or stakeholders. Indeed, this was why the DSB had adopted findings that such restrictions on MON-810 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. The United States looked forward to addressing the EU's other comments in the coming months and during the next US-EU biannual consultation, which the United States understood had been confirmed for 22 October 2020.

1.14. The representative 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 European Union 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". Under the terms of Directive 2001/18/EC, 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: "[m]ember States may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive". The EU also noted 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 species included 150 varieties of maize MON-810, which 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, contrary to what the United States had just asserted. Once more, the EU invited the United States to provide any evidence it might have at its disposal that would substantiate the disruption of the free movement of MON-810 seeds in the EU.

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.30)

1.16. The Chairman drew attention to document WT/DS464/17/Add.30, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case 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 September 2020, 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. Once again, Korea urged the United States to take prompt and appropriate steps to implement the DSB's recommendations for the "as such" measure at issue in this dispute.

1.19. 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" (DPM) 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. The reasonable period of time to implement the recommendations relating to the "as such" WTO-inconsistency of the DPM had expired more than two years ago. However, in its most recent status report, the United States stated that it continued to consult with interested parties. Moreover, the continued use by the United States of the DPM had forced Members to resort to several dispute settlement proceedings concerning this measure. This was an inefficient and unnecessary use of WTO dispute settlement resources. 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.

1.20. 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.22)

1.21. The Chairman drew attention to document WT/DS471/17/Add.22, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning certain methodologies and their application to anti-dumping proceedings involving China.

1.22. The representative of the United States said that the United States had provided a status report in this dispute on 17 September 2020, 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.

1.23. 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, in this dispute, which had found that a series of US measures had violated the Anti-Dumping Agreement, which included: (i) the use of zeroing under the W-T methodology was as such incompatible 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. The arbitration pursuant to Article 21.3(c) of the DSU had decided that the reasonable period of time (RPT) would be 15 months, expiring on 22 August 2018. In response to the continued US failure to implement the DSB's recommendations and rulings in this dispute, China had had no other choice but to request the authorization to retaliate in accordance with Article 22.2 of the DSU. On 1 November 2019, the arbitration pursuant to Article 22.6 of the DSU had determined that the level of nullification or impairment caused by the United States was USD 3.579 billion. This amount revealed the severe hardship imposed by the illegal US measures. To date, the United States continued to fail to achieve compliance. None of its 23 status reports provided thus far indicated any implementation action. Forty months after the DSB had adopted its recommendations and rulings in this dispute, and 25 months after the expiry of the RPT, the DSB'S recommendations and rulings were not worth to China more than the paper they had been printed on. However, what China had experienced in this dispute was not exceptional. The record showed that US implementation, especially in trade remedy disputes, had long become a systemic problem for this Organization. The substantial delay in US compliance or the US ignorance of its implementation obligations in many disputes had seriously compromised the effectiveness and authority of the WTO dispute settlement system. Implementation was the cornerstone of the dispute settlement system which kept the

rules-based, multilateral trading system afloat. The refusal to implement WTO dispute settlement rulings would not only backfire on the US economy. It would also cause the United States to lose its credibility when asking other WTO Members to comply with WTO rules. Article 21.1 of the DSU 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 faithfully honour its implementation obligation and take concrete actions to achieve full compliance in this dispute.

1.24. 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.17 – WT/DS478/22/Add.17)

1.25. The Chairman drew attention to document WT/DS477/21/Add.17 – WT/DS478/22/Add.17, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case concerning importation of horticultural products, animals and animal products.

1.26. The representative of Indonesia said that his country had provided a status report pursuant to Article 21.6 of the DSU. Indonesia reiterated its commitment to implementing the DSB's recommendations and rulings in these disputes. With regard to measures 1–17, necessary adjustments to the relevant Ministry of Agriculture (MoA) and Ministry of Trade (MoT) regulations had continuously been made and regularly reported to the DSB. Indonesia noted the continued concerns raised by New Zealand and the United States. Regarding Measure 18, discussions between the Government and Parliament had been taking place in spite of the challenging circumstances due to the COVID–19 pandemic. Indonesia believed that the provisions relevant to these disputes in the draft amendment of the relevant laws would be addressed accordingly and appropriately. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings.

1.27. The representative of New Zealand said that his country wished to thank Indonesia for its status report. New Zealand acknowledged Indonesia's commitment to comply fully with the DSB's recommendations and rulings in this dispute, as well as the steps that Indonesia had taken towards compliance to date. It was disappointing, however, that there continued to be a need to have this item on the Agenda of DSB meetings. Both compliance deadlines that had been agreed between the parties had expired. New Zealand was seriously concerned that measures remained non-compliant. These included: the failure to remove Measure 18; and 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. New Zealand was particularly concerned that difficulties continued to be experienced in obtaining import recommendations and approvals. If this issue were not resolved promptly, it could undermine the progress made towards compliance to date. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve full compliance with the DSB's recommendations and rulings in this dispute.

1.28. The representative of the United States thanked Indonesia for its status report but was concerned that Indonesia had not brought 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 the United States 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 changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 46/2019 on Strategic Horticultural Commodities.

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

G. Australia – Anti-dumping measures on A4 copy paper: Status report By Australia (WT/DS529/17)

1.30. The Chairman drew attention to document WT/DS529/17, which contained the status report by Australia on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on A4 copy paper.

1.31. The representative of Australia said that her country had provided a status report in this dispute on 17 September 2020 in accordance with Article 21.6 of the DSU. As set out in that report, Australia had fully implemented the DSB's recommendations and rulings in this dispute. In particular, on 12 March 2020, the Australian Anti-Dumping Commission (ADC) had initiated a review of measures under Division V of Part XVB of the *Customs Act 1901* (Cth) for the purpose of implementing the DSB's rulings and recommendations in this dispute (Review 547). On 11 September 2020, the Australian Minister for Industry, Science and Technology had signed a notice (Anti-Dumping Notice No. 2020/90, published on 14 September 2020), adopting the recommendations and reasons for the recommendations in the ADC's Final Report for Review 547, and declaring that the dumping duty notice be revoked with respect to A4 copy paper exported from Indonesia to Australia by Indah Kiat and Pindo Deli with effect from 12 March 2020, the date of initiation of Review 547. The Industry Minister's decision, published in Anti-Dumping Notice No. 2020/90 on 14 September 2020, brought Australia into full compliance with the DSB's recommendations and rulings in this dispute. In notifying its implementation, Australia again wished to thank the Panel and the Secretariat for their time and effort on this dispute, which had addressed important systemic issues not previously considered, notably with respect to the interpretation of "particular market situation" under Article 2.2 of the Anti-Dumping Agreement. Australia welcomed the Panel's findings on "particular market situation". These findings recognized that situations arising from government intervention could, under certain circumstances, constitute a "particular market situation". The findings had usefully clarified the methodologies required to find that a "particular market situation" did not "permit a proper comparison" under Article 2.2. The findings had also clarified the construction of normal value under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

1.32. The representative of Indonesia said that his country wished to thank Australia for its status report and its statement made at the present meeting regarding Australia's obligation under Article 21.6 of the DSU. Indonesia took this opportunity to convey that the reasonable period of time for Australia to implement the DSB's recommendations and rulings in this dispute had expired on 27 September 2020, with an extension of one month in the event of unavoidable delays. Indonesia noted that the Australian Anti-Dumping Commission (ADC) had initiated a review under Division V of Part XVB of the Customs Act 1901 (Review 547) in order to implement the DSB's recommendations and rulings. This action had been followed by the adoption of the ADC's recommendation in the Final Report of Review 547 by the Minister for Industry, Science and Technology and by the issuance of Anti-Dumping Notice (ADN) No. 2020/090 on 11 September 2020, which declared that the Anti-Dumping duty for A4 copy paper in this dispute had been revoked as of 12 March 2020. However, in order to ensure the full implementation of the DSB's recommendations and rulings in this dispute, Indonesia wished to seek further clarifications on several important issues from Australia. In particular, Indonesia sought clarifications on whether the decision made by the Minister for Industry, Science and Technology had been final, considering the Anti-Dumping Notice stated that interested parties could seek a review of this decision and could submit an application within 30 days after its publication. Indonesia asked whether that meant that the decision could still be changed depending on the outcome of this review. Indonesia also asked how long this review would take. Against this background, Indonesia sought Australia's clarifications regarding these crucial issues. Indonesia stood ready to communicate and work closely with Australia to resolve this matter with a view to achieving a mutually satisfactory solution in accordance with the provisions of the DSU.

1.33. The representative of Australia said that in response to Indonesia's intervention, her country wished to note that, as required by Article 13 of the WTO Anti-Dumping Agreement, Australia maintained independent judicial and administrative procedures for the prompt review of final determinations and reviews of anti-dumping decisions. In particular, interested parties to a review of measures under Division V of Part XVB of the *Customs Act 1901* (Cth) were entitled to apply for an administrative review (within 30 days of publication) or a judicial review (within 28 days of publication) of the Industry Minister's decision, and any decision by the Minister following administrative review. For this reason, Australia and Indonesia were in the process of discussing

sequencing arrangements with respect to Articles 21 and 22 of the DSU to facilitate the resolution of this dispute should a disagreement as to compliance arise in future. Australia wished to thank Indonesia for continuing to engage in good faith to ensure the prompt resolution of this dispute.

1.34. The DSB took note of the statements.

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

A. Statement by the European Union

2.1. The Chairman said 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.

2.2. The representative of the European Union said that on 1 May 2020, the EU had adjusted the level of suspension to the nullification or impairment caused by the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) to the EU. The adjustment maintained unchanged the list of products subjected to retaliation while increasing the rate of additional duty to which those products were subjected to 0.012% in order to adjust to the level of retaliation. The letter informing of the adjustment, together with the Commission Delegated Regulation (EU) 2020/578 of 21 February 2020, had been notified to the DSB on 26 June 2020. The EU 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 most recent CDSOA report from December 2018 showed that amounts were still being disbursed in practice. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. As long as the United States did not fully stop transferring collected duties, this item was rightly under the DSB's surveillance. Due to the long-standing nature of this breach, the EU would continue to insist on placing this item on the Agenda of DSB meetings, as a matter of principle, and independently from 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 DSB meetings as long as the United States had not fully implemented the DSB's rulings and until the disbursements ceased completely.

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

2.4. 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 more than 14 years ago in February 2006. The Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 12 years ago. Accordingly, the United States had long ago implemented the DSB's recommendations and rulings in these disputes. Even aside from this, it was evidently not common sense that was driving the EU's approach to this Agenda item. On 26 June 2020, the EU had notified that it would apply an additional duty of 0.012% on certain imports of the United States. That was 12 thousandths of one per cent. There was no trade rationale for inscribing this item month after month. The EU had erroneously referred to a "clear obligation" under Article 21.6 of the DSU for the United States to submit a status report in this dispute. As the United States had explained repeatedly, Article 21.6 called for a Member to provide a report "on the progress of its implementation". There was no obligation under the DSU for a Member to provide further status reports once that Member announced that it *has implemented* the DSB's recommendations. The widespread practice of Members – including the European Union as a responding party – confirmed this understanding of Article 21.6. Indeed, at recent meetings, two Members (Brazil and China) had informed the DSB that they had come into compliance with the DSB's recommendations in three disputes (DS472, DS497, and DS517), and the complaining parties had *not* accepted the claims of compliance. Those Members announcing compliance had not provided a status report for the present meeting. This was consistent with the understanding that there was no obligation for a Member to provide further status reports once that Member announced that it had implemented the DSB's recommendations. The EU was the complaining party in one of those

disputes (DS472). If the EU believed that status reports were "required" under the DSU, it would have insisted that the responding Member provide a status report, or the EU would have inscribed that dispute as an item on the present meeting's Agenda. The EU had taken neither action. Therefore, it was once again clear that the EU did not truly believe that there was a "clear obligation" under Article 21.6 of the DSU to submit a status report after a party had claimed compliance. The EU had simply invented, in its own mind, a rule for this dispute that it did not apply to other disputes.

2.5. The representative of the European Union said that under Article 21.6 of the DSU, the issue of implementation shall remain on the Agenda of DSB meetings until the issue was resolved. In this dispute, the EU did not agree with the US assertion that it had implemented the DSB's recommendations and rulings. This meant that the issue remained unresolved for the purposes of Article 21.6 of the DSU. If the United States did not agree that the issue remained unresolved, nothing prevented it from seeking a multilateral determination through a compliance procedure. This understanding seemed to also be shared by Indonesia in the "Indonesia – Chicken" dispute (DS484).

2.6. The DSB took note of the statements.

3 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

3.1. 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.

3.2. The representative of the United States noted that once again the European Union had not provided Members with a status report concerning the dispute "EC – Large Civil Aircraft" (DS316). 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 [of the] 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 did *not* agree with the EU's assertion that it had complied. The EU's position was erroneous and not based on the text of the DSU. The EU argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance" and the DSB was somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations". Yet, there was nothing in the DSU text to support that argument, nothing in Article 2 of the DSU or elsewhere that limited the DSB's authority in this manner, and the EU provided no explanation for how it read Article 21.6 of the DSU to contain this limitation. The EU was not providing a status report because of its assertion that it had complied, demonstrating that the EU's principles varied depending on its status as complaining or responding party. The US position on status reports had been consistent: under Article 21.6 of the DSU, once a responding Member announced to the DSB that it had complied, there was no further "progress" on which it could report, and therefore no further obligation to provide a status report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in this "EC – Large Civil Aircraft" dispute (DS316). The United States noted that it was committed to obtaining a long-term resolution of this dispute. The United States had recently showed great restraint in its review of WTO-authorized countermeasures for the EU's WTO-inconsistent launch subsidies. The United States would engage with the EU in a new process in order to seek an agreement that would remedy the conduct that harmed the US aviation industry and workers and would ensure a level playing field for US companies.

3.3. The representative of the European Union said that as during previous DSB meetings, the United States had implied 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 US assertions were without merit. As the EU had repeatedly explained during past DSB meetings, the crucial point for the defending party's obligation to provide status reports to the DSB was the stage of the dispute. In the "EC – Large Civil Aircraft" (DS316) case (the Airbus case), 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 the DSB that in the Airbus case, the EU had notified a new set of

compliance measures to the DSB. That new set of compliance measures had been a clear demonstration that the EU – contrary to the United States in the parallel "US – Large Civil Aircraft (2nd complaint)" case (DS353) (the Boeing-case) – was serious about and committed to achieving compliance. That new set of compliance measures had been subject to an assessment by a compliance panel and that panel's report had been issued on 2 December 2019. As noted in the EU's statement made at the 18 December 2019 DSB meeting, the EU believed that significant aspects of the compliance panel's report could not be regarded as legally correct and were very problematic from a systemic perspective when it came to assessing compliance with the subsidy disciplines of the WTO agreements. It was in order to have these legal errors corrected that the EU had filed an appeal against the compliance panel's report on 6 December 2019. The EU was concerned that with the current blockage of the two-step multilateral dispute settlement system, the EU was losing the possibility of a proper appellate review of the serious flaws contained in the panel report. While the blockage continued, the EU stood ready to discuss with the United States alternative ways to deal with this appeal. The EU was also committed to finding a balanced negotiated solution with the United States that would allow leaving both aircrafts disputes behind them. These considerations did not, however, alter the fact that the compliance proceeding in this dispute had not been concluded. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU remained the very subject matter of this ongoing 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 ongoing. The EU noted that its reading of the provision was supported by other WTO Members. The view of the European Union 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 and it was temporarily taken out of the DSB's surveillance.

3.4. He said that the EU's willingness to find a negotiated solution was also shown by its notification dated 21 August 2020, which had been discussed at the 28 August 2020 DSB meeting, of additional and extraordinary compliance measures that withdrew all remaining subsidies and constituted appropriate steps to remove adverse effects, substantially in excess of what was required by Article 7.8 of the SCM Agreement. These additional and extraordinary measures went far beyond what was required in order to discharge the EU's compliance obligations under Article 7.8 of the SCM Agreement. The EU had procured these additional, extraordinary and costly compliance measures in an effort to persuade rational and reasonable stakeholders in the United States, including consumers, employers, workers, government officials and entities, airlines and other economic operators, that now was the time to draw a line under these disputes. It was not in the interests of anyone that the EU and the United States now proceed to, or continue, mutually assured retaliation, and certainly not in the current economic climate. Instead of progressively stepping-up retaliatory measures, the EU and the United States should step them down. With that in mind, the EU reaffirmed its determination to obtaining a long-term resolution to the WTO aircrafts disputes. A balanced negotiated settlement was the only way to avoid mutually imposed countermeasures.

3.5. The representative of the United States said that the United States was aware that the EU had recently filed yet another notice of supposed compliance. The United States disagreed that the EU had achieved compliance. Instead, the United States agreed with the second compliance panel report, which had rejected the EU's assertions and had found that eight EU launch aid subsidies continued to cause adverse effects. The EU now asserted that it had amended two of these eight measures; therefore, it admittedly had made no changes to six WTO-inconsistent measures. Unfortunately, the amendments the EU had made to French and Spanish A350 XWB launch aid were marginal and insufficient to withdraw those subsidies. The EU had also expressed doubt about US compliance in the "US – Large Civil Aircraft (second complaint)" dispute (DS353). But no one could deny that Washington State had terminated the aerospace tax break – and the EU had not denied it. The text of the measure was public, and its terms had been notified to the WTO and the EU. This was the sole measure found to cause adverse effects in the compliance proceeding. Nevertheless, as previously stated, the United States was committed to a new process with the EU in an effort to reach a long-term resolution of this dispute.

3.6. The representative of the European Union said that the EU did not agree with the unilateral US assertion that it had fully implemented the DSB recommendations and rulings in the "US – Large Civil Aircraft (2nd complaint)" dispute (DS353). While the EU was still examining the impact of the legislative action concerning the Washington State B&O tax, the EU noted that the rulings in that

dispute covered a number of additional measures where the US remained non-compliant (including NASA and Department of Defense Research and Development measures and certain State and local measures). As already referred to in the EU's statements made at previous DSB meetings on this matter, following the Appellate Body report on compliance in the "EC – Large Civil Aircraft" case (DS316), the EU had notified a set of compliance measures to the WTO that had brought the EU into compliance with the ruling. The United States had disagreed. On the basis of its disagreement, the United States continued to apply countermeasures against products from the EU. At the same time, the United States was blocking the two-stage multilateral dispute settlement system, thus depriving the EU from seeking a multilateral determination of compliance regarding its measures.

3.7. The representative of the United States said that the EU again suggested that it was "still examining the impact of the legislative action concerning the Washington State B&O tax". This formulation appeared to be a way to avoid stating what was clear – that the United States had unequivocally withdrawn this measure. The elimination of the preferential tax rate was straightforward and had been enacted in March, some six months ago. It had taken effect on 1 April 2020. From that date forward, the tax on Boeing's large civil aircraft was the same as the benchmark rate identified in the adopted reports. There was no grandfathering. It was not possible to still be examining this straightforward piece of legislation. The EU had also referred, again, to NASA and Department of Defense research and development measures, as well as to certain state and local measures. However, as the EU was aware, it had attempted and failed to show that these measures were WTO-inconsistent after the end of the US compliance period. To be clear, the EU had been unsuccessful in the compliance proceeding in obtaining WTO findings of non-compliance on NASA research and development, on Department of Defense research and development, or on any state or local measures. Nevertheless, as previously stated, the United States was committed to a new process with the EU in an effort to reach a long-term resolution of this dispute.

3.8. The DSB took note of the statements.

4 UKRAINE – ANTI DUMPING MEASURES ON AMMONIUM NITRATE: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the Russian Federation

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

4.2. The representative of the Russian Federation said that on 30 September 2019, the DSB had adopted its recommendations and rulings in the "Ukraine – Ammonium Nitrate (Russia)" dispute (DS493), including the recommendation for Ukraine to bring its measures into conformity with its obligations under the Anti-Dumping Agreement. At the 28 October 2019 DSB meeting, Ukraine had indicated its intention to fully implement the DSB's recommendations and rulings in this dispute, and that it would need a reasonable period of time for implementation. On 8 April 2020, pursuant to Article 21.3(c) of the DSU, the Arbitrator had issued an award that determined the reasonable period of time for Ukraine to implement the recommendations and rulings of the DSB in this dispute. This reasonable period of time had expired on 15 September 2020. It had been two weeks since the reasonable period of time had elapsed. Yet there had been no communication from Ukraine to the Russian Federation with respect to its implementation of, and compliance with, the DSB's recommendations and rulings in this dispute. The Russian Federation wished to underscore the Arbitrator's clarification that: "given the limited scope of the contemplated administrative review, which will focus on calculating normal value and complying with certain disclosure requirements, *12 months is more than reasonably needed* for implementation in this dispute". The period established by the Arbitrator had duly taken into account the on-going COVID-19 pandemic.[3] For these reasons, the Russian Federation requested that Ukraine share information regarding the steps taken prior to 15 September 2020 to implement the DSB's recommendations and rulings.

4.3. The representative of Ukraine said that on 30 September 2019, the DSB had adopted the recommendations and rulings in the "Ukraine – Ammonium Nitrate (Russia)" dispute (DS493). Subsequently, at the 28 October 2019 meeting, Ukraine had informed the DSB of its intention to implement the DSB's recommendation. The Russian Federation had requested that the reasonable period of time for Ukraine to implement the DSB's recommendations be determined through

[3] Award of the Arbitrator, Ukraine – Anti-Dumping Measures on Ammonium Nitrate, para. 3.47.

arbitration pursuant to Article 21.3 of the DSU. The Arbitrator had determined the reasonable period of time to be 11 months and 15 days from the date of adoption of the Appellate Body and Panel reports. With respect to the DSB's recommendations and rulings, the anti-dumping duties on imports into Ukraine of ammonium nitrate originating in the Russian Federation had been completely lifted following the decision of the Interdepartmental Commission of International Trade, dated 21 September 2020. This decision had become publicly available following its publication in the Government's *Uryadovy Kuryer* newspaper. This decision ensured full implementation of the DSB's recommendations and rulings in this dispute.

4.4. The DSB took note of the statements.

5 CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

A. Recourse to Article 21.5 of the DSU by China: Request for the establishment of a panel (WT/DS511/19)

5.1. The Chairman recalled that the DSB had considered this matter at the 28 August 2020 DSB meeting and had agreed to revert to it, should a requesting Member wish to do so. He then drew attention to the communication from China contained in document WT/DS511/19 and invited the representative of China to speak.

5.2. The representative of China said that on 5 August 2020, China had submitted its request for the establishment of a compliance panel in this dispute, pursuant to Article 21.5 of the DSU and Article 19 of the Agreement on Agriculture. At the 28 August 2020 DSB meeting, China had clarified the background and reasons for this request. He recalled that China had fully implemented the DSB's recommendations and rulings in this dispute within the reasonable period of time. Starting from 2020, the Minimum Procurement Price (MPP) policies for wheat and rice set out maximum procurement amounts that served to limit the amount of production eligible to receive the MPP. The procurement process was required to be monitored and published regularly, and, in no event, shall the actual procurement amount exceed the maximum procurement amount fixed each year. In spite of China's prompt and full compliance, the United States had still chosen to directly pursue retaliation without first resorting to compliance proceedings. Nor had it engaged with China on reaching a sequencing arrangement which was a customary and prevailing practice of WTO Members in such circumstances. China expressed concern with the systemic implication of the US approach in this dispute, as it could open the door to abuse of the dispute settlement system. Moreover, the United States continued to fail to specify on what basis China's implementation fell short of full compliance. If the United States genuinely disagreed with China that its implementation had achieved compliance, it was incumbent on the United States to prove the shortcomings in China's compliance measures. By filing this compliance panel request, China aimed at protecting its rights under the covered agreements, and at finding a positive resolution of the dispute in a logical manner. It was worth noting that when a WTO Member made its best endeavour to promptly comply with WTO rulings, just like what China had done in this dispute, it also held a reasonable and legitimate expectation that others would do the same in return. Unfortunately, the United States continued to fail to meet such an expectation. In the "US – Anti-Dumping Methodologies (China)" dispute (DS471) and in other disputes, the United States had deliberately delayed or ignored its implementation obligations long after the expiration of the relevant reasonable periods of time. Such neglect of clear rules was not limited to implementation. China noted that in recent years the United States had paid increasing amounts of money to its agricultural sector. Taking only the so-called trade mitigation payment as an example, payments to farmers from the US government had increased from USD 12 billion in 2018 to USD 16 billion in 2019. This number had further increased to USD 19 billion for the start of 2020 only. With all this new financial assistance in addition to existing price supports, observers should have legitimate reasons to ask whether the US agricultural support had exceeded its allowable limits under the covered agreements. It was obvious that the viability of the rules-based multilateral trading system depended on a good faith observance of the rules agreed by all Members. He noted that China had placed this item on the Agenda of a DSB meeting for the second time. According to the DSU, the compliance panel had to be established at the present meeting. China was confident that an impartial panel would confirm that China's measures achieved full compliance in this dispute.

5.3. The representative of the United States said that the DSB had found that China provided domestic support to its agricultural producers in excess of its Aggregate Measure of Support (AMS) commitments under the *Agreement on Agriculture*. The DSB had adopted its recommendation in

April 2019 to China to bring its measures into conformity with its WTO commitments. Since then, China continued to provide significant levels of domestic support to its agricultural producers. The revised market price support measures notified by China in June 2020 did not themselves demonstrate that China provided a level of domestic support within its commitment levels. Therefore, China had not demonstrated that its AMS (as calculated per the *Agreement on Agriculture*) would be within its commitment level in 2020. The United States had reserved its right to suspend concessions under Article 22.6 of the DSU, and the level of nullification and impairment resulting from China's provision of domestic support in excess of its AMS commitments had been referred to arbitration. The United States had paused that arbitration. The United States understood that China did not seek further litigation but had requested a panel to preserve its rights under Article 21.5 of the DSU. The United States and China continued to work together to reach a resolution to this dispute.

5.4. The DSB took note of the statements and agreed pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by China in document WT/DS511/19. It was agreed that the Panel would have standard terms of reference.

5.5. The representatives of Australia, Brazil, Canada, the European Union, Guatemala, India, Japan, Korea, Norway, Pakistan, the Russian Federation, Chinese Taipei, Thailand and Turkey reserved their third-party rights to participate in the Panel's proceedings.

6 STATEMENT BY CANADA REGARDING THE PANEL REPORT IN "UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA"

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

6.2. The representative of Canada said that his country first wished to thank the members of the Panel and the WTO Secretariat for their work in this dispute. Canada also wished to express its appreciation for the contribution by third parties in this case. Canada welcomed the findings and recommendations of the Panel regarding the US Department of Commerce's final countervailing duty determination concerning softwood lumber from Canada. The Panel had reviewed thousands of pages of written submissions and supporting evidence to prepare a thorough and balanced report. The Panel had repeatedly found that the Department of Commerce had improperly determined that the Canadian provinces provided subsidies to softwood lumber producers by selling Crown timber for less than adequate remuneration. Canada wished to first address the contents of the report itself before discussing the implications of the US decision to appeal this report while it simultaneously blocked appointments to the Appellate Body. At the outset, Canada wished to reiterate that it strongly believed that all Members were entitled to take appropriate measures to address unfair trade practices. However, ensuring the security and predictability of the multilateral trading system demanded that any such measures conformed to the obligations that the Members had undertaken in the WTO Agreements. In this dispute, the Panel had conducted an objective assessment of the matter before it. To this end, the Panel had examined whether the Department of Commerce had provided "reasoned and adequate" explanations as to how the record evidence supported its findings and whether the Department of Commerce had assessed that evidence in an objective and unbiased manner. The Panel had found that the Department of Commerce had failed to meet these requirements in relation to 16 different claims. The Panel had concluded that the Department of Commerce had repeatedly failed to act in an objective and unbiased manner and that its treatment of the evidence had undermined the due process rights set out in Article 12.1 of the SCM Agreement.

6.3. Canada wished to highlight three important aspects of the Report. First, the Panel had provided valuable guidance on benchmark selection under Article 14(d) of the SCM Agreement. Canada had argued that an investigating authority was required to determine adequacy of remuneration on the basis of the market conditions that prevailed for the government-provided good. In particular, Canada had argued that markets for standing timber were regional in nature and that the Department of Commerce had improperly rejected regional provincial market prices and had instead made a comparison to prices outside of these regional markets. The Panel had indicated that there was "ample" and "copious" amounts of evidence that indicated that provincial stumpage markets in the British Columbia Interior, Quebec, Alberta and Ontario were regional markets. The Panel had therefore found that Commerce was under the obligation to consider using market-determined benchmarks from within each of those regions as a starting point in its Article 14(d) benefit analysis. The Panel had also agreed with Canada that the Department of Commerce had acted inconsistently

with Article 14(d) by rejecting prices from provincial auction systems and other market-based benchmarks in British Columbia, Alberta, Québec, and Ontario. Second, the Panel had determined that the Department of Commerce had erred by expressly ignoring "remuneration" in the form of mandatory charges or in-kind obligations that had been incurred in exchange for Crown timber. The failure to account for this "remuneration" had artificially inflated the amount of alleged subsidy. Third, the Panel had upheld Canada's claim that the British Columbia Log Export Permitting process did not constitute a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. The Panel had agreed with Canada that there was no evidence that the Governments of British Columbia and Canada required log suppliers to provide their logs to anyone, or direct them to sell those logs at any particular price. Canada noted that the report was not limited to the items it had just discussed. While Canada would not discuss the remaining findings in any detail, the Panel had found, for example, that the Department of Commerce's calculation of benefit for various electricity programs had not been consistent with Articles 1.1(b) and 14(d) of the SCM Agreement. Canada estimated that nearly USD 3 billion had already been collected in duties on Canadian exports of softwood lumber as a result of the Department of Commerce's errors – a clear violation of the WTO obligations of the United States. Nor was this the first time that the United States had imposed trade remedy measures on Canadian softwood lumber that had ultimately been found to be inconsistent with the WTO agreements. In the face of overwhelming evidence that Canada's market-based mechanisms did not result in countervailable subsidies, the United States continued to treat Canadian softwood lumber producers in a manner that was neither unbiased nor objective.

6.4. Canada also wished to address the systemic implications of the US appeal in this dispute. In a statement at the 28 August 2020 DSB meeting, the United States had stated that, despite the ongoing Appellate Body impasse, the dispute settlement system still worked. The US behaviour in this dispute and in previous disputes contradicted its statement. Canada recalled that all WTO Members, including the United States, had agreed to the DSU. It provided that, when a panel report was issued, it could be either adopted or appealed. When there was an appeal, the Appellate Body had to issue a report in that appeal. In either case, the DSB would be in a position to adopt recommendations if violations had been found. In the event that the respondent did not bring its measures into compliance with its WTO obligations, a complainant could adopt countermeasures. In this dispute, in the absence of a functioning Appellate Body, Canada had offered the United States to enter into an appeal-arbitration agreement that would have allowed the United States to seek review of the Panel Report if it so wished. Having refused that offer, Canada would have hoped that the United States would have allowed the adoption of the Panel Report and implemented its recommendations and rulings as soon as possible. By appealing this Panel Report to an Appellate Body that it had made non-functional through its blockage of AB member appointments, the United States was compounding the unfair treatment accorded to Canadian softwood lumber producers. An appeal, in the current circumstances, had the effect of denying Canada its right, under the DSU, to prompt settlement of the dispute. Canada was surprised that the United States had appealed the Panel report given the stated position of the US Trade Representative that there was no need for an Appellate Body. In the interests of a clear and predictable settlement of their differences, rather than compounding the uncertainty created by the effective suspension of the Appellate Body, Canada called on the United States to accept the decision of the Panel and fully implement the recommendations of the Panel in this dispute. More broadly, Canada was deeply concerned by the US actions, which frustrated the proper functioning of the dispute settlement system. The United States' behaviour significantly reduced the security and predictability that Members collectively valued in international trade.

6.5. The representative of the United States said that the United States had notified the DSB of its decision to appeal the panel report, in accordance with the DSU. The Panel in this dispute had erroneously interpreted and applied numerous provisions of the SCM Agreement, and many of the findings in the panel report build on erroneous Appellate Body interpretations and were deeply flawed. The United States would, at the appropriate time, fully explain the errors in the panel report. As stated in in its notification to the DSB of the US decision to appeal, the United States was open to discussions with Canada on the way forward in this dispute. The suggestion that the United States had appealed simply to delay this dispute settlement proceeding was utterly without foundation. The DSU provided Members the right of appeal, and the United States had availed itself of that right. The DSU also established rules governing the conduct of appeals, and for years the Appellate Body had failed to abide by those rules. The Appellate Body's failure to follow the agreed rules had undermined confidence in the WTO. It was difficult to maintain support for a rules-based trading system in which the adjudicator did not itself follow the rules. The United States remained resolute in its view that Members needed to resolve that issue as a priority. But 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 the Chair to seek a solution on these important issues. The United States had always been a strong supporter of a rules-based international trading system and remained so now.

6.6. The representative of European Union said that this was another dispute that illustrated the grave consequences of the blockage of AB appointments since 2017. That blockage frustrated the essential rights of Members that had been agreed multilaterally in the DSU. Under the DSU, parties to a dispute had the right to appeal a panel report and to have their case heard by the Appellate Body. At the same time, under the DSU, the complainant was entitled to the resolution of the dispute through adjudication. The EU took note of the appeal by the United States of the panel report in the dispute on: "United States – Countervailing Measures on Softwood Lumber from Canada" (DS533). As a result of this appeal, and pursuant to Article 16.4 of the DSU, the panel report could not be adopted pending the completion of that appeal. The lack of at least three Appellate Body Members was not a legal bar to a Member exercising its right to an appeal. However, Members should be mindful that, in the current specific circumstances where the Appellate Body was not operational, the decision by a respondent to appeal a panel report could amount in effect to dispute resolution through adjudication being blocked, unless that respondent agreed to the appeal being adjudicated upon through appeal arbitration based on Article 25 of the DSU, consistently with the principles of the DSU. This was precisely why the EU and other Members had put in place the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), to allow the above-mentioned rights to be preserved in a balanced manner, despite the blockage of Appellate Body appointments. In particular, the MPIA preserved the right to appellate review of a panel report and the right to have a dispute resolved through adjudication. The standard default appeal arbitration procedures, as attached to the MPIA, could also be used on an *ad hoc* basis by Members who themselves did not participate in the MPIA. However, it would appear, as Members had just heard in Canada's statement, that the United States had not been ready to resort to appeal arbitration procedures based on Article 25 of the DSU. As it had stated many times since 2017, the EU expressed serious concern about the implications of the blockage of Appellate Body appointments. Members could now see these implications unfold in specific cases. In the absence of a functioning Appellate Body, the EU invited Members engaged in appeals to resort to the procedures foreseen in the MPIA, which preserved the rights of both parties under the DSU in a balanced way. The EU also wished to reiterate its willingness to find a lasting solution to the current impasse, as a matter of priority.

6.7. The representative of China said that his country wished to register its concern about the US appeal in this dispute, especially given the fact that the United States was the only Member blocking the Appellate Body member appointments. China believed that the multilateral trading system would be undermined without prompt settlement of disputes. In the long run, this would undermine the interests of US businesses. Therefore, China wished to encourage the United States to rejoin negotiations with a view to resuming the functioning of the Appellate Body as soon as possible.

6.8. The representative of Canada said that, as noted by the EU, his country wished to underscore that Canada had offered the United States to enter into an appeal-arbitration agreement that would have allowed the United States to seek review of the Panel Report if it so wished. The United States had refused that offer. Canada continued to be surprised that the United States had appealed given the stated position of the US Trade Representative that there was no need for an Appellate Body. Canada was open to discuss the issue of the Appellate Body. In the meantime, Canada called on the United States to support the dispute settlement system and to implement the recommendations of the Panel.

6.9. The DSB took note of the statements.

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

A. Statement by the Chairman on consultations with Thailand and the Philippines with regard to the Recourse to Article 22.2 of the DSU (WT/DS371/32)

B. Statement by the Philippines

C. Statement by Thailand

7.1. The Chairman said that under the first sub-item, he wished to make a statement under his own responsibility in order to report to delegations on his consultations with Thailand and the Philippines in the "Thailand – Cigarettes (Philippines)" dispute (DS371). His statement was without prejudice to the rights and obligations of the parties to this dispute or of any other Member. He recalled that these consultations had first been conducted by the previous DSB Chair, Amb. Walker, prior to the 5 March 2020 DSB meeting. At that meeting, the matter had been suspended in order to allow more time for consultations. Following his appointment as DSB Chair on 20 May 2020, he had been consulting with Thailand and the Philippines on this matter. He had held virtual intensive consultations with the parties in preparation for the 29 June 2020 DSB meeting. Following the 29 June 2020 DSB meeting, he had continued his intensive consultations with the parties to this dispute and had held three meetings to discuss this matter. Immediately after the 29 July 2020 DSB meeting, he had held another meeting in-person with the parties to this dispute on 30 July 2020. Subsequently, he had reported back to the Membership on this matter at the 28 August DSB meeting. Since the 28 August 2020 DSB meeting, he had continued to consult with the parties to the dispute and had had written exchanges with both parties on this subject. He had then held another in-person meeting with the parties to the dispute on 23 September 2020 to further discuss this matter. Since his consultations were ongoing, it was not his intention to have a discussion on this matter at the present meeting. He hoped that this was agreeable to all Members.

7.2. The DSB took note of the statement.

7.3. The Chairman invited the representative of the Philippines to speak.

7.4. The representative of the Philippines said that his country wished to thank the Chairman for his report. The Philippines reiterated its sincere appreciation of the Chair and the Secretariat's ongoing efforts. The Philippines also wished to thank the Chairman and the Secretariat for the nine questions sent to the parties to this dispute on 3 August 2020, to which both parties had sent responses on 28 August 2020. The Philippines and Thailand had also been given the opportunity to comment on each other's responses on 14 September 2020. The Philippines trusted that these responses and comments had been helpful in fostering a better understanding of the parties' respective positions on the issues before them. The Philippines also wished to thank the Chairman for calling for consultations on 23 September 2020. At these consultations, the Chairman had recounted to the parties his clear, concise and correct understanding of the facts and circumstances, and of the issues in this dispute. The questions posed had obviously been focused in an informed way. In this spirit of cooperation and on the Chairman's suggestion, the Philippines had presented for consideration a non-exhaustive list of alternative arrangements, contained in document WT/DS371/40 dated 3 August 2020 that could allow the parties to fashion a constructive solution that would permit the completion of Thailand's appeals, which had been suspended as a result of the non-functioning of the Appellate Body. Any such alternative arrangements should not in any way prejudice the parallel rights of the Philippines under the DSU to seek automatic and mandatory authorization to suspend concessions. As the Philippines had set out in its statements made at previous DSB meetings under this Agenda item, and in the consultations, the Philippines had remained open, ready, and willing to constructively engage with Thailand. But it should also become more clear to the Chairman, and to the DSB, that should Thailand, as the losing party in duly-adopted Panel and AB reports, not be able to constructively engage in a solution, then the burden of applying the automatic and mandatory rules-based provisions of the DSU would become the duty and responsibility of the DSB. At the present meeting, therefore, the Philippines asked the DSB to grant the Philippines the authority it sought. The provisions of Article 22.6 of the DSU were clear: "[t]he DSB, upon request, *shall* grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request"; and "[i]f the Member concerned objects to the level of suspension proposed, […] the

matter *shall* be referred to arbitration". Therefore, the Philippines believed that there were only two options under the reverse consensus rule of Article 22.6 of the DSU: first, the DSB granting authorization to suspend concessions; or, second, the DSB referring the matter to arbitration.

7.5. The DSB took note of the statement made by the Philippines.

7.6. The Chairman invited the representative of Thailand to speak.

7.7. The representative of Thailand said that her country wished to take this opportunity to once again express Thailand's appreciation for the Chairman's active engagement in assisting Thailand and the Philippines in finding a way forward in this dispute. The consultations that the Chairman had initiated were permitting a constructive dialogue between the parties. Thailand remained committed to continuing this dialogue conducted under the Chairman's good offices. Thailand had made its views clearly known in its prior statements at the DSB meetings of 5 March, 29 June, 29 July and 28 August 2020. As Thailand had previously indicated, the Philippines' retaliation request was without legal foundation because it had been made long after the expiry of the 30-day deadline under Article 22.6 of the DSU. It was undisputed that the Philippines had not filed any retaliation request by 14 June 2012, which was the date on which the 30-day deadline in this dispute had expired. Additionally, the Philippines' retaliation request was contrary to the Sequencing Agreement concluded by both parties. The Sequencing Agreement stated that the Philippines first had to complete proceedings under Article 21.5 of the DSU; only thereafter, if non-compliance was determined, could the Philippines request retaliation under Article 22 of the DSU. Thailand noted that in commenting on the nature of sequencing agreements, Japan had correctly noted, in its statement at the 29 July 2020 DSB meeting, that: "disputing Members have always respected and abode by the terms of the agreement they concluded".[4] Thailand was therefore disappointed that the Philippines was attempting to disavow the Sequencing Agreement that both parties had concluded precisely to avoid these types of procedural problems. Furthermore, Thailand disagreed with the Philippines' position that Article 22.6 of the DSU would force the DSB to authorize retaliation despite the obvious fact that its request had been filed almost eight years after the expiry of the 30-day deadline under Article 22.6 of the DSU. In these circumstances, and given that the two appeals under Article 21.5 of the DSU were still ongoing, there was no possible reading of Article 22 of the DSU or of the Sequencing Agreement that would allow the Philippines to request retaliation prior to the completion of the ongoing appeals under Article 21.5 of the DSU. Nonetheless, Thailand remained committed to participating in good faith in the consultations organized by the Chairman with the aim of finding a way forward in light of the present circumstances. Thailand was pleased with the progress achieved so far in these consultations. Thailand urged all WTO Members to focus on resolving the Appellate Body crisis, which was the root cause of the discussions under this Agenda item. Thailand noted that, in other disputes, parties had recently filed appeals before the Appellate Body despite being fully aware that those appeals would not be resolved promptly given the insufficient number of Appellate Body members. This further highlighted the urgency of finding a multilateral solution to the Appellate Body impasse. Thailand looked forward to continuing the multilateral efforts to solve the Appellate Body impasse with a view to preserving the two-tier dispute settlement system of the WTO. Thailand thanked the Chairman for the opportunity to make a statement at the present meeting. Thailand looked forward to the next steps in the consultations facilitated by the DSB Chairman in this dispute.

7.8. The DSB took note of the statement made by Thailand.

7.9. The representative of Brazil said that his country wished to express its support for the Chairman in his efforts to assist the parties in finding a solution to this problem. The current paralysis of the Appellate Body could not have been foreseen by Members that had concluded sequencing understandings a few years ago. At the same time, however, Members had to acknowledge that this situation amounted to a change in circumstances that might render impracticable or impossible the performance of any steps of a sequencing understanding that assumed and depended on the continuing operation of the Appellate Body. Such steps should not be an excuse for stalling indefinitely the resolution of a dispute. The DSU was clear in that the "prompt settlement of [disputes] […] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Brazil trusted that, with the Chairman's help, the parties would, in good faith, move forward in this dispute.

[4] Japan's statement at the 29 July 2020 DSB meeting, para. 2.

7.10. The representative of the European Union said that in these extraordinary circumstances of the Appellate Body paralysis, his delegation called on the parties concerned to seek an agreed solution that would preserve the rights of both parties in a balanced manner. The EU wished to point out that the parties could decide to submit the suspended appeal for completion under an appeal arbitration procedure pursuant to Article 25 of the DSU, such as the MPIA. Such an appeal arbitration procedure could, for all practical purposes, replicate all substantive and procedural aspects of appellate review. The EU trusted that the Chairman could assist the parties in reaching such a solution. The EU also wished to make two comments on certain broader legal issues that had been raised in by other Members. First, the EU disagreed with the assumption that a request to suspend concessions pursuant to Article 22.2 of the DSU could not be automatically granted through negative consensus in the DSB. The EU wished to refer to its statement made at the DSB meeting of 29 July 2020 on this matter regarding the fact that there were pending appeal proceedings. Second, the EU did not agree with the assumption that a request to suspend concessions made 30 days after the expiry of the reasonable period of time could not be adopted by negative consensus. The EU referred to its previous statements on this matter.

7.11. The DSB took note of the statements.

7.12. The Chairman said that in light of the importance and the sensitivity of this matter, he would continue to consult with the parties to this dispute and that he would report back to delegations.

7.13. The DSB took note of the statement.

8 STATEMENT BY AUSTRALIA ON MINIMIZING COVID-19 DISRUPTIONS TO THE DISPUTE SETTLEMENT SYSTEM

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

8.2. The representative of Australia said that its statement was on minimizing COVID-19 disruptions to the dispute settlement system. Australia wished to deliver its statement on behalf of: Brazil; Canada; Ecuador; Guatemala; Hong Kong, China; Mexico; New Zealand; Norway; Peru; Singapore; Switzerland; Ukraine and the United Kingdom. As Members knew well, the COVID-19 pandemic was causing significant disruption across the globe and its impact could continue into the foreseeable future. His country wished to extend its sympathies to all Members and to the WTO Secretariat for the serious risks that they had seen to health, the loss of life, and the major social and economic crises caused by the coronavirus. As Members had seen, the WTO dispute settlement system was not immune to the impacts of COVID-19. It was encouraging that, since July, delegates had been able to resume DSB meetings at the WTO premises. However, ongoing restrictions affecting international travel and immigration put into question the feasibility of physical participation of panelists and capital-based delegates at meetings in Geneva into the future. As it stood, Members did not know when they would be able to resume the arrangements for work and travel that had existed before the pandemic. Postponing substantive meetings with panels until conditions once again allowed for the physical attendance of international colleagues could therefore mean placing disputes on hold indefinitely. During 2020, Members had witnessed governments, private sector organizations, and domestic and international adjudicative bodies throughout the world adapt their usual ways of working to continue operating in these difficult conditions. Members had to ensure that the WTO dispute settlement system did the same in order to remain functional and relevant. Australia, therefore, urged panels to consider actively, in consultation with parties, flexible alternative arrangements to ensure that new disputes and those currently under way could continue to progress in a timely manner despite the challenge of current restrictions.

8.3. Australia wished to recall that Article 12.1 of the DSU afforded panels discretion in the working procedures that they adopted in individual disputes, after consulting with the principal parties. Panels therefore had the discretion to determine alternative arrangements that would best serve the satisfactory settlement of the matters they were examining, taking into account each dispute's unique context and factors. In addition, Article 12.2 of the DSU required that panel procedures provide sufficient flexibility to ensure high-quality panel reports while not unduly delaying the panel process. To this end, Australia called on panels to exercise their discretion bearing in mind the principles of prompt and positive settlement of disputes enshrined in Articles 3.3 and 3.7 of the DSU. Some panels had already adjusted their procedures to hold substantive meetings virtually through

video conferencing technology. Australia welcomed these developments. To ensure the equitable operation of the dispute settlement system, however, Members had to find solutions to enable *all* current and future matters to move forward in one way or another. To facilitate this, Australia encouraged the Secretariat to assist panels and Members by outlining a range of practical options for conducting substantive meetings through alternative arrangements that adhered to the requirements of the DSU, including with regard to the confidentiality of proceedings. In undertaking this, the Secretariat could consider the ways WTO panels and other international dispute settlement bodies had modified their hearing procedures. Australia wished to stress that it was not calling for any departure from the physical hearing format to become the default. Australia looked forward with optimism – as all Members surely did – to the time when it would be possible to resume in-person substantive meetings free of the current, necessary restrictions. However, until that time, Members had to find temporary, alternative ways to conduct proceedings while they weathered the ongoing disruptions from the coronavirus pandemic. An effective, multilateral, dispute settlement system played a vital role in preserving the rights and obligations of all Members under the covered agreements. Therefore, Members had to ensure that the current restrictions on their ability to meet in person did not prevent the proper functioning of the WTO dispute settlement system.

8.4. The representative of Japan said that his country wished to thank Australia for raising this important issue under the current circumstances. Japan considered it important to examine feasible and practical ways to preserve the functionality of the dispute settlement system to ensure effective resolution of disputes in the current COVID-19 situation. In this regard, Japan expressed appreciation of Australia's statement that drew attention of Members to this issue. Based on Article 12.2 of the DSU which stated, in part, that Panel procedures should "not unduly delay[] the panel process", Japan fundamentally agreed with examining various ways, including the use of online means, to advance panel proceedings. At the same time, under Article 10.1 of the DSU: "the interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process". Japan believed that securing interactive and lively discussions in substantive meetings would be essential for fruitful panel proceedings and high-quality panel reports. Non-virtual, face-to-face discussions were of great significance from this perspective. While Japan recognized virtual meetings as an option in the current COVID-19 situation, face-to-face meetings were preferable especially for substantive meetings with disputing parties. In response to the requirements under the DSU, each panel should consult sufficiently with disputing parties on how to move forward with proceedings. Each panel should also make efforts toward the parties to strike an appropriate balance between prompt settlement of disputes and protection of due process rights. This issue should be discussed among Members in order to avoid inconsistencies among panels. In considering such possible ways, Japan wished to share some challenges that Japan had faced in virtual third-party meetings: (i) the need for advance clarification of schedules and procedures related to a virtual meeting, including whether there would be a Q&A session; (ii) the need to prevent communication failures due to poor connection; (iii) the need to secure simultaneous interpretation for virtual attendees; and (iv) the need to ensure information security. In addition, Japan had experienced several virtual third-party meetings without Q&A sessions. While understanding the various technical barriers in holding virtual meetings, Japan believed that it was desirable to secure procedural guarantees that ensured substantial two-way discussions. In any event, Japan expressed the hope that other Members which had participated in virtual sessions, as well as the Secretariat, would share information and views on those meetings, if possible, and especially regarding technical challenges. This might be useful for Members which had not had an opportunity to attend a virtual session. Japan hoped to constructively discuss further ways that could be applied to panel proceedings, while sharing such useful information among Members and reviewing any problem that would need to be addressed.

8.5. The representative of Guatemala said that his country wished to thank Australia for its statement made on behalf of a group of Members that included Guatemala. More than six months had passed since the start of the COVID-19 pandemic. It was a fact that such pandemic had impacted the functioning of the dispute settlement mechanism. It did not appear that the measures taken globally against COVID-19 would allow any time soon to resume the arrangements for work and travel in panel proceedings that had existed before the pandemic. This was the reason why Guatemala believed that it was necessary to adapt usual ways of working to continue operating in these difficult conditions. Therefore, Guatemala wished to underscore the urgency for panels to actively consider, in consultation with the disputing parties, flexible alternative arrangements to ensure that new disputes and those currently under way could continue to progress in a timely manner despite the challenge of current restrictions. Guatemala also wished to invite Members, regardless of whether they were complaining, defending or third parties in actual or potential dispute

settlement proceedings, to cooperate with panels in exploring practical options for conducting substantive meetings through alternative arrangements that adhered to the requirements of the DSU. In undertaking this, Guatemala was confident that the Secretariat could assist panels and the disputing parties in considering ways in which WTO panels and other international dispute settlement bodies had modified their hearing procedures.

8.6. The representative of India said that the COVID-19 pandemic had caused an unprecedented crisis in the global community and India was no exception. The pandemic continued to spread in India at an alarming rate. The total number of cases in India had crossed 6 million and the active cases were at around 963,000. India wished to inform Members that, at the present time, there were numerous travel restrictions which impacted Indian delegations' ability to travel to Geneva. India also understood that physical meetings were not possible for the time being, as Switzerland maintained travel restrictions on account of the COVID-19 pandemic. For India, a party's right to an oral hearing was an intrinsic aspect of its due process rights and could not be dispensed with, except with the agreement of the parties to a dispute. Several provisions of the DSU, including the procedure set out in Appendix 3, expressly provided for substantive meetings, notably Article 15.1 of the DSU which made an express reference to oral arguments. India noted that Paragraph 1 of Appendix 3 was couched in mandatory terms regarding the rights guaranteed to parties and third parties in a dispute. A panel could not exercise its margin of discretion to truncate these rights without the parties' agreement. India also noted that Paragraph 5 of Appendix 3 provided that: "[a]t its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, *and still at the same meeting*, the party against which the complaint has been brought shall be asked to present its point of view" (emphasis added). Further, Paragraph 10 of Appendix 3 provided that: "in the interest of *transparency*, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 *shall be made in the presence of the parties*" (emphasis added). Therefore, the importance that the DSU attached to oral hearings was unquestionable. For India, the written submissions *and* the substantive meetings (i.e., oral hearings) together constituted the suite of fair processes and due process rights guaranteed by the DSU. None of these steps were expendable for an original panel proceeding. The advocacy opportunities (including the degree of persuasion and explanation) associated with an oral hearing were quite simply not available in other means such as a written procedure. India believed that modest extensions of timelines for making submissions or providing for an additional round of submissions could not be considered as a meaningful substitute for oral hearings unless parties to a dispute agree. If written procedures were considered to be equally effective and meaningful as an oral hearing by the WTO Membership, the working procedures in Appendix 3 of the DSU would not have expressly provided for two substantive meetings. While India noted that Article 3.3 of the DSU recognized the importance of "prompt settlement" of disputes, this did not mean that such prompt settlement could whittle away "fundamental" due process rights such as a right to an oral hearing. This right was particularly important for developing countries which were used to presenting submissions in person as it provided an opportunity for further refining and presenting their arguments. India considered that physical oral hearings were indispensable since such hearings were conducive to a contemporaneous oral exchange and observation of demeanour among other elements essential to oral advocacy. This was simply not possible in technologically enabled virtual oral hearings. In the case of virtual oral hearings, there were issues of technological limitations like failure of the internet connection, camera malfunctions, acoustical problems within the videoconferencing rooms and choppy video streams. Such limitations could quickly make the hearings frustrating or useless. India also noted that there would be complex coordination issues during virtual oral hearings for Members who wished to involve officials from different domestic departments and regions. Further, there were issues of security and confidentiality for virtual hearings. These elements were burdensome for seasoned litigants and were too difficult for developing countries. Consequently, physical oral hearings were vital for meaningfully participating in dispute settlement proceedings under the DSU and ultimately for the proper functioning of a WTO panel. WTO disputes, being high stakes litigation amongst international actors, demanded nothing less than every procedural right guaranteed by the DSU in light of due process and based on agreement of the parties. India could not consider that a settlement of the matter had been reached unless proceedings as guaranteed by the DSU had been held. Therefore, India believed that any substantive meeting should be postponed to a reasonable future date when face-to-face substantive meetings at the WTO were feasible.

8.7. The representative of South Africa said that her country wished to thank Australia and the co-sponsors of Australia's statement for introducing this Agenda item. COVID-19, as Australia had stated, had unleashed a devastating health, economic and social crisis unprecedented in recent

times. Since the outbreak, the loss of the life was the immediate consequence that governments had had to grapple with. This eventually led to a number of measures, including confinement schemes and lockdowns, aimed at reducing the spread of the virus. COVID-19 had forced or would likely force governments to take drastic trade measures in the public interest that were unimaginable in normal times. This might lead to possible disputes as to whether there were violations of the covered agreements. Therefore, South Africa believed that Members needed a more substantive discussion at a DSB meeting not only on procedural issues related to panels, but also on the substantive impact of COVID-19 on dispute settlement. Developing countries had confronted their own unique set of challenges, in addition to their general macro-economic instability. Even prior to the crisis, developing countries had already been experiencing deepening financial and debt vulnerabilities in the context of tepid economic growth, slowing trade, sluggish real investment and growing income inequalities. In the absence of any fiscal packages, the economic situation in many developing countries remained serious and had had a negative impact on key sectors of the economy, including manufacturing and in some cases tourism. The WTO agreements contained rules governing restrictions on trade. The general rule for trade in goods was that quantitative restrictions and import bans were prohibited pursuant to GATT Article XI. However, exceptions for emergency and crisis situations were provided for in terms of GATT Article XI:2(a) in respect of foodstuffs and other product shortages. In addition, regarding food products, Article 12 of the Agreement on Agriculture allowed for the imposition of export restrictions in emergency situations. GATT Article XX also provided general exceptions, including those necessary to protect human, animal or plant life. The GATS also had Article 14. There were also national security exceptions under Article XXI of the GATT. Therefore, a number of provisions were available. Those exceptions contained specific conditions that had to be met, including non-discrimination, non-arbitrary application and not imposing disguised restrictions on trade. These measures should be temporary and sufficient to address the emergency situation. South Africa also acknowledged that there were transparency obligations on Members to notify trade restrictive measures. However, in many instances, these requirements had not been met or their notification had occurred only after the fact. Developing countries, which had been disproportionately affected by this crisis, should not bear the brunt of their lack of capacity to notify measures that had been instituted to deal with the pandemic. Given the unprecedented challenges presented by COVID-19, South Africa remained concerned that legitimate measures taken to address the coronavirus pandemic could nonetheless be subject to dispute settlement proceedings. In the context of investment treaty disputes, there seemed to have been calls and support for emergency public health and economic policy measures to be subject to international arbitration. A call had also been made to suspend the application of such treaties in respect of COVID-19 related investment measures. South Africa believed that it was equally necessary, in the WTO context, for Members to apply the utmost restraint when dealing with COVID-19 related trade measures. There was a need to consider to what extent a peace clause or waiver, including in the context of the TRIPS Agreement, might be introduced to deal with the potential of legitimate public interest measures being challenged in the WTO. For example, there had been a number of instances where peace clauses had been implemented. For example, regarding Article 13 of the Agreement on Agriculture, Members had initially foreseen a peace clause. For public stockholding, the 20-page Ministerial Conference Decision as well as the 2014 General Council Decision made clear that such programmes shall not be challenged in the dispute settlement mechanism. Therefore, South Africa believed that this discussion was timely and that there was a need to have a proper discussion and reflection at a DSB meeting on how Members would deal with the specific and challenging circumstances presented by COVID-19.

8.8. The representative of the United States thanked Australia for its statement made at the present meeting, which raised issues of systemic importance. The United States first wished to extend its sympathies to all those who had directly borne the impact of the novel coronavirus pandemic. The global pandemic had caused significant disruptions to the work of the WTO, including panel proceedings. Travel restrictions imposed by WTO Members had made it difficult to schedule a substantive meeting of the panel with parties in Geneva. In some instances, this had resulted in a postponement of the meeting. Under these extraordinary circumstances, the United States encouraged each panel to consult with the parties to the dispute on how to proceed, bearing in mind the views of the parties and the relevant provisions of the DSU. As part of the consultation process, it was incumbent on each panel to engage with the parties on the health, travel, and technological restrictions that affected the parties to a dispute. The United States encouraged panels to undertake this consultation *before* taking a decision on how to move forward. Before the scheduling of a panel meeting, it would be appropriate for a panel to consult with the parties on the travel restrictions that might limit a party's ability to attend a meeting in Geneva. The same logic applied if a panel were to consider an alternative arrangement to an in-person meeting. In that situation, it would likewise

be appropriate for a panel to consult with the parties on the constraints that might limit a party's ability to participate meaningfully in the arrangement under consideration. For example, the United States noted that several parties and third parties in ongoing disputes had raised pertinent concerns with the possibility of holding a "virtual meeting". These included not only DSU considerations but the effect on a party's right of participation, including situations where health or technology considerations precluded or seriously undermined a party's ability to participate remotely. The circumstances of each dispute and each party would vary. It would be misguided for all panels to adopt a single solution to the challenge posed by the global pandemic to the work of panel proceedings. As WTO panels navigated these extraordinary circumstances, the United States encouraged each panel to consult with the parties to the dispute and to consider carefully the feasibility and implications of a possible course of action *before* taking a decision.

8.9. The representative of Nigeria, speaking on behalf of the African Group, thanked Australia for its statement made under this Agenda item. The African Group welcomed discussions in this area, as the COVID-19 pandemic had forced some governments and would likely force other governments to take drastic trade measures that were unimaginable in normal times and which might eventually lead to disputes in the near future. As this was the first time that Nigeria heard Australia's statement it took note of comments made by Australia and other Members under this Agenda item. At this stage, the African Group would request that Australia's statement be made available to enable the African Group to conduct a more substantive discussion in this subject area based on the DSU provisions.

8.10. The representative of China said that his country was well aware of the continuing difficulties posed by the ongoing COVID-19 pandemic, both in terms of public health concerns and impact on working conditions, and consequently over legal proceedings. Nevertheless, the prompt resolution of disputes remained at the core of the WTO dispute settlement system, as provided for in Articles 3.3 and 12.2 of the DSU. In light of this, China considered it fundamental to provide certainty as to dispute settlement proceedings in order to avoid any undue delay in the settlement of any dispute. While addressing legitimate public health interests, it was equally necessary to preserve the protection afforded by the WTO legal framework against unjustified trade restrictions, and to keep the global trade system functioning during a period of economic downturn. China noted that some panels had opted for flexibility so as to avoid excessive delays in the proceedings. China supported and encouraged adjudicators and the Secretariat to do so under the present extraordinary circumstances.

8.11. The representative of the European Union said that his delegation wished to thank Australia for its statement and for placing this important issue on the Agenda of the present meeting. As a general observation, the EU took the view that the WTO dispute settlement system had to continue its normal operations as much as possible, taking into account the need to ensure the safety of persons involved and the restrictions put in place by the relevant authorities to that end. Over the past few months, governments, international organizations and also tribunals had managed to perform their functions, despite the health-related restrictions. This had mainly been possible thanks to the available means of remote communication. This meant that people could meet and work together even when in-person meetings were not possible. The same means of communication allowed for the maintenance of dispute settlement operations, in a manner consistent with the DSU. In particular, Covid-19 should not indefinitely paralyze the WTO dispute settlement system because it was considered that in-person hearings should not be held for public health reasons or due to related travel restrictions. This was why the EU welcomed the recent decisions of panels to conduct "virtual" hearings. In the current specific circumstances, this struck the right balance between the requirements of prompt settlement of disputes and due process. The EU wished to invite other panels to adopt similar procedures in similar circumstances. Indeed, once the period within which hearings would normally be expected to take place had clearly passed, and if there was little prospect of normal operation resuming within the immediately foreseeable future, virtual hearings had to be organized instead. The EU would expect that this be done on an even-handed basis in all cases, for all Members. While panels had discretion when it came to their working procedures, as indicated in Article 12.1 of the DSU, including organizing virtual hearings, that discretion was not completely unfettered. In particular, panels had to ensure compliance with all of the applicable principles relating to dispute settlement, including prompt settlement, and that consideration was valid for all disputes. The EU invited all parties involved to cooperate with panels so that they could discharge their functions as envisaged by the DSU despite the pandemic. The EU was encouraged by the recent panel decisions to conduct virtual hearings. The EU expected similar procedures to be adopted in other cases, as long as in-person meetings were considered not possible.

8.12. The representative of Australia said that his country wished to thank Members for their detailed and thoughtful engagement on this important systemic issue at the present meeting. Picking up on issues raised regarding the importance of consultation with the parties, Australia would of course expect panels to consult with parties in proposing flexible arrangements, consistent with the DSU. But, given how far in the future it could be until Members could resume the traditional format for meetings, Australia was encouraged to hear a number of Members noting how they too wished to explore actively how the dispute settlement system could operate to preserve all Members' rights – including the right to prompt and positive settlement of disputes. There was also, in the discussion, a concern about "one size fits all" solutions. Australia wished to emphasize that there would need to be – as Australia had made clear in its statement – a taking into account of each dispute's "unique context and factors". That would be Australia's proposed approach. In respect of Nigeria's request, Australia would of course circulate its statement to Members.

8.13. The DSB took note of the statements.

9 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/669)

9.1. The Chairman drew attention to document WT/DSB/W/669 which contained additional names proposed by New Zealand and Pakistan, respectively, for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/669.

9.2. The DSB so agreed.

10 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; BANGLADESH; 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; MALDIVES; MALI; MAURITANIA; MAURITIUS; MEXICO; REPUBLIC OF MOLDOVA; MOROCCO; MOZAMBIQUE; NAMIBIA; NEPAL; 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; UNITED KINGDOM; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.18)

10.1. 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 then drew attention to the proposal contained in document WT/DSB/W/609/Rev.18 and invited the representative of Mexico to speak.

10.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, said that the delegations in question had agreed to submit the joint proposal dated 18 June 2020 to launch the AB selection processes. Her delegation, on behalf of 121 Members, wished to make the following statement. The extensive number of Members submitting this joint proposal reflected a common concern with the current situation of the Appellate Body, which was seriously affecting the overall dispute settlement system against the best interest of WTO Members. 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 without further delay as set out in the joint proposal, which sought to: (i) start six selection processes: one process to replace Mr Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; a second process to fill the vacancy that had occurred following 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 had expired on 11 December 2017; a fourth process to replace Mr Shree Baboo Chekitan Servansing, whose

four-year term of office had expired on 30 September 2018; a fifth process to replace Mr Ujal Singh Bhatia, whose second term had expired on 10 December 2019; and a sixth process to replace Mr Thomas R. Graham whose second term had expired 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 issue its recommendation within 60 days after the deadline for nominations of candidates. The proponents were flexible regarding the deadlines for the AB selection processes. However, they believed that Members should consider the urgency of the situation. They continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

10.3. The representative of the European Union said that his delegation wished to refer to the EU statements made on this issue at previous DSB meetings, starting in February 2017, as well as to its statements made at the General Council meetings, including at the 9 December 2019 General Council meeting. Since 11 December 2019, the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. This was in clear breach of the WTO Agreements. As the EU had stated repeatedly, Members had a shared responsibility to resolve this issue as soon as possible, and to fill the outstanding vacancies as required by Article 17.2 of the DSU. The EU thanked all Members that had co-sponsored the proposal to launch the AB selection processes. The EU invited all other Members to endorse this proposal.

10.4. The representative of the United Kingdom said that his country continued to support the proposal for the launch of the AB selection processes. The United Kingdom wished to refer to its statements made at previous DSB meetings under this Agenda item. The United Kingdom also supported the statement made by Mexico on behalf of all co-sponsors. The United Kingdom continued to be concerned that the WTO Membership had not been able to launch the AB selection processes. Members were currently seeing the increasingly frequent impairment of rights arising from this situation. This could not be in the interest of any Member or the system more broadly. The United Kingdom had listened carefully to the concerns raised and understood the many challenges in agreeing on a reform. However, the United Kingdom continued to view two tier dispute settlement with the support of all Members as a central pillar of the multilateral trading system. The United Kingdom called on all Members to engage in a solutions-based discussion on reform.

10.5. The representative of Brazil said that his country wished to thank Mexico for having presented the proposal contained in document WT/DSB/W/609/Rev.18 on behalf of its co-sponsors. Brazil wished to refer to its statements made at previous DSB meetings under this Agenda item. Brazil stood ready to engage with all Members and to discuss a multilateral, long-term solution to the current AB impasse.

10.6. 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 commence the AB selection processes. Since 11 December 2019, the Appellate Body was no longer available to review panel reports. The binding, two-stage, impartial dispute settlement system, which was the central element in providing security and predictability to the multilateral trading system, was a core priority for India. India stood ready to engage in a constructive dialogue with Members to reach a shared understanding of the concerns raised and to agree to pragmatic solutions in the interests of all Members.

10.7. The representative of Canada said that his country supported the statement made by Mexico, and that it shared the concerns expressed by other Members at the present meeting. Canada invited WTO Members that had not yet co-sponsored the proposal contained in document WT/DSB/W/609/Rev.18 to consider joining the 121 Members calling for the launch of the AB selection processes. The critical mass of WTO Members behind this proposal was a clear testimony to the importance that they all accorded to a fully functioning Appellate Body as an integral part of the dispute settlement system. The fact that the Appellate Body could not hear new appeals was of great concern. Canada reiterated that it was fully committed to discussions on matters related to the functioning of the Appellate Body. Canada's priority remained to find a long-lasting multilateral resolution to the impasse that covered all Members, including the United States. In the meantime, Canada and 23 other WTO Members had established the Multi-Party Interim Appeal-Arbitration Arrangement (MPIA) as a contingency measure to safeguard their rights to binding two-stage dispute settlement in disputes amongst themselves.

10.8. The representative of South Africa said that her country thanked Mexico for the statement made on behalf of 121 Members, which South Africa supported. South Africa called for the need to resolve the current impasse and find a permanent solution to the appointment of the members of the Appellate Body. A functional dispute settlement system was a cornerstone of the multilateral trading system and was essential to the functioning of the WTO. South Africa wished to recall its statements made at previous DSB meetings under this Agenda item. South Africa reiterated that the biggest risk related to a dysfunctional Appellate Body was borne by smaller WTO Members who were likely to be subjected to unilateralism and power dynamics. Without the Appellate Body, the WTO dispute settlement system would lose much-needed predictability and this in turn had serious consequences for future rulemaking in the WTO. Therefore, a multilateral solution was urgent and had to address the concerns of all Members, including the African Group's concern about accessibility of the dispute settlement system. Therefore, South Africa called on all Members to ensure that they discharged their collective duty to select and appoint Appellate Body members as soon as possible.

10.9. The representative of Norway said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Norway would continue to urge the United States to show responsibility, and to participate in the Members' shared obligation under Article 17.2 of the DSU to fill vacancies in the Appellate Body as they arose. Until this happened, Members had to keep the item on the Agenda of DSB meetings and to call for meaningful discussion on this matter. Norway wished to thank Mexico for its continued determination in the coordination of the proposal contained in document WT/DSB/W/609/Rev.18.

10.10. The representative of Switzerland said that her country wished to refer to its statements made at previous DSB meetings on this matter. As time passed, Members' commitment to resolving the current impasse must be maintained. Switzerland urged all Members to engage constructively in order to find concrete solutions. Switzerland continued to be committed to working with all Members towards that goal. Switzerland's priority remained that the appellate stage could fully function again, to the benefit of the entire Membership.

10.11. The representative of Nigeria, speaking on behalf of the African Group, said that they wished to thank Mexico for its statement on the proposal for appellate body appointments. The African Group also wished to refer to their statements made at previous DSB meetings under this Agenda item. The African Group expressed regret that up to now the DSB had failed in the performance of its function under Article 17.2 of the DSU which clearly stated that: "[v]acancies shall be filled as they arise". Nigeria recognized the fact that the WTO dispute settlement system was a central element in providing security and predictability of the multilateral trading system. Therefore, Nigeria wished to underscore the importance for Members of tasking themselves with guaranteeing and preserving the effective functioning of the Appellate Body, as it was the fundamental pillar of the WTO and the multilateral trading system. All Members recognized its importance. This was evidenced by the undertaking under the DSU. The extensive number of Members that had submitted the joint proposal contained in document WT/DSB/W/609/Rev.18 reflected a common concern with the current situation of the Appellate Body impasse that was seriously affecting its functioning and that of the overall dispute settlement system against the best interests of WTO Members. Members had the responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the duty of Members to launch the AB selection processes without further delay, as set out in the joint proposal which sought to: (i) start the six selection processes; (ii) establish a selection committee; (iii) set a deadline of 30 days for the submission of candidates; and (iv) request that the selection committee issue its recommendation within 60 days after the deadline for nomination of candidates. At this point, there was a need for all Members to consider the urgency of this situation in the interest of the multilateral trading system and the dispute settlement system because the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. The African Group wished to thank all Members that had co-sponsored this proposal to launch the AB selection processes and encouraged all other Members to endorse this proposal.

10.12. The representative of Thailand said that as a co-sponsor, her country supported the statement made by Mexico on behalf of 121 co- sponsors to fill the vacancies in the Appellate Body. Thailand, like other Members, had strongly advocated for a solution to the Appellate Body impasse from the beginning of the crisis. Thailand remained committed to the two-tier system of WTO dispute settlement provided for in the DSU, which was necessary to provide security and predictability to the multilateral trading system. Due to the current impasse, a system without the possibility of review by the Appellate Body affected the ability of Members to secure a positive solution to their

disputes. As one of the Members with pending appeals, Thailand's rights had been impaired as a result of the Appellate Body impasse. Thailand's priority remained to restore a fully functioning dispute settlement system in order to preserve the rights and obligations of WTO Members. Thailand strongly urged all Members to engage in discussions and to identify a long-term solution to this problem.

10.13. The representative of Singapore said that his country wished to thank Mexico for its statement. Singapore wished to refer to its statements made at previous DSB meetings on this matter. Singapore reiterated its strong systemic interest in the maintenance of the two-tier binding WTO dispute settlement mechanism that was underpinned by negative consensus. The unblocking of the AB selection processes had to remain of paramount priority for all Members. Singapore urged all Members, including the United States, to constructively engage in finding a lasting multilateral solution.

10.14. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Japan supported the proposal contained in document WT/DSB/W/609/Rev.18. Japan fully shared the sense of urgency expressed by other Members regarding the need for an expeditious reform of the WTO dispute settlement system. Beyond the current impasse, taking its own experience into consideration, Japan considered it a top priority to reform the WTO dispute settlement system in a manner that would serve to achieve a long-lasting solution to the Appellate Body impasse. As Japan had pointed out many times under this Agenda item and as Members had discussed under Agenda item 8 of the present meeting, Members, as owners of the system, needed to be creative when facing a standstill. To that end, Japan would spare no effort in collaborating with other WTO Members.

10.15. The representative of Korea said that his country supported the statement made by Mexico based on the joint proposal contained in document WT/DSB/W/609/Rev.18. Korea urged all Members to engage constructively in the relevant discussions to resolve this important issue as soon as possible.

10.16. The representative of New Zealand reiterated his country's support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.18 and wished to refer to his country's statements made at previous DSB meetings on this matter. New Zealand continued to urge all Members to engage, constructively, on the issues with a view to urgently addressing this serious situation.

10.17. The representative of China said that his country supported the statement made by Mexico on behalf of 121 Members. China wished to refer to its statements made at previous DSB meetings under this Agenda item, and to reiterate its firm support for the restoration of the Appellate Body. Filling the vacancies in the Appellate Body was a legal obligation that should be borne by the entire Membership. Nothing could serve as an excuse. The fact that the negotiating and monitoring pillars of the WTO needed to be reinforced was not an excuse to dismantle the Appellate Body and cripple the dispute settlement system. The cure could not be more harmful than the problem. While the Appellate Body continued to be paralyzed, the violation of current trade rules could easily escape from sanctions. The lack of multilateral enforcement would eventually impact the interest of Members for negotiating new rules. In this regard, without a strong dispute settlement system, the negotiating and monitoring pillars could not genuinely be reinforced. Moreover, the fact that disputes continued to flow into the WTO dispute settlement system and that various means had been adopted to cope with the Appellate Body's paralysis did not mean that the WTO dispute settlement functioned as usual. The system's continued popularity was premised on an expectation that the Appellate Body would be restored soon. Different damage control measures, such as non-appeal agreements, were meant to minimize the legal uncertainties, but could not replace the Appellate Body. These interim measures were not without cost and did not work for all Members. If Members let the status quo to become the new normal, a collapse of the entire system would be unavoidable. The security and predictability of the multilateral trading system that Members had enjoyed for decades would be gone forever. In light of this, maintaining a two-tier, independent and binding dispute settlement system should remain the priority of the entire Membership. China called on every Member, including the United States, to constructively participate in solutions-based consultations with a view to restoring the Appellate Body in the near future. China stood ready to further engage with other stakeholders on this urgent matter.

10.18. The representative of Hong Kong, China said that his delegation supported the statement made by Mexico and wished to refer to its statements made at previous DSB meetings on this matter.

10.19. The representative of the United States said that as the United States had explained in 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. Instead, Members should consider how to achieve meaningful reform of the dispute settlement system. The US view across multiple US Administrations had been clear and consistent: when the Appellate Body overreached and itself broke WTO rules, it undermined the rules-based trading system. The Appellate Body's abuse of the limited authority given by Members damaged the interests of all WTO Members who cared about a WTO in which the agreements were respected as they had been negotiated and agreed. Earlier in 2020, the Office of the US Trade Representative had published a Report on the Appellate Body of the World Trade Organization, detailing how the Appellate Body had failed to apply WTO rules as agreed by WTO Members, imposing new obligations and violating Members' rights.[5] The United States encouraged Members to review the Report. As the United States had explained repeatedly, the fundamental problem was that the Appellate Body had not respected the current, clear language of the DSU. Members could not find meaningful solutions to this problem without understanding how they had arrived at this point. Without an accurate diagnosis, Members could not assess the likely effectiveness of any potential solution. The United States had actively sought engagement from Members on these issues. Yet, some Members had remained unwilling to admit there was even a problem, much less engage in a deeper discussion of the Appellate Body's failures. And rather than seeking to understand why the Appellate Body had departed from what Members had agreed, these Members and others had redirected the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body.[6] Nevertheless, the United States was determined to bring about real WTO reform. Members had to ensure that the WTO dispute settlement system reinforced the WTO's critical negotiating and monitoring functions, and did not undermine those functions by overreaching and gap-filling. As discussions among Members continued, the dispute settlement system continued to function. The central objective of that system remained unchanged: to assist the parties to find a solution to their dispute. As before, Members had many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third-party adjudication. And, as discussed under Agenda item 6, the United States was open to further discussions with Canada with respect to the panel report in the dispute "United States – Countervailing Measures on Softwood Lumber from Canada" (DS533). Parties should make efforts to find a positive solution to their dispute, consistent with the aim of the WTO dispute settlement system. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system. The United States would continue its efforts and its discussions with Members and with the Chair to seek a solution to these important issues.

10.20. The representative of Indonesia said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. The current crisis surrounding the appointment of Appellate Body members had resulted in the inability of the WTO dispute settlement system to provide a two–tier resolution of disputes among Members. In this regard, WTO Members should acknowledge that adverse impacts on the positive solution of disputes had occurred. Cases had been appealed into the void and the current crisis had led to a backlog of cases. Some Members might expect that MC–12 would serve as a milestone to reactivate the Appellate Body. However, considering the uncertainty due to the pandemic and the growing adverse impacts of the current crisis on this Organization, Indonesia believed that Members should not delay the resolution of this crisis and should commit to reaching a solution as soon as possible. Indonesia, once again, urged all Members to provide their meaningful attention, willingness, and commitment to resolve this issue.

10.21. The representative of Mexico, speaking on behalf of the 121 co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, expressed regret that for the thirty-sixth occasion, Members had still not been able to launch the AB selection processes and had thus continuously failed to fulfil their duty as Members of this Organization. The fact that a Member might have

[5] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.

[6] See US Statement at the June 29, 2020, Meeting of the Dispute Settlement Body (Item 13), available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun29.DSB_.Stmt_.as-deliv.fin_.public13218.pdf.

concerns about certain aspects of the functioning of the Appellate Body should not serve as a pretext to impair and disrupt its work as well as the work of the dispute settlement system in general. There was no legal justification for the current blockage 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 had to comply with their obligation under the DSU to fill the AB vacancies. Mexico noted with deep concern that due to the continued failure to act at the present meeting, the Appellate Body would continue to be unable to perform its functions, against the best interest of all Members.

10.22. The representative of Mexico said that her country wished to refer to its statements made at previous DSB meetings under this Agenda item. Mexico expressed regret that there still was no consensus to launch the AB selection processes that would allow Members to fulfil their obligation under Article 17.2 of the DSU and, thus, to rely on a fully functioning dispute settlement system. As Mexico had noted at the most recent DSB meetings, all ongoing disputes were being affected. This undermined the right to appellate review for all Members. Mexico called on those Members that had not yet done so to support this proposal. Mexico reiterated its willingness to engage in discussions with a view to achieving consensus and finding a solution to overcome this impasse.

10.23. The Chairman thanked delegations for their statements. He said that in the past, the DSB would take note of the statements expressing the respective positions, which would be reflected in the minutes of this meeting. He said that this matter required a political engagement on the part of all WTO Members.

10.24. The DSB took note of the statements.