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Dispute Settlement Body
28 August 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 28 AUGUST 2020

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

Prior to the adoption of the Agenda[1]

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[1] See pages 2 and 3.

Prior to the adoption of the Agenda: (i) the Chairman welcomed the delegations participating physically as well as those delegations who were listening–in remotely. He recalled that, as had been done at the 29 June and 29 July 2020 DSB meetings, he would not be offering the floor to delegations participating remotely; (ii) the item concerning the adoption of the Panel Report in the dispute on: "European Union – Cost Adjustment Methodologies and Certain Anti–Dumping Measures on Imports from Russia (Second Complaint)" (DS494) was removed from the proposed Agenda following the European Union's decision to appeal the Panel Report; (iii) the representative of India said that India wished to make a statement regarding panel composition in the disputes: "India – Tariffs on ICT Goods (EU)" (DS582) and "India – Tariffs on ICT Goods (Chinese Taipei)" (DS588) under "Other Business". He said that prior to the present meeting, India had provided an advance notice of its intention of raising this item under "Other Business" to the Chairman and the Secretariat, as well as to the European Union and Chinese Taipei, the Members directly concerned, for the purposes of Rule 6 of the Rules of Procedure for GC/DSB Meetings. India could not have placed this matter on the Agenda of the present meeting under Rule 3 of the Rules of Procedure for GC/DSB Meetings because developments regarding these disputes had taken place after the circulation of the Agenda of the present meeting. This was a matter of urgency for India, and it was India's only opportunity to inform the Membership of such developments at this stage. India further wished to note that this matter was not intended to lead to a substantive discussion. Rather, it was meant to register India's views and the DSB would take note of the statement for future discussions. Moreover, India was not seeking a decision on this matter but only wished to have the right to present its views on this matter; and (iv) the representative of the Russian Federation said that following the European Union's decision to appeal of the Panel Report in the dispute: " EU – Cost Adjustment Methodologies II (Russia)" (DS494), her country wished to make a statement regarding its general concern raised by the EU's appeal. Russia could not have requested that this item be placed on the Agenda of the present meeting because it had only been made aware of the EU's decision to appeal the Panel

Report this very morning. She said that Russia's statement would not be substantive and that the objective would be to present Russia's concerns regarding future appeals and the current state of the Appellate Body. The representative of the European Union said that the EU understood that Russia wished to make a statement under "Other Business" and not under the Agenda item which had just been removed. The representative of Russia confirmed that her country intended to make a statement under "Other Business".

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

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti–dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.207)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.182)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.145)

D. United States – Anti–dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.29)

E. United States – Certain methodologies and their application to anti–dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.21)

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.16 – WT/DS478/22/Add.16)

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

A. United States – Anti–dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.207)

1.2. The Chairman drew attention to document WT/DS184/15/Add.207, 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 August 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 recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country 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.182)

1.6. The Chairman drew attention to document WT/DS160/24/Add.182, 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 August 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 more than two decades after the DSB had adopted recommendations and rulings in this dispute, the United States had yet to achieve full compliance in this dispute. The 183 US status reports provided thus far were not different from one another and none of them indicated any progress on implementation. Since this dispute remained unresolved, China believed that the United States continued to fail to accord the minimum standard of protection required by the TRIPS Agreement. As a result, the United States had become the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement. Article 21.1 of the DSU required Members to promptly bring its WTO-inconsistent measures into conformity so as to ensure effective resolution of disputes. Therefore, China urged the United States to faithfully implement 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.145)

1.11. The Chairman drew attention to document WT/DS291/37/Add.145, 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 his delegation 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. At previous DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover that "opt-out Directive". At the 29 July 2020 DSB meeting, the United States had claimed that 13 applications were awaiting risk management decisions. This figure needed to be put into perspective. With regard to three of these applications, the EFSA had recently published opinions which were not fully conclusive. At the moment, no full scope authorization could be granted regarding these three

applications. Finally, nine applications that had received a positive opinion from the EFSA were undergoing internal procedures and would be presented for a vote as soon as these procedures were finalized. The next Standing Committee on genetically modified food and feed would take place on 15 September 2020. 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 appreciated the EU's update during the 29 July 2020 DSB meeting that the EU had scheduled its next Standing Committee on genetically modified food and feed for 15 September 2020. The United States requested that the Standing Committee move forward with this meeting without delay, as the past four meetings had been canceled (which had originally been scheduled for 6 March, 20 April, 12 June, and 10 July). The United States certainly understood the impact that COVID-19 restrictions had on daily operations. However, the United States continued to see persistent delays that affected dozens 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 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 29 July 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 had adopted findings that, even where the EU had approved a 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 EU member States subject to panel findings – Austria and Italy. There were seven additional EU member States that 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 eight EU member States that did not previously ban cultivation of MON-810 but had since opted out of cultivation under the EU's legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, 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 EU member States did not restrict marketing or free movement of MON-810 in the EU. As the United States had noted at the 29 July 2020 DSB meeting, this answer did nothing to address US concerns.

1.14. The United States also disagreed with the EU's response during the 29 July 2020 DSB meeting that opt-out procedures taken by EU 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 29 July 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 intended to schedule for Fall 2020.

1.15. 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. 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.

1.16. 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.29)

1.17. The Chairman drew attention to document WT/DS464/17/Add.29, 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.

1.18. The representative of the United States said that the United States had provided a status report in this dispute on 17 August 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 recommendations of the DSB relating to other measures challenged in this dispute.

1.19. 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.

1.20. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" (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.

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

E. United States – Certain methodologies and their application to anti–dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.21)

1.22. The Chairman drew attention to document WT/DS471/17/Add.21, 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.

1.23. The representative of the United States said that the United States had provided a status report in this dispute on 17 August 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 recommendations of the DSB.

1.24. The representative of China said that on 22 May 2017, the DSB had adopted the Appellate Body report and the Panel report, as modified by the Appellate Body, in this dispute, which had found that certain measures taken by the United States were inconsistent with the requirements of 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. On 19 June 2017, the United States had stated its intention to implement the DSB's recommendations and rulings in this dispute. 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. Since the United States had failed to implement the DSB's recommendations and rulings in this dispute, China had requested 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 number, which was the third largest retaliation amount in WTO history, revealed the severity of the WTO-inconsistent measures adopted by the United States. Regrettably, more than two years after the expiry of the reasonable period of time, the United States continued to fail to implement the recommendations and rulings of the DSB in this dispute. None of its 22 status reports provided thus far indicated any implementation action. However, what China experienced in this dispute was not an exception. The record showed that US implementation, especially in trade remedy disputes, had long become a systemic problem for the entire Membership. The US unwillingness to comply with the DSB's recommendations and rulings had seriously undermined the authority and effectiveness of the dispute settlement system. This wrongful US approach undermined the credibility of this Organization and that, in turn, was harmful for the whole world, including the United States. Implementation was the cornerstone of the dispute settlement system which kept the rules-based, multilateral trading system afloat. Deliberately delaying implementation or ignoring this important obligation reduced the DSB's recommendations and rulings to nothing more than a piece of paper. 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 moral high ground 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". Therefore, China urged the United States to faithfully honour its implementation obligation and take concrete actions to achieve full compliance in this dispute.

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

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.16 – WT/DS478/22/Add.16)

1.26. The Chairman drew attention to document WT/DS477/21/Add.16 – WT/DS478/22/Add.16, 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.

1.27. The representative of Indonesia said that his country had provided a status report pursuant to Article 21.6 of the DSU. Indonesia wished to reiterate 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.

1.28. 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 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.

1.29. 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.

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

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

A. Statement by the European Union

2.1. The 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 latest 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, there was no obligation under the DSU for a Member to provide further status reports on the progress of its implementation once that Member announced that it *has implemented* the DSB recommendations. The widespread practice of Members – including the European Union as a responding party – confirmed this understanding of Article 21.6. Indeed, at recent DSB 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, 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 a 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 Agenda of the present meeting. The EU had not done so. Therefore, it was once again clear that the EU did not truly believe that there was a "clear obligation" under Article 21.6 to submit a status report after a party had claimed compliance.

2.5. The representative of the European Union said that his delegation maintained its statement that under Article 21.6 of the DSU, the issue of implementation shall remain on the DSB's Agenda 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.

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 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 appeared to be premised on two unfounded assertions, neither of which was based on the text of the DSU. First, the EU had erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". There was nothing in the DSU text to support that argument, and the EU provided no explanation for how it read

Article 21.6 of the DSU to contain this limitation. Second, the EU once again relied on its incorrect assertion that the EU's initiation of compliance panel proceedings meant that the DSB was somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations". Yet again, there was nothing in Article 2 of the DSU or elsewhere that limited the DSB's authority in this manner. The EU was not providing a status report because of its assertion that it had complied, demonstrating the EU's principles varied depending on its status as complaining or responding party. In sum, the US position on status reports had been consistent and clear: 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).

3.3. The representative of the European Union said that his delegation reiterated its position with respect to Article 21.6 as of the DSU expressed in detail at previous DSB meetings. At the present meeting, the EU wished to focus on its notification dated 21 August 2020 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. The EU had taken this extraordinary step in the context created by the second compliance panel and the arbitration panel, along with the US obstruction of appointments of new Appellate Body members, as a result of which the EU was trapped by the prospect of an essentially indefinite authorization of countermeasures, unilaterally maintained by the United States, coupled with a denial of any legal recourse to demonstrate compliance. The EU had decided to secure these additional and extraordinary measures with respect to the remaining two subsidies given the extremely unfavourable economic conditions created by the COVID-19 crisis, and with a view to achieving a situation in which there were no countermeasures on either side, so that both large civil aircraft producers and other affected or potentially affected economic operators were properly able to contribute to a global recovery. These additional and extraordinary measures went far beyond what was required in order to discharge the EU's compliance obligations required by Article 7.8 of the SCM Agreement. These additional and extraordinary measures consisted of: first, the amendment of the *French A350XWB* MSF loan agreement so as to align the terms of the financial instrument on a market benchmark prevailing at the time of the original measure, with prospective effect from the date of the amendment; and, second, the binding agreement to amend the *Spanish A350XWB* MSF loan agreement so as to align the terms of the financial instrument on a market benchmark prevailing at the time of the original measure, with prospective effect from the date of the amendment. The full details of the measures had been shared with the United States in line with the applicable highly sensitive business information (HSBI) rules. The European Union 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 interest of anyone that the European Union and the United States now proceeded to, or continued, 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 European Union reaffirmed its determination to obtaining a long-term resolution to the WTO aircraft disputes. A balanced negotiated settlement was the only way to avoid mutually imposed countermeasures.

3.4. 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 found that eight EU launch aid subsidies continued to cause adverse effects. The EU only asserted that it had amended two of these eight measures; it admittedly had made no changes to six WTO-inconsistent measures. And, 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 "US — Large Civil Aircraft (2nd complaint)" (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. The United States was committed to obtaining a long-term resolution to this dispute. The United States had recently showed great restraint in its review of WTO-authorized countermeasures for the EU's WTO-inconsistent launch aid subsidies. And the United States intended to begin a new process with the EU in an effort to reach 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.

3.5. The representative of the European Union said that his delegation 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 this 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 previously mentioned, 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 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.

3.6. The DSB took note of the statements.

4 EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

A. Request for the establishment of a panel by Turkey (WT/DS595/3)

4.1. The Chairman recalled that the DSB had considered this matter at the 29 July 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 Turkey contained in document WT/DS595/3 and invited the representative of Turkey to speak.

4.2. The representative of Turkey said that at the DSB meeting on 29 July 2020, his country had requested the DSB, for the first time, to establish a panel to examine the safeguard measures that the European Union had imposed on certain steel products. As stated at the 29 July 2020 DSB meeting, Turkey was deeply concerned by those safeguard measures which were manifestly inconsistent with several of the EU's obligations under Article XIX of the GATT and the Agreement on Safeguards. In particular, the European Union had failed to make reasoned and adequate determinations regarding the essential conditions and circumstances that were necessary to impose safeguard measures. Hence, Turkey had initiated WTO dispute settlement proceedings. However, as Turkey had previously stated, while consultations had taken place on 29 April 2020, they had failed to resolve this dispute. Given that the panel had not been established at the 29 July 2020 DSB meeting, Turkey, for the second time, requested the DSB, pursuant to Article 6 of the DSU, to establish a panel to examine this matter with standard terms of reference in accordance with Article 7.1 of the DSU.

4.3. The representative of European Union said that his delegation expressed regret that Turkey had decided to request the establishment of a panel on EU safeguard measures on steel. The EU respected the right of Turkey to bring this matter to WTO dispute settlement but firmly believed that its measures were fully justified. For these reasons, the EU hoped that it would prevail in this dispute, and that its actions would be declared in line with WTO law. The EU also stood ready to discuss with Turkey reciprocal interim arrangements that would preserve the availability of appellate review in this and other disputes on the basis of Article 25 of the DSU, through an arbitration agreement as set forth in the standard agreed default procedures in Annex 1 of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). The MPIA foresaw that participating Members would notify any such agreement to the panel within 60 days of its establishment. In this respect, the EU would gladly contact Turkey after the present meeting.

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

4.5. The representatives of Argentina, Brazil, Canada, China, India, Japan, Korea, Norway, Russia, Switzerland, Ukraine, the United Kingdom and the United States reserved their third-party rights to participate in the Panel's proceedings.

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 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. As the original respondent, China had been reluctant to take this unusual action. China was doing so in light of the US failure, under Article 21.5 of the DSU, to initiate compliance proceedings to review the implementation actions of China in this dispute. As documented in its most recent status report, and as set out in its request contained in document WT/DS511/19, China had fully implemented the DSB'S recommendations and rulings. From 2020 onward, 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. These newly amended measures ensured full compliance with the DSB'S recommendations and rulings in this dispute. China was confident that its position would be supported by the compliance panel. Article 21.5 of the DSU explicitly stated that: "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel".

5.3. In this dispute, China had fully implemented the recommendations and rulings of the DSB within the reasonable period of time, it had submitted status reports in accordance with Article 21.6 of the DSU and had provided additional implementation details through bilateral channels upon US request. However, the United States continued to fail to specify on what basis China's implementation fell short of full compliance. Even if the United States disagreed with China's implementation, it was required to resolve the matter through proceedings under Article 21.5 of the DSU. China expressed regret that the United States had chosen to directly pursue retaliation without first resorting to compliance proceedings. The United States had even refused to engage with China on reaching a sequencing arrangement, which was a customary practice in dispute settlement and a "logical way forward" to resolve the matter. China was very concerned about the systemic implication of the US approach which would open the door to abusing the dispute settlement system. In light of the US failure to engage, China had to take this unusual step. Compliance proceedings would enable a proper review of compliance through a transparent multilateral dispute settlement mechanism. By filing this compliance panel request, China sought to protect its rights under the covered agreements and find a positive resolution of this dispute. China wished to state clearly that the burden of proof could not be shifted. It remained for the United States to establish the WTO-inconsistency of China's compliance measures. China strongly believed that the compliance panel would confirm China's full compliance. Moreover, to harmonize the different ongoing proceedings in this dispute, the Arbitrator under Article 22.6 of the DSU should suspend its work pending resolution of the proceedings under Article 21.5 of the DSU. Prompt findings under Article 21.5 of the DSU would, therefore, assist the parties in securing a positive solution to the dispute.

5.4. Last but not least, since China made tremendous efforts to comply with WTO rulings, China also had a reasonable and legitimate expectation that other WTO Members would also do so with the same goodwill and sincerity. However, the Agenda of the present meeting clearly revealed the poor compliance record of the United States. In the "US – Anti-Dumping Methodologies (China)" dispute (DS471) and also in many other disputes, the United States had deliberately delayed or ignored its implementation obligations long after the expiry of the respective reasonable periods of time. Article 21.1 of the DSU set out a single standard of implementation. Each WTO Member should apply it to its offensive and defensive cases in the same manner. In this regard, China wished to emphasize that the rules-based multilateral trading system had to be preserved through good faith implementation efforts and a proper compliance record from all Members. Clearly, the United States was an important participant in the WTO dispute settlement mechanism. In addition to requesting Appellate Body reform and asking other Members to implement dispute settlement rulings, it seemed also very important that the United States review and improve its own manner and record of implementing dispute settlement rulings. The United States was not an exception.

5.5. The representative of the United States said that as the United States had previously stated, the United States was not in a position to agree with China that it had come into compliance with the DSB's recommendations in this dispute. The United States recalled 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 these rulings in April 2019. 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 currently 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. As such, the United States could not at this time confirm China's assertion of compliance. 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 proceeding.

5.6. The United States understood that China did not seek further litigation but was requesting a panel to preserve its rights as well. Contrary to the position taken by China, nothing in the DSU supported the view that an arbitration proceeding under Article 22.6 of the DSU had to be suspended while corresponding proceedings under Article 21.5 of the DSU were ongoing. Members had at times agreed through *voluntary* agreements on the sequencing of proceedings or otherwise to conduct proceedings in such an order, but as Members were well aware, this was not required under the DSU. In some disputes, an agreement provided for the completion of a compliance proceeding under Article 21.5 of the DSU before a Member could request authorization to suspend concessions or other obligations. In others, the parties agreed that, once a Member requested authorization pursuant to Article 22.2 of the DSU and the responding Member objected, the arbitration could be suspended to permit proceedings under Article 21.5 of the DSU to occur. Where no sequencing agreement had been reached between the parties, as was the case in this dispute, a complaining Member had to request authorization to suspend concessions or other obligations within the time-frame specified in Article 22.6 of the DSU or risk prejudicing its rights to do so at a later date. Accordingly, in this proceeding, the United States had done so in a timely manner. The United States stood ready to work constructively with China to reach a resolution to this dispute. For these reasons, the United States was not in a position to agree to the establishment of a compliance panel.

5.7. The DSB took note of the statements and agreed to revert to this matter, should a requesting Member wish to do so.

6 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

6.1. 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) following the 29 June 2020 DSB meeting. 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, the Chairman 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 in the interim 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 and he intend to continue to consult on 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.

6.2. The DSB took note of the statement.

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

6.4. The representative of the Philippines said that his country sincerely appreciated the Chairman's report and his ongoing efforts. His country thanked the Chairman and the DSB Secretariat for the nine questions sent to the Philippines on 3 August 2020. The Philippines would be submitting its responses to the nine questions on 28 August 2020 and trusted that they would be helpful to the Chairman and the DSB in better understanding the parties' respective positions on the issues before them. The Philippines remained open, ready and willing to constructively engage with Thailand in resolving their long-standing dispute. In the spirit of cooperation, and on the Chairman's suggestion, the Philippines had proposed, in its 9 March 2020 letter, that the parties commence discussions towards a constructive solution in order to complete Thailand's appeals which had been suspended as a result of the non-functioning of the Appellate Body. Further to its willingness and openness to cooperate, the Philippines also had provided the Chairman and the DSB, in its 24 July 2020 communication, a non-exhaustive list of various constructive alternative legal options that had been resorted to in the past that might allow for the resolution of Thailand's appeals. The Philippines' openness was without prejudice to its consistent position that the Philippines was fully within its rights to seek recourse under Article 22.2 of the DSU. As the Philippines had previously stated, the provisions of Article 22.6 of the DSU were clear: the 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 decided by consensus to reject the request; and if the Member concerned objected to the proposed level of suspension of concessions, 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. At the present meeting, the Philippines asked, once again, that the DSB grant the Philippines the authority it sought.

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

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

6.7. The representative of Thailand wished to thank the Chairman, once again, for his efforts and active engagement in assisting Thailand and the Philippines to find a way forward in this dispute. The consultations the Chairman had initiated with the parties were facilitating a constructive dialogue and were permitting a clarification of the parties' respective positions. Thailand remained committed to engaging in the ongoing dialogue conducted under the Chairman's leadership. For purposes of the present meeting, Thailand wished to refer to its statements made at the DSB meetings of 5 March 2020, 29 June 2020 and 29 July 2020 during which Thailand had set out its views on the status of this dispute. Thailand did not wish to repeat in detail its prior statements on this matter. However, Thailand considered it important to briefly recall the circumstances surrounding the Philippines' request for suspension of concessions and the reasons why the Philippines was legally prevented from making such a request. As Members knew, the appeals filed by Thailand in the two compliance proceedings under Article 21.5 of the DSU had not yet been completed due to the Appellate Body impasse. As these appeals regarding proceedings under Article 21.5 of the DSU were ongoing, the Philippines' retaliation request was without legal basis at this stage of the dispute. There was no possible reading of either the sequencing agreement between the parties or Article 22.6 of the DSU that would allow the Philippines to request retaliation prior to the completion of the ongoing appeals regarding proceedings under Article 21.5 of the DSU. The Philippines would be permitted to request retaliation only if the Appellate Body were to find that Thailand had failed to comply with the DSB's rulings and recommendations in the original dispute. Only then would the Philippines be in a position to request the authorization from the DSB to retaliate in accordance with Article 22.6 of the DSU. Despite the clear absence of any legal justification for the Philippines' retaliation request at this time, Thailand had accepted to engage in the ongoing consultations organized by the Chairman with the aim of finding a way forward in light of the present circumstances. As Thailand had previously stated, these consultations had been productive, and Thailand remained committed to this exercise.

6.8. Thailand also wished to take this opportunity to comment briefly on the list of alternative arrangements suggested by the Philippines that had been circulated to WTO Members on 3 August 2020.[2] The Philippines noted that this constituted "a non-exhaustive list of various

[2] *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371), Communication from the Philippines, 3 August 2020, WT/DS371/40.

alternative arrangements that WTO Members have utilized in the past".[3] Thailand thanked the Philippines for this list, but noted that none of these arrangements had been used in disputes in which there were appeals already pending before the Appellate Body. Thus, the Philippines' list described agreements to resolve appeals under Article 25 of the DSU either for future potential disputes (items 5 and 6 of the Philippines' list) or for existing disputes where the panel report had *not* yet been issued and thus no appeal had been filed (items 9 and 11 of the Philippines' list). Other arrangements consisted of "non-appeal understandings" (items 4 and 8 of the Philippines' list), which obviously did not apply to the present dispute because Thailand had already filed appeals. Therefore, while the Philippines' list was informative, it did not resolve the issue now facing the parties of how to ensure that this dispute was resolved using multilaterally agreed rules for dispute settlement. In these circumstances, Thailand called on all WTO Members to focus on resolving the Appellate Body crisis which, as all Members knew, was the root cause of the discussions under this Agenda item. Thailand looked forward to continuing the multilateral efforts to unblock the Appellate Body impasse, as Members would discuss under Agenda item 9 of the present meeting. Thailand also looked forward to reviving the informal "Walker process" on AB matters, an exercise in which Thailand had been an active participant from the beginning. Thailand wished to thank 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 Chairman of the DSB in this dispute.

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

6.10. The representative of Japan said that a so-called "sequencing agreement" was an agreement between the parties and could not modify the provisions of the DSU. Neither could it add to or diminish the authority of the DSB. Japan considered that it was not the role of the DSB to decide on the meaning of a sequencing agreement and whether a request for authorization to suspend concessions or other obligations was made properly under such an agreement.

6.11. The representative of European Union said that in these extraordinary circumstances due to the paralysis of the Appellate Body, the EU 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 appeals for completion under an appeal arbitration procedure pursuant to Article 25 of the DSU, such as the MPIA. An appeal arbitration procedure like the MPIA 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. In response to certain views expressed in other statements made at the present meeting, the EU wished to register on the record its disagreement with the assumption that a sequencing agreement concluded between two disputing parties precluded the complaining party from requesting the suspension of concessions. The EU wished to refer to its statements made at previous DSB meetings on this matter.

6.12. The DSB took note of the statements.

6.13. 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.

6.14. The DSB took note of the statement.

7 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/667)

7.1. The Chairman drew attention to document WT/DSB/W/667 which contained an additional name proposed by Montenegro 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 name contained in document WT/DSB/W/667.

7.2. The DSB so agreed.

[3] Ibid, para. 2.

8 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)

8.1. 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.

8.2. 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 that 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.

8.3. 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 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.

8.4. The representative of the United States said that as the United States had explained at prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. Instead, Members should consider how to achieve a 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 that Members had given it 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.[4] 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 that 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.[5]

8.5. 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. As noted at prior meetings of the DSB, Members were experimenting and deciding what made the most sense for their own disputes. For instance, in "Indonesia – Safeguard on Certain Iron or Steel Products" (DS490, DS496), Chinese Taipei, Indonesia and Vietnam had reached procedural understandings that included an agreement not to appeal any compliance panel report.[6] Similarly, in the dispute "United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea" (DS488), Korea and the United States had agreed not to appeal the report of any compliance panel.[7] Australia and Indonesia had agreed not to appeal the panel report in the dispute "Australia – Anti-Dumping Measures on A4 Copy Paper" (DS529).[8] 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 on these important issues.

8.6. The representative of Brazil said that his country wished to thank Mexico for explaining the joint proposal contained in document WT/DSB/W/609/Rev.18. Brazil wished to refer to its statements made at previous DSB meetings under this Agenda item. Two items that were on the

[4] US 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.

[5] See US Statement at the 29 June 2020 DSB meeting (item 13), available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun29.DSB_.Stmt_.as-deliv.fin_.public13218.pdf.

[6] "Understanding between Indonesia and Chinese Taipei regarding Procedures under Articles 21 and 22 of the DSU", (WT/DS490/3) (11 April 2019), para. 7 ("[t]he parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU") and "Understanding between Indonesia and Viet Nam regarding Procedures under Articles 21 and 22 of the DSU", WT/DS496/14 (22 March 2019), para. 7 ("[t]he parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU").

[7] "Understanding between the Republic of Korea and the United States regarding Procedures under Articles 21 and 22 of the DSU", (WT/DS488/16) (6 February 2020), para. 4 ("[f]ollowing circulation of the report of the Article 21.5 panel, either party may request adoption of the Article 21.5 panel report at a meeting of the DSB within 60 days of circulation of the report. Each party to the dispute agrees not to appeal the report of the Article 21.5 panel pursuant to Article 16.4 of the DSU").

[8] Minutes of the 27 January 2020 DSB meeting (WT/DSB/M/440), paras. 4.2 ("Indonesia also wished to thank Australia for working together with Indonesia in a spirit of cooperation in order to reach an agreement not to appeal the Panel Report" and 4.3 ("Australia and Indonesia had agreed not to appeal the Panel Report and to engage in good faith negotiations of a reasonable period of time for Australia to bring its measures into conformity with the DSB's recommendations and rulings, in accordance with Article 21.3(b) of the DSU").

Agenda of the present meeting provided a vivid illustration, if any were needed, that this impasse was seriously impacting Members' ability to have their disputes resolved as was their right under the DSU. This problem could affect a growing number of disputes going forward. Brazil stood ready, as it had always been, to engage with all Members in frank, meaningful discussions aimed at reaching a lasting multilateral solution to the AB impasse.

8.7. 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 complete impairments of rights arising from that situation. While it did not underestimate the challenge of reaching necessary reforms, the United Kingdom continued to view a two-stage dispute settlement system with the support of all Members as an essential pillar of the multilateral trading system. The United Kingdom had listened carefully to the concerns raised and proposals advanced and continued to call on all Members to engage in a solutions-based discussion on reform.

8.8. 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 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 22 other WTO Members had established the Multi-Party Interim Appeal-Arbitration Arrangement (MPIA) as a contingency measure to safeguard our rights to binding two-stage dispute settlement in disputes amongst themselves. The MPIA was open to all WTO Members. Canada invited all WTO Members to consider joining the MPIA to safeguard their dispute settlement rights to the greatest extent possible until they collectively found a permanent solution to the Appellate Body impasse. Canada remained available to discuss the MPIA with any interested Member.

8.9. 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 to refer to its 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.

8.10. The representative of Norway said that his country wished to be associated with the statement made by Mexico under this Agenda item. At this point, Members were experiencing the damaging consequences of blocking Appellate Body appointments at every DSB meeting. Norway, once again, urged the United States to do the right thing, i.e., to unblock the AB selection processes, and to thereby uphold the rule of law and the integrity of the international trading system. Until this happened, Norway encouraged all Members to join the newly established Multi-Party Interim Appeal Arrangement (MPIA).

8.11. The representative of Nigeria, speaking on behalf of the African Group, said that the Group supported the statement made by Mexico under this Agenda item. The African Group wished to refer to its statements made at previous DSB meetings on this matter.

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

8.13. 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 the paramount priority for all Members. Singapore urged all Members, including the United States, to constructively engage in finding a lasting multilateral solution.

8.14. The representative of Thailand said that as a co-sponsor, his country supported Mexico's proposal to fill the AB vacancies. Thailand believed that the two-tier binding WTO dispute settlement system was a central element in providing security and predictability to the multilateral trading system. The current Appellate Body impasse 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. Restoring a fully functioning dispute settlement system was a priority for preserving the rights and obligations of WTO Members. Thailand strongly urged all Members to identify a long-term solution to this problem.

8.15. The representative of Hong Kong, China said this his delegation supported the statement made by Mexico on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.18. Hong Kong, China reiterated its concerns with the lack of progress in resolving the Appellate Body impasse. The AB selection processes should commence without any delay. Hong Kong, China urged Members to continue with their efforts and constructive engagement until a solution was found.

8.16. The representative of Qatar said this delegation wished to refer to its statements made at previous DSB meetings on this matter. Qatar supported the statement made by Mexico on behalf of 121 Members. Qatar expressed regret that, to date, the DSB had failed to initiate the AB selection processes. Qatar recalled that Members had a shared obligation to promptly fill the vacancies in the Appellate Body as required by Article 17.2 of the DSU. The clear text of that provision indicated that such responsibility had to be fulfilled unconditionally. To avoid unintended consequences, Qatar called on all Members to act in a cooperative manner in order to break the impasse in the AB selection processes without further delay. Qatar also wished to emphasize that discussions on improving the DSU should not be a reason to delay the AB appointments. Qatar was ready to work on a solution with all Members while preserving the essential features of the system and of the Appellate Body.

8.17. The representative of Switzerland said that his country wished to refer to its statements made at previous DSB meetings on this matter. As time passed, Members' resolve to solve the current impasse should not falter. Switzerland urged all Members to engage constructively in order to find concrete solutions. Switzerland was committed to working with all Members towards that goal. Switzerland's priority remained that the two-tier binding dispute settlement system could fully function again to the benefit of the entire Membership.

8.18. 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 of other WTO Members regarding the need for expeditious WTO reform. However, beyond the current impasse, Japan's priority remained to reform the WTO dispute settlement system in a manner that would serve to achieve a long-lasting solution to the Appellate Body impasse.

8.19. 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 Appellate Body should be deemed as alarming for this Organization, bearing in mind the centrality of WTO dispute settlement system for the resolution of disputes among WTO Members. The unavailability of the Appellate Body to carry out appellate review had also clearly adversely impacted the dispute settlement system's ability to provide predictability to the rules–based multilateral trading system. Indonesia believed that finding a solution to this issue should be the utmost priority of all Members. Therefore, Indonesia, once again, urged all Members to afford serious attention, willingness and commitment to resolving this important issue.

8.20. The representative of China said that his country wished to echo the statement made by Mexico on behalf of the 121 co-sponsors of the important proposal contained in document WT/DSB/W/609/Rev.18. The urgency and necessity of restoring the Appellate Body could not be overstated. China wished to refer to its statements made at previous DSB meetings on this important matter. China also wished to reiterate its firm support for a two-tier, independent and effective dispute settlement system. With regard to WTO reform, Members did not disagree on the need to

reinforce the WTO's critical negotiating and monitoring functions. However, dismantling the Appellate Body and crippling the current dispute settlement system were not an effective prescription. China asked why Members should negotiate new rules if the current trade rules could not be enforced. China also asked how the negotiating and monitoring functions could be genuinely reinforced if the dispute settlement system was no longer capable to deal with WTO-inconsistent measures. China noted that the United States had stated, at the present meeting and also at the 29 July 2020 DSB meeting, that the WTO dispute settlement system continued to function while the paralysis of the Appellate Body persisted. Unfortunately, this statement ran counter to reality. The paralysis of the Appellate Body had pushed the dispute settlement system to the brink of collapse. The risk of appeals into the void had exposed every disputing party to a high level of uncertainty. Various means, such as non-appeal agreements, were merely damage control measures aimed at minimizing the uncertainty to some extent. However, such damage control measures were not without cost and might not work for all Members. For example, a right of appeal had to be involuntarily forfeited in order to reach a non-appeal agreement. Without meaningful second-tier review, a one-off *ad hoc* panel would make it far more difficult to maintain the quality of adjudications. The fragmentation of rule interpretation seemed inevitable over time. As a result, the dispute settlement system would ultimately fail to provide security and predictability to the multilateral trading system under Article 3.2 of the DSU. The current bitter experience with investor-state dispute settlement in the investment law regime had clearly demonstrated that going down this path was a non-starter. In this regard, maintaining a two-tier, independent and binding dispute settlement system should remain the priority of the entire Membership. Members had to find a lasting solution to the Appellate Body crisis. The informal "Walker process" on AB matters had unique value and should be continued. Also, 23 WTO Members, including China, had recently established a Multi-Party Appeal Arbitration Arrangement (MPIA) under Article 25 of the DSU. The MPIA sought to preserve the appellate rights of participating Members and to facilitate the positive resolution of disputes among them. With the successful composition of the pool of arbitrators, the MPIA was now ready to start. China encouraged more Members to join the MPIA and stood ready to constructively engage with other Members on Appellate Body reform.

8.21. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this issue. Since 11 December 2019, the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. This had resulted in a clear breach of the WTO Agreements. India, therefore, requested that all WTO Members resolve this matter and work on filling the outstanding vacancies as set out in Article 17.2 of the DSU.

8.22. The representative of Turkey said that his country wished to thank Mexico for placing this item on the Agenda of the present meeting. As a cosponsor of the proposal contained in document WT/DSB/W/609/Rev.18, Turkey wished to reiterate its support for preserving the two-tier character and the binding nature of the dispute settlement system. Turkey did not see an alternative to a well-functioning Appellate Body. In this respect, Turkey wished to refer to its statements made at previous DSB meetings on this matter. Turkey recalled the urgent need to start the AB selection processes in accordance with Article 17.2 of the DSU. Turkey believed that as this impasse persisted, the predictability of the multilateral trading system would gradually diminish. Members had already seen certain ramifications of this impasse. Turkey was ready to work constructively with all Members to break the current impasse and to engage in discussions with the Membership to commence the AB selection processes.

8.23. The representative of the European Union said that his delegation noted that the United States had asserted that the Appellate Body had not followed the rules of the DSU. The EU wished to reiterate that Members should be having a forward-looking discussion and should not continuously re-litigate their differences as to the reading of the current rules. The draft General Council decision presented by Amb. Walker could have been the right basis for unblocking the appointments. However, it had not been accepted by the United States who had not made any proposal or counterproposals. The EU stood ready to continue a forward-looking discussion. On substance, the EU wished to refer to its previous statements on the respective issues. The EU's views were well known, but the EU would be happy to explain its position again as appropriate. The EU noted that the United States had also made some negative comments in relation to the MPIA. It was not clear on what basis the United States could make such negative comments, in particular at a time when not a single arbitration award had been issued under the MPIA. The MPIA was a stopgap interim arrangement, not a means to reform the dispute settlement process. Pending a multilaterally agreed reform of the dispute settlement system, the participants in the MPIA had devised an interim

arrangement based on the core features of appellate review pursuant to Article 17 of the DSU. These features had been agreed multilaterally by all WTO Members, including the United States. In addition, the MPIA also included a number of elements designed to enhance the procedural efficiency of appellate proceedings, in the specific context of appeal arbitration under Article 25 of the DSU.

8.24. 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, regretted that for the thirty-fifth 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 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. 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.

8.25. 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 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 of all Members. Mexico wished to thank the 121 Members that had co-sponsored this proposal. This was a clear demonstration of the Membership's determination to have access to a functional dispute settlement system and to fulfil their obligation in conformity with Article 17.2 of the DSU. Mexico called on all Members that had not yet done so to support this proposal.

8.26. 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.

8.27. The DSB took note of the statements.

9 STATEMENT BY INDIA REGARDING THE COMPOSITION OF PANELS BY THE DIRECTOR-GENERAL IN ACCORDANCE WITH ARTICLE 8.7 OF THE DSU IN THE FOLLOWING DISPUTES: DS582 AND DS588

9.1. The representative of India, speaking under "Other Business", said that his country wished to bring to the DSB's attention certain unfortunate developments regarding panel composition in the following disputes: "India – Tariffs on ICT Goods (EU)" (DS582) and "India – Tariffs on ICT Goods (Chinese Taipei)" (DS588). India believed that WTO dispute settlement expected disputing parties to work together at every stage, except insofar as their difference of opinion on the matter's merits. India recalled that parties' agreement on panelists was an entrenched principle that was carried over from GATT practice, which was aimed at securing the legitimacy of panels. Only when such agreement was not possible would the Director-General be in a position to appoint suitable panelists under Article 8.7 of the DSU. India considered it unfortunate that complaining Members in the aforementioned disputes expected India to either agree with their assertions and preferences or acquiesce to an aberrational and inapplicable trend of involving the Director-General in composing the Panels. India considered that as a respondent in these disputes, India was entitled to engage in discussions with the respective complainants in order to reach a mutually acceptable solution at the panel composition stage, especially considering that one complainant expressly acknowledged India's cooperation in previous stages of the dispute and its commitment to working with the respective complainants. India did not understand the undue hurry to have panelists appointed through the Director-General. Presumably, this hurry was due to the departure of the Director-General from office on 31 August 2020. India noted that even if agreements on appropriate panelists were not possible for some compelling reason, there would certainly be an alternative arrangement to carry out the same function should that happened.

9.2. Furthermore, India understood that every WTO Member involved in a dispute had been traditionally entitled to provide criteria to the WTO Secretariat, once a panel was established, on the basis of which the Secretariat would propose nominations for consideration by parties to the dispute under Article 8.6 of the DSU. India expressed regret at informing the DSB that this treatment, which was normally available to every Member, had not been given to India in the previously mentioned disputes. Against this backdrop, India wished that the Secretariat would fulfil its duties under Article 8.6 of the DSU instead of delaying the matter and contributing to the complainants' choice of having the panels composed through the Director-General's involvement. India considered that despite being mandated by the DSU to propose nominations, the Secretariat had yet to provide assistance to India. In fact, the Secretariat had indicated that it would not provide nominations unless both disputing parties agreed to request such nominations from the Secretariat. This was unacceptable to India and contravened the plain text of Article 8 of the DSU. India urged the respective Members to reconsider their decision. India would prefer to come to agreed outcomes on the nominations and panelists. India also urged the respective complainants to positively consider a developing country respondent Member's views in a spirit of good faith. India noted that in the absence of a functioning Appellate Body, the spirit of cooperation amongst disputing parties, now more than ever, would go a long way in preserving dispute settlement practices that had been followed since GATT times and had been carried over to the WTO. Members should avoid taking recourse to last resort safeguards as a first line of action.

9.3. The representative of the European Union said that India's statement raised very interesting legal and substantive issues. However, the EU asked whether it was appropriate to have this discussion at the present meeting. He noted that Rule 25 of the Rules of Procedure for DSB meetings provided that: "discussions on substantive issues under 'Other Business' shall be avoided". That Rule also provided that delegations: "should avoid unduly long debates under 'Other Business'". If India wished to have a lengthy debate on substantive issues, it should have placed this item on the Agenda of a DSB meeting. If it had not been not possible to do so for the present meeting, then India should have waited until the next DSB meeting. In line with Rule 25 of the Rules of Procedure for DSB meetings, the EU would not engage in a long debate with India on this matter at the present meeting. The EU simply wished to briefly state for the record that on the basis of Article 8.7 of the DSU, the complaining parties, in the cases referred to by India, were entitled to request the Director-General to compose the respective Panels. The two conditions provided for in Article 8.7 of the DSU were met, namely: 20 days had passed from the establishment of Panels and no agreement reached on panelists. The exercise of this right of the complaining parties was not conditional upon the Secretariat proposing first a slate of names pursuant to Article 8.6 of the DSU. It was clear that on the basis of Article 8.7 of the DSU, the WTO Director-General had to determine the composition of Panels within 10 days from that request and this was what the WTO Director-General would do.

9.4. The representative of Chinese Taipei said that his delegation believed that under Article 8.7 of the DSU, if there was no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairperson of the DSB and the Chairperson of the relevant council or committee, should determine the composition of the panel by appointing the panelists whom the Director-General considered the most appropriate. In Chinese Taipei's case, the Panel had been established on 29 July 2020. There had been no agreement on the panelists within 20 days following the establishment of the Panel. Therefore, Chinese Taipei had the right to request that the Director-General compose the Panel.

9.5. The representative of India said that his country wished to note that it was not India's intention to have a substantive discussion under "Other Business". India merely wished to register a point of view so that the DSB could take note of the statement for any future discussions. India was also not seeking a decision on this matter but only wished to have the right to present its view. India believed that its statement was well within the rule under "Other Business". India noted that detailed discussions, including of a substantive nature, had been carried out by other Members under "Other Business" in the past. For example, India recalled that lengthy substantive discussions had taken place when discussing the "EC – Bananas III" dispute (DS27) at the DSB meeting held on 18 November 1997, contained in document WT/DSB/M/39 dated 7 January 1998. India requested that the DSB take note of India's statement made at the present meeting. Moreover, India believed that its conduct did not warrant the aberrational trend developed in recent times for any reason whatsoever. India recognized that requests to the Director-General could be acceptable in some instances, for example, when a respondent failed to provide its views on the criteria for the panelists or the nominations proposed by the Secretariat. However, that was not the case in the

aforementioned disputes, since India had demonstrated flexibility and willingness in principle to accommodate the respective complainants' views. On the contrary, India noted that one complainant had not even waited for the lapse of 20 days necessary for an agreement on nominations proposed by the Secretariat before seeking the Director-General's intervention, while another complainant had not initiated the process under Article 8.6 of the DSU for one and a half months before directly requesting the Director-General's intervention. India wished to proceed on the basis of standard panel composition procedures, including the steps envisaged in Article 8.6 of the DSU. India, once again, urged the respective complainants in the mentioned disputes to actively consider having agreed outcomes on the panel composition processes as was expected under the DSU, and to consider that India sought to work on these aspects in a spirit of good faith with the respective complainants.

9.6. The DSB took note of the statements.

10 STATEMENT BY THE RUSSIAN FEDERATION REGARDING ITS GENERAL CONCERNS ABOUT THE EU DECISION TO APPEAL THE PANEL REPORT IN DS494

10.1. The representative of the Russian Federation, speaking under "Other Business", said that the Panel in this dispute had found that various measures of the European Union (EU), including its so-called cost adjustment methodology and its anti-dumping duties applied in respect of a number of Russian exporters, were inconsistent with the EU's WTO commitments. The Russian Federation expressed deep disappointment at the EU's decision to appeal the Panel Report in this dispute in light of the current circumstances related to the Appellate Body. The EU's appeal was effectively sending this dispute into the void. With the aim of taking advantage of a situation whereby this dispute would remain unresolved, one of the major economies had felt free to escape its international obligations by appealing the Panel Report to a non-functioning Appellate Body. She said that Brussels constantly presented itself as a "friend of the dispute settlement system". However, misusing the crisis created by another Member to avoid complying with its international obligations could not be considered either a positive contribution to the solution of such crisis or a friendly act in respect of the Membership or the system itself. In fact, this placed the EU on the same side as the opponents of a properly functioning dispute settlement system. Should such a step be taken against the EU in respect of disputes in which it prevailed, the EU believed (quoting the Proposal for an EU Regulation Concerning the Exercise of the EU's Rights for the Application and Enforcement of International Trade Rules) that: "where the responsible party fails to cooperate in good faith in the dispute settlement procedures, thereby preventing the injured party from completing such procedures, the possibility to resort to countermeasures in accordance with the requirements of general public international law necessarily revives". As shown by its decision to appeal, when EU measures were found to be inconsistent with the EU's WTO obligations, the EU failed to cooperate in good faith and prevented the injured party from completing such dispute settlement procedures. The EU might refer to the multi-party interim appeal arbitration arrangement as an excuse for its action. Russia wished to note that it did not join this arrangement. Therefore, this alternative was not available to the parties to this dispute. Moreover, the reasons not to participate in that arrangement could vary from Member to Member. However, the fact that a Member had not subscribed to a new arrangement could not serve as an excuse to completely disregard existing means and available methods of dispute settlement. It was not a reason to revert to the "dark ages". Russia expressed regret that it was left with no other option but to reserve its rights to take any action which could be necessary to secure its interests and the interests of its companies that were subjected to unfair EU measures found to be WTO-inconsistent by the Panel.

10.2. The DSB took note of the statement.