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Dispute Settlement Body
26 October 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 OCTOBER 2020

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

Prior to the adoption of the Agenda: (i) The Chairman welcomed all delegations participating in person as well as those delegations that were listening-in remotely. He recalled that, as had been done at past DSB meetings, he would not be offering the floor to delegations participating remotely; and (ii) the item concerning the adoption of the Panel Report in the dispute on: "United States – Tariff Measures on Certain Goods from China" (DS543) was removed from the proposed Agenda following the decision of the United States to appeal the Panel Report.

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1.1. The Chairman noted that there were 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.209)

1.2. The Chairman drew attention to document WT/DS184/15/Add.209, 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 15 October 2020, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the DSB's recommendations and rulings that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country wished to thank the United States for its most recent status report and its statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.184)

1.6. The Chairman drew attention to document WT/DS160/24/Add.184, 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 15 October 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 dispute as soon as possible.

1.9. The representative of China said that, once again, his country wished to register its concern about US non-compliance with WTO rulings and its failure to provide sufficient protection of intellectual property rights. The United States continued to fail to fully comply in this dispute. More than two decades after the DSB had adopted recommendations and rulings in this dispute, this dispute remained unresolved. China expressed regret that the 185 US status reports provided thus far were not different from one another and none of them indicated any progress on implementation. China believed that as a result, the United States continued to fail to accord the minimum standard of protection required by the TRIPS Agreement. The United States had also become the only WTO Member who failed to implement DSB recommendations and rulings under the TRIPS Agreement. The clear text of Article 21.1 of the DSU required Members to promptly bring their WTO-inconsistent measures into conformity so as to ensure effective resolution of disputes. China urged the United States to faithfully honour this legal obligation and complete the implementation of the DSB's recommendations and rulings in this dispute without further delay.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.147)

1.11. The Chairman drew attention to document WT/DS291/37/Add.147, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that at the on-line meetings of the Standing Committee on GM Food and Feed held on 15 September and 7 October 2020, the European Commission had presented for a vote eight authorizations representing 38 possible GMOs.[1] Due to the current public health situation, the voting had been carried out by written procedure ending 14 days after the date of the meeting concerned. The European Commission would present authorizations that had not received a qualified majority vote in favour or against at the next meeting of the Appeals Committee. The EU-US Biotech Dialogue, organized on 22 October 2020, was the ideal opportunity to provide a detailed state of play of all authorizations pending in the European Food Safety Authority (EFSA) or in the European Commission. The EU believed that these detailed overviews clearly demonstrated that the delays were not systematically due to "actions or inactions of the EU and its member States", as claimed by the United States. A large part of the delays had always been and remained linked to incomplete applications and the lack of reactivity on the part of applicants. The EU continued to progress with the authorizations where the EFSA had finalized its scientific opinion and concluded that there were no safety concerns. As repeatedly explained by the EU and confirmed by the US delegation during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level at all stages of the authorization procedure. The United States frequently referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings do not cover the "opt-out Directive". The EU acted in line with its WTO obligations. The EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States understood that the EU had held another meeting of the Standing Committee on genetically modified food and feed on 7 October 2020. The United States looked forward to receiving an update regarding the outcomes of that meeting. The United States noted that there was another Standing Committee meeting scheduled for 12 November 2020. The United States would welcome confirmation of the date and the agenda for that meeting. The United States also requested an update from the EU regarding the date for the next Appeals Committee meeting. However, the United States continued to see persistent delays that affected a number of applications that had been awaiting approval for an extended period – delays that had 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 European Union to adopt final approvals for those products that had completed evaluation by the Standing Committee. The United States also urged the Standing Committee and the European Commission to issue final approvals for those products that had successfully received an EFSA positive opinion, yet remained under the Committee's "internal procedures".

1.14. As the United States had stated at the 28 September 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 its WTO-inconsistent member-State bans covered by the DSB recommendation. The DSB had adopted findings that, even where the EU had approved

[1] Meeting of 15 September 2020: Soybean SYHT0H2, Maize MON 87427 x MON 89034 x MIR162 x NK603 (stack + 10 possible sub-combinations = 11 GMOs), Maize MON 87427 x MON 87460 x MON 89034 x MIR162 x NK603 (stack + 14 possible sub-combinations = 15 GMOs. Meeting of 7 October 2020: 2 new authorizations (soybean MON 87751 x MON 87701 x MON 87708 x MON 89788, only stack approval, no sub-combinations, and maize MON 87427 x MON 89034 x MIR162 x MON 87411, approval of stack and 6 sub-combinations) and 3 renewals (maize MIR604, maize MON 88017, maize MON 89034).

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 member States that had previously maintained bans on cultivation and had since opted out of cultivation under the EU's legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland. There were also nine EU member States that had not previously banned cultivation of MON-810 but had since opted out of cultivation under the EU's legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, Slovakia, and Slovenia. Further, Austria and Italy appeared to maintain bans on other products subject to specific Panel findings. The EU's only response, which it continued to repeat, was that the EU member States did not restrict marketing or free movement of MON-810 in the EU. As the United States had noted at the 28 September 2020 DSB meeting, this answer did nothing to address US concerns. The United States also disagreed with the EU's response that opt-out procedures taken by 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 28 September 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.

1.15. The representative of the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The European Union had different regulatory approaches to GMOs and non-GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. Contrary to the assertions of the United States, no EU member State had imposed any "ban". Under the terms of the relevant Directive, an EU member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law and only when they 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 complaints 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 the United States might have at its disposal substantiating 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.31)

1.17. The Chairman drew attention to document WT/DS464/17/Add.31, 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 15 October 2020, in accordance with Article 21.6 of the DSU. On 6 May 2019, the US Department of Commerce had published a notice in the US Federal Register announcing the revocation of the anti-dumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (6 May 2019)). With this action, the United States had completed implementation of the DSB's recommendations concerning those anti-dumping and countervailing duty orders. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to other measures challenged in this dispute.

1.19. 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.23)

1.22. The Chairman drew attention to document WT/DS471/17/Add.23, 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 15 October 2020, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.24. 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 a series of US measures had violated the Anti-Dumping Agreement, which included: (i) the use of zeroing under the W-T methodology was as such incompatible with Article 2.4.2; (ii) the so-called single rate presumption as such violated Articles 6.10 and 9.2; and (iii) the adverse facts available was a norm of general and prospective application, which could be subject to future "as such" challenges. The arbitration pursuant to Article 21.3(c) of the DSU had decided that the reasonable period of time (RPT) would be 15 months, expiring on 22 August 2018. In response to the continued US failure to implement the DSB's recommendations and rulings in this dispute, China had had no other choice but to request the authorization to retaliate pursuant to Article 22.2 of the DSU. On 1 November 2019, the arbitration under 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 was the third largest retaliation amount in the WTO's history. This amount revealed the severe hardship imposed by US measures, which were WTO-inconsistent. To date, the United States continued to fail to achieve compliance. None of its 24 status reports provided thus far indicated any implementation action. Forty-one months after the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in this dispute, and 26 months after the RPT had expired, the DSB's recommendations and rulings in this dispute did not bring much for China other than a piece of paper. What China had experienced in this dispute was not exceptional. The record showed that US compliance had increasingly become a systemic problem for the Membership. The substantial delays in US compliance or the US ignorance of its implementation obligations in many disputes had seriously compromised the effectiveness and authority of the WTO dispute settlement system. The credibility of this Organization also incurred collateral damage, and that in turn was harmful for the world, including for the United States. Implementation was the cornerstone of the dispute settlement system which kept the rules-based, multilateral trading system afloat. The refusal to implement WTO dispute settlement rulings would not only backfire on the US economy. It

would also cause the United States to lose its 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". 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.18 – WT/DS478/22/Add.18)

1.26. The Chairman drew attention to document WT/DS477/21/Add.18 – WT/DS478/22/Add.18, 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 reiterated its commitment to implementing the DSB's recommendations and rulings in these disputes. With regard to measures 1–17, Indonesia noted continued concerns raised by New Zealand and the United States at previous DSB meetings. Regarding Measure 18, the Government and the Parliament had finalized their discussion and had jointly approved draft amendments to the relevant laws. In accordance with Indonesia's national regulations, the Parliament would hand over the draft amendments to the President for further processing towards the enactment of the relevant laws. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings in these disputes.

1.28. The representative of the United States thanked Indonesia for its status report but was concerned that Indonesia had not brought its measures into compliance with WTO rules. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States understood that Indonesia claimed to have "completed its enactment process" of certain regulations, but the United States was still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remained unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia would complete its process. The United States looked forward to receiving further detail from Indonesia regarding the changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 46/2019 on Strategic Horticultural Commodities.

1.29. The Chairman said that he wished to inform delegations that the delegation of New Zealand was unable to be physically present in the meeting room today, and therefore requested that its statement be delivered on behalf of New Zealand under this Agenda item. He then requested the Secretariat to read out the statement on behalf of New Zealand.

1.30. As requested by the Chairman, the representative of the Secretariat read out the following statement on behalf of the delegation of New Zealand: New Zealand wished to thank Indonesia for its status report and acknowledged Indonesia's commitment to comply fully with the DSB's recommendations and rulings in this dispute. However, both compliance deadlines had long since expired, and a number of measures remained non-compliant. This included 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. New Zealand would be watching closely as the application windows for the 2021 import period opened. New Zealand understood that Indonesia's Parliament had recently passed the Job Creation Bill. However, New Zealand did not yet have the information necessary to assess what impact this would have on Indonesia's compliance with the DSB's recommendations and rulings in this dispute, in particular in respect of Measure 18.

New Zealand strongly encouraged Indonesia to achieve full compliance with the DSB's recommendations and rulings in this dispute.

1.31. 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 despite the United States having repeatedly indicating that the DSB's recommendations and rulings had been fully implemented by adopting the Deficit Reduction Act in 2013, disbursements under the Continued Dumping and Subsidy Offset Act (CDSOA) had been made every year since. Every disbursement that still took place under this legal basis was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. The United States had to fully stop transferring collected duties for this Agenda item to be considered resolved and removed from under the DSB's surveillance. 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 recommendations and rulings and the disbursements had not ceased completely. The EU would continue to insist – as a matter of principle – independently of the cost resulting from the application of such limited duties. The EU reiterated 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, as the issue remained unresolved. If the United States did not agree that the issue remained unresolved, nothing prevented it from seeking a multilateral determination through a compliance procedure.

2.3. 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. 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 once that Member announced that it *has implemented* the DSB's recommendations. The widespread practice of Members – including the European Union as a responding party – confirmed this understanding of Article 21.6. Indeed, at recent meetings, three Members – Australia, Brazil, and China – had informed the DSB that they had come into compliance with the DSB's recommendations in four disputes (DS472, DS497, DS517, and DS529), and the complaining parties had *not* accepted the claims of compliance. Those Members announcing compliance had not provided status reports for the present meeting. This was consistent with the understanding that there was no obligation for a Member to provide further status reports once that Member announced that it had implemented the DSB's recommendations. The EU was the complaining party in one of those disputes (DS472). If the EU believed that status reports were "required" under the DSU, it would have insisted that the responding Member provide a status report, or the EU would have inscribed that dispute as an item on the present meeting's Agenda. The EU had taken neither action. Therefore, it was once again clear that the EU did not truly believe that there was a "clear obligation" under Article 21.6 of the DSU to submit a status report after a party had claimed compliance. The EU had simply invented a

rule for this dispute, involving the United States, that it did not apply to other disputes involving other Members.

2.5. The DSB took note of the statements.

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

A. Statement by the United States

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

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

3.3. The representative of the European Union said that as during previous DSB meetings, the United States had implied that the EU was taking inconsistent positions under Article 21.6 of the DSU, depending on whether the EU was a complaining party or a defending party in a dispute. The US assertions were without merit. As the EU had repeatedly explained during past DSB meetings, the crucial point for the defending party's obligation to provide status reports to the DSB was the stage of the dispute. In the "EC – Large Civil Aircraft" (DS316) case (the Airbus case), the dispute was at a stage where the defending party did not have an obligation to submit status reports to the DSB. The EU wished to remind the DSB that in the Airbus case, the EU had notified a new set of compliance measures to the DSB. That new set of compliance measures had been a clear demonstration that the EU – contrary to the United States in the parallel "US – Large Civil Aircraft (second complaint)" case (DS353) (the Boeing-case) – was serious about and committed to achieving compliance. That new set of compliance measures had been subject to an assessment by a compliance panel and that panel report had been issued on 2 December 2019. As noted in the EU's statement made at the 18 December 2019 DSB meeting, the EU believed that significant aspects of the compliance panel's report could not be regarded as legally correct and were very problematic from a systemic perspective when it came to assessing compliance with the subsidy disciplines of the WTO Agreements. It was in order to have these legal errors corrected that the EU had filed an appeal against the compliance panel's report on 6 December 2019. The EU was concerned that with the current blockage of the two-step multilateral dispute settlement system, the EU was losing the possibility of a proper appellate review of the serious flaws contained in the panel report. While the blockage continued, the EU stood ready to discuss with the United States

alternative ways to deal with this appeal. The EU was also committed to finding a balanced negotiated solution with the United States that would allow leaving both aircrafts disputes behind them.

3.4. However, these considerations did not alter the fact that the compliance proceeding in this dispute had not been concluded. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU remained the very subject matter of this ongoing litigation. The EU asked how it could be claimed that the defending party should submit "status reports" to the DSB in these circumstances. The EU would be very concerned with a reading of Article 21.6 of the DSU that would require the defending party to notify the purported "status of its implementation efforts" through the submission of status reports to the DSB, while dispute settlement proceedings on that precise issue were ongoing. The EU noted that its reading of the provision was supported by other WTO Members. The view of the European Union was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance. Under Article 21.6 DSU, the issue of implementation had to remain on the Agenda of DSB meetings until the issue was resolved. In the "US – Offset Act (Byrd Amendment)" case (DS217), 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, asking for a confirmation of its assertion that the CDSOA measure had been repealed in line with the relevant findings, just like the EU was doing in the Airbus dispute.

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

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

3.7. The representative of the European Union said that the EU wished to respond to the US statement that the EU had amended only two out of eight measures and had made no changes to the other six WTO-inconsistent measures. With regard to the additional Repayable Launch Investment (RLI) measures not covered by the EU notification that had been mentioned by the United States, the EU reiterated its position as previously expressed, that the compliance proceeding in this dispute had not been concluded due to the current blockage of the two-step multilateral dispute settlement system. Moreover, some of the measures mentioned by the United States had

actually been amended and the EU had fully explained this to the United States. It had to be noted that the other contested measures related to the RLI for the development of the A380 aircraft model. It was well known that Airbus had decided, in 2019, to completely wind-down the A380 programme. The last Airbus 380 had rolled out from the production line in Toulouse a few weeks ago. The production line was closed, and its employees had been moved to other operations. Therefore, the A380 RLI could not cause any more adverse effects to the United States.

3.8. The DSB took note of the statements.

4 STATEMENT BY CHINA REGARDING THE PANEL REPORT IN "UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA"

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

4.2. The representative of China said that his country wished to express its appreciation for the Panel's objective findings in the "US – Tariff Measures" dispute (DS543). The Panel's findings preserved the authority of multilateral trading system and Members' confidence in the dispute settlement system. China also wished to express its disappointment that the United States had opposed the adoption of the Panel Report and had appealed this dispute to a paralyzed Appellate Body. It was the United States that had ruined the operation of the Appellate Body. The United States was taking advantage of the Appellate Body's paralysis to prevent the coming into effect of this Panel Report. This dispute was an important case, not only for China, but also for the WTO. Therefore, China wished to make a statement on this case, even though the Panel Report could not be adopted at the present meeting due to the US appeal. China would focus mainly on three aspects. First, the unilateral US tariff measures were inconsistent with WTO rules. Second, the unilateral US tariff measures endangered the interests of China, the United States and the world. Third, China would make a statement to discuss the abuse of procedural rules by the United States.

4.3. First, China said that the Panel had correctly concluded that the unilateral US tariff measures were inconsistent with WTO rules. China had requested the establishment of a panel in this dispute on 6 December 2018 to challenge the discriminatory US tariff measures imposed on approximately USD 234 billion of imports from China. On 15 September 2020, the Panel had circulated its Final Report. In the Panel Report, the unilateral Section 301 tariff measures had been found incompatible with the multilateral trading system. The additional US duties exclusively on imported products from China violated Article I:1 of the GATT 1994. By adding such additional duty rate, the customs duties levied on imports from China by the United States were in excess of those set forth in its Schedule, and in violation of Articles II:1(a) and (b) of the GATT 1994. In the face of such flagrant infringement, the United States had made no defence of its violations of Article I and II of GATT 1994, but had tried to invoke Article XX(a) of the GATT 1994. Through careful examination and reasoning, the Panel had rejected the unjustified US defence. Pursuant to Article 19.1 of the DSU, the Panel had recommended that the United States bring its measures into conformity with its obligations under the GATT 1994.

4.4. Second, China said that the Panel's decision had unveiled the profoundly unilateral nature of the US tariff measures. Most-favoured-nation treatment and the bound rate obligation were well recognized as fundamental principles of WTO rules. By finding that the US tariff measures violated Articles I and II of the GATT 1994, the Panel had unveiled the profoundly unilateral nature of the US tariff measures. China believed that this was not only a victory for China, but also a victory for the multilateral trading system against unilateralism. Indeed, the unilateral tariff measures taken by the United States had severely impaired the legitimate interests of numerous Chinese enterprises and damaged the trade relationship between China and the United States. Trade, which should have been a driver of growth for the common interests of both China and the United States, had become a sore topic. What was more, the unilateral tariff measures had also harmed the United States itself. US economists had warned that unilateral tariff measures could slow the US economy down and would have a negative impact on US consumers and businesses, because the unilateral tariff measures were imposing additional burdens on *them*. This might explain why a mounting number of lawsuits had been brought against Section 301 tariff measures at the US Court of International Trade since September of this year. These lawsuits claimed that the tariffs had been imposed in an "arbitrary and capricious manner". The multilateral trading system, with the WTO at its core, also had been threatened by those unilateral measures. History had taught Members that unilateralism, if left unchecked and unregulated, would seriously undermine the global industry and value chains

and threaten the development of the world economy. No country would be immune. Therefore, it was high time for all WTO Members to shoulder common responsibility in countering and resisting the tendencies of unilateralism and protectionism. That was the message that the Panel Report in this dispute conveyed to Members.

4.5. Third, China said that the US appeal of the Panel Report in this dispute was an abuse of procedural rules. China had noted that the United States had recently filed appeals in several disputes in order to obstruct the adoption of the Panel reports that comprised findings that were to its disadvantage. The US appeal was nothing but an abuse of procedural rules which was infringing upon other Members' right to prompt settlement of disputes under the DSU. As a result of the US obstruction to the AB selection processes, the Appellate Body had been paralyzed at the end of 2019. This posed a serious threat to the dispute settlement system. Since then, Members had witnessed two distinct situations. The first situation consisted of more than a dozen WTO Members joining to establish the Multiparty Interim Appeal Arbitration Arrangement (MPIA) and 121 WTO Members making a joint proposal for launching the AB selection processes. The second situation was one in which the United States hid behind the paralyzed Appellate Body and tried to build a "safe haven" by abusing procedural rules. No one ought to profit from one's own wrongdoing. The United States was no exception. China, once again, urged and called upon the United States not to use this unfair advantage, accept the decision of the Panel and take meaningful actions to fully implement the recommendations of the Panel in this dispute. Also, the US disregard of the well-accepted practice of submitting a notice of appeal and an appellant submission clearly constituted abuse of procedural rules. China expressed regret that the US appeal under Article 16.4 of DSU had caused this dispute settlement proceeding to enter into appellate review, and that the Panel Report in this dispute could not be adopted at the present meeting. However, China wished to state clearly that the Panel Report in this dispute was only temporarily not entering into force. China would continue to work with other WTO Members towards the resumption by the Appellate Body of its normal operation as soon as possible. China firmly believed that justice would only be delayed, but would not be absent in the end. Effective actions should be taken to stop unilateralist and protectionist measures from spreading around the world. China sincerely advocated for taking the decision in this dispute as an outstanding example and a good starting point for the Members' future collective efforts aimed at better countering unilateralist and protectionist measures and at safeguarding the multilateral trading system. China also hoped that the United States would make a constructive contribution to the multilateral trading system and revitalize it again.

4.6. The representative of the United States said that the findings in the report "US – Tariff Measures on Goods from China" (DS543) were based on legal errors. The United States had notified an appeal of this report to the DSB. Accordingly, the panel report could not be adopted at the present meeting. The United States would submit a notice of appeal and an appellant submission once a Division of the Appellate Body could be established to hear this appeal. China could file its own appeal of the panel report now or at that point of time. The United States nonetheless wished to address this panel report because it reflected a major, missed opportunity for the WTO to begin to address the most serious problem faced by every Member that sought a balanced and fair world trading system: namely, aggressive, state policies that sought to dominate broad industrial sectors. In prior DSB statements, the United States had elaborated upon China's far-reaching efforts to unfairly take technology from other Members.[2] And, as Members were aware, it was that action taken by the United States to combat these policies that had led to the US measures that China had challenged in this dispute. These unfair trade practices had cost US innovators, workers, and businesses billions of dollars every year. Further, they harmed every Member, and every industry in every Member, that relied on technology for maintaining competitiveness in world markets. The tariff measures the United States had taken in response to China's practices had led earlier in 2020 to the historic Phase One Economic and Trade Agreement Between the United States and China.[3] In this agreement, China had committed to cease some – though not all – of its unfair and harmful technology transfer

[2] See WT/DSB/M/410, paras. 11.2-11.3 (27 March 2018, meeting); WT/DSB/M/412, paras. 5.5-5.11 (27 April 2018, meeting); WT/DSB/M/413, paras. 4.1-4.4 (28 May 2018, meeting); WT/DSB/M/423, paras. 8.3-8.7 (18 December 2018, meeting); see also Findings of the Investigation into China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974, https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

[3] Economic and Trade Agreement Between the Government of the United States and the Government of the People's Republic of China (Phase One Agreement), https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf.

practices.[4] The Phase One Agreement included a strong enforcement mechanism, including China's agreement that the United States could impose additional tariffs on goods of China upon a US finding that China had failed to meet its obligations. Pursuant to the Phase One Agreement, China was making changes to its economic and trade practices that would benefit not just the United States, but also China, and all WTO Members. China would not have agreed to the technology transfer provisions of the Phase One Agreement but for the additional US tariffs that China had chosen to challenge in this dispute. Moreover, it could not credibly be asserted that alternative tools were available to the United States, nor to any other Member, to address China's unfair and harmful technology transfer policies. Accordingly, the Panel's findings against the US tariff measures amounted to an acknowledgement that the WTO system, as currently formulated, was an impediment to an improved world trading system. This was completely backwards. Rather, as stated in the preambles to the WTO Agreement and the Marrakesh Declaration, the WTO's role should be to promote "reciprocal and mutually advantageous arrangements"[5]; "an integrated, more viable and durable multilateral trading system"[6]; and "open, market-oriented policies".[7]

4.7. The representative of the United States said that the Panel had reached its institutionally harmful findings by making fundamental legal errors in the evaluation of two defences presented by the United States. First, the Panel had failed to conduct its own objective assessment of whether the facts on the record in the dispute established that China and the United States had both agreed that issues relating to the dispute were to be addressed outside the WTO system. The United States had established, and China had not disputed, that China had already adopted its own remedy by imposing retaliatory tariffs on more than half of all US exports to China. And China had done this openly as a response to the same tariff measures that China had challenged in this dispute.[8] Furthermore, in the Phase One Agreement, China had agreed that the United States could impose additional tariff measures upon a US finding that China was breaching its obligations under that agreement, including with respect to technology transfer.[9] In short, the Parties' actions demonstrated that they had agreed on bilateral mechanisms to address the issues related to this dispute. The Panel, however, had taken no account of the evidence. Rather, the Panel had simply accepted China's assertion to the contrary – an assertion made during the litigation and only for the purpose of seeking a finding that essentially would signal the WTO's support for China's technology theft.[10] This erroneous result amounted to an approval for the cynical misuse of the WTO dispute settlement system. Even if adopted, the finding would not in any way promote the resolution of any dispute between China and the United States. At most, a Member that prevailed in a WTO dispute could obtain the authority to suspend WTO concessions. But here, China had already taken the unilateral decision that the US measures could not be justified, and China had already imposed tariff measures on US goods.

4.8. Second, the representative of the United States said that the Panel had incorrectly rejected the US defence that the measures at issue in this dispute were necessary to protect public morals under Article XX(a) of the GATT 1994.[11] The United States had provided extensive evidence and argumentation, showing: the existence of China's unfair and harmful technology transfer policies, as the United States had summarized earlier in its present statement; that these policies were inconsistent with US and international norms for moral conduct; that the US measures had been taken for the explicit purpose of ending the unfair practices; and that after years of unproductive negotiations and discussions in various fora, the United States had had no other available tools to address this crucial issue. The US showings on these factual matters had been largely undisputed by China. China had not even attempted to rebut the existence of the unfair technology transfer policies documented by the United States. At the outset of its analysis, the Panel had correctly found that the norms against theft, misappropriation, and unfair competition underlying the US tariff measures could fall within the scope of public morals as used in Article XX(a).[12] However, the Panel had used an unsupportable approach for evaluating whether the US measures were "necessary" within the meaning of Article XX(a).[13] As a result, the Panel's findings were legally unsound. Ironically, the Panel had written that it was adopting a "holistic" approach to the analysis of

[4] Idem., see Chapter 2 (Technology Transfer).
[5] Marrakesh Agreement Establishing the World Trade Agreement, preamble.
[6] Idem.
[7] Marrakesh Declaration of 15 April 1994, preamble.
[8] Panel Report, paras. 7.4-7.6.
[9] Phase One Agreement, Chapter 7.
[10] Panel Report, para. 7.22.
[11] Panel Report, paras. 7.236-7.238.
[12] Panel Report, para. 7.140.
[13] Panel Report, paras. 7.178 and 7.180.

necessity.[14] But the actual approach was anything but that; rather, it was myopic, addressed only to whether the public morals objective of the US measure was sufficiently connected to the particular products subject to the US tariffs.[15] The Panel had no legal basis for adopting this single test to evaluate "necessity". As an initial matter, nothing in the text of Article XX(a) required any particular level of connectedness. And even if this were a valid consideration, the Panel had no basis for assuming that it was even possible for any Member to tightly connect particular sets of imported products to far-ranging and non-transparent policies involving technology theft. Nor had the Panel even addressed the US showing that there were no possible alternative means for the United States to achieve the public morality goals recognized under Article XX(a). In short, the Panel had failed to conduct a holistic analysis, ignoring nearly all of the record evidence in the dispute. Instead, the Panel had rejected the US defence based only on the legally erroneous use of a narrow and unsupportable legal test.

4.9. In closing, the United States would turn to the real-world events involving China's unfair technology transfer policies, and US efforts to address them. As noted, China had committed in the Phase One Agreement not to pursue some of the unfair technology transfer policies that had led to the US tariff measures. This was a positive step, and the United States was closely monitoring China's compliance. The issuance of this report had no effect on the Parties' ongoing implementation of the Phase One Agreement, which would benefit all of China's trading partners. The Panel had avoided any meaningful findings by taking flawed legal shortcuts, instead of considering the extensive record evidence involving China's harmful technology transfer policies and the past failed attempts to address these policies in other ways. In taking this approach, the panel report indicated that the WTO was incapable of handling these issues. The report thus served as further confirmation that the US tariff measures were the only available means to address the major problems to the world trading system resulting from China's forced technology transfer policies.

4.10. The representative of China said that his country wished to respond to the US allegations. First, China strongly objected to the US assertion regarding China's so-called retaliatory tariff measures. The countermeasures taken by China were fully consistent with the basic principles of China's domestic law and international law. He wished to re-emphasize that China firmly upheld and supported the multilateral trading system. When faced with severely WTO-inconsistent measures, China had no other choice but to take necessary and appropriate measures in such an emerging situation in order to safeguard its legitimate rights and interests as well as the multilateral trading system. Second, regarding the US allegation regarding forced technology transfer, the United States had obviously chosen to turn a blind eye to China's determination and efforts to open up, as well as to China's scientific and technological progress and its great contribution to global economic growth. The US allegation on so-called "forced technology transfer" largely ignored facts and was entirely untrue. The United States had mentioned the Phase One agreement with China again. The United States had simply repeated the arguments it had made before the Panel. However, the Panel had clearly rejected those arguments, since they were baseless and irrelevant. The United States wished to continue promoting its false views in this regard. However, the DSB meeting was not an appropriate venue for this. Instead, Members should be focusing on the serious damage that the unilateral US tariff measures were imposing upon the multilateral trading system. The groundless US accusations could not conceal the unilateral nature and WTO-inconsistency of its tariff measures.

4.11. The representative of the European Union said that this was another dispute that illustrated the grave consequences of the blockage of AB appointments since 2017. That blockage frustrated the essential rights of Members that had been agreed multilaterally in the DSU. In that regard, the EU referred to its intervention under Agenda item 6 of the 28 September 2020 DSB meeting, where the EU had elaborated on these consequences and on the possibility of appeals being adjudicated upon through appeal arbitration based on Article 25 of the DSU, consistently with the principles of the DSU. The EU would not repeat these points at the present meeting. The EU took note of the US decision to appeal the Panel Report in this dispute. The Panel Report would therefore not be adopted by the DSB at the present meeting. The EU had participated as a third party in this dispute and would intervene before the Appellate Body once the proceedings could resume. Therefore, the EU reserved its position for the purposes of these appellate proceedings. The EU wished to make some brief remarks on the substance of the Report. The EU wished to recall that, as expressed in its written submission, it shared the concerns expressed by the United States regarding the protection of intellectual property rights and discriminatory conditions applying to foreign licensors of

[14] Panel Report, paras. 7.111, 7.152 -7.1533, and 7.238.
[15] Panel Report, para. 7.178.

intellectual property in China. However, the EU did welcome the general approach of the Panel to the exception in Article XX(a) of the GATT. The EU believed that much as the text of Article XX itself, the Panel's approach struck the right balance between the Members' legitimate right to protect public morals and the need to ensure that exceptions were not used to circumvent the Members' obligations under the GATT.

4.12. The representative of the Russian Federation said that her country acknowledged with disappointment that WTO Members continued to file appeals notwithstanding the fact that on 10 December 2019, the Appellate Body had become non-operational. On the same day as that of the present meeting, the United States had notified its appeal into the void. This was already the fifth dispute that was blocked before the non-functioning Appellate Body. Russia fully agreed with those WTO Members who had criticized, at the present meeting and during previous DSB meetings, decisions of Members to appeal panel reports into the void. At the 28 September 2020 DSB meeting, the EU had stated that: "the decision by a respondent to appeal a panel report in the current circumstances may amount in effect to dispute resolution through adjudication being blocked, unless that respondent agrees to the appeal being adjudicated upon through appeal arbitration based on Article 25 of the DSU".[16] Russia agreed that appealing into the void amounted to dispute resolution through adjudication being blocked. At the same time, Russia noted that any agreement, including on arbitration, required mutual consent of the parties and could not be forced upon a party. In this particular context, Russia wished to recall that on 28 August 2020, the EU had notified the DSB of its decision to appeal into the void the Panel Report in the "EU – Cost Adjustment Methodologies II (Russia)" dispute (DS494). Russia wished to reiterate its disappointment with that decision, even more so because the EU was appealing the findings of the Panel regarding the same EU practice which had already been found to be WTO-inconsistent by the Appellate Body in a number of disputes. Russia believed that the actions that harmed the operation of the dispute settlement mechanism, in particular appeals into the void, contributed significantly to the WTO dispute settlement mechanism crisis.

4.13. The representative of the European Union said that the EU's appeal to the Appellate Body in the "EU – Cost Adjustment Methodologies II (Russia)" dispute (DS494) should not be confused with "blocking the dispute resolution" or appealing "into the void". The EU attached great importance to maintaining a functioning two-tier dispute settlement process. This was why the EU had actively supported all efforts to find a solution to the impasse over AB appointments and this was also why the EU, together with other Members, had put in place the MPIA. However, if the other party to a dispute was not willing to agree on such contingency measures while the AB impasse continued, the EU could have no choice but to appeal before the Appellate Body. Whether or not such appeal would be processed was in the hands of the other party. In the DS494 dispute, the EU had offered to Russia to agree on a means of having the appeal heard through appeal arbitration based on Article 25 of the DSU, and that offer still stood.

4.14. The DSB took note of the statements.

5 UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT (SECOND COMPLAINT)

A. Recourse to Article 7.9 of the SCM Agreement and Article 22.7 of the DSU by the European Union (WT/DS353/35)

5.1. The Chairman drew attention to the communication from the European Union contained in document WT/DS353/35. He then invited the representative of the European Union to speak.

5.2. The representative of the European Union said that the European Union took note of the decision of the Arbitrator, dated 13 October 2020, for an amount of USD 3.993 billion annually, together with the confirmation by the Appellate Body, adopted by the DSB on 11 April 2019, in the context of this case, that, with respect to the "Foreign Sales Corporation and Extraterritorial Income Exclusion" (FSC/ETI), relevant outstanding rulings and recommendations of the DSB and the authorization based on them remained operative. This marked the end of some sixteen years of litigation, in which the United States had complained about EU subsidies to Airbus, whilst the EU had complained about US subsidies to Boeing, including, notably, various Washington State tax exemptions, the FSC/ETI tax exemption (which had been found in earlier phases of this dispute to

[16] EU statement made at the 28 September 2020 DSB meeting.

be a prohibited subsidy), NASA and Department of Defense (DoD) research and development subsidies and various other measures. And now the EU had rights to countermeasures in the same order of magnitude. Accordingly, the EU requested to be authorized to take countermeasures towards the United States under Article 7.9 of the SCM Agreement and Article 22.7 of the DSU in a manner consistent with the Arbitrator's decision. But the EU recognized that the world, and the situation in this sector, were different than they were 16 years ago. And this the EU saw as an opportunity that should lead the EU and the United States to leave the path of litigation and seek a sustainable negotiated solution of this matter. The EU reiterated its position that it was not in the interests of anyone that the EU and the United States proceed to mutually imposed retaliation. Instead of progressively stepping-up countermeasures, the EU and the United States should step them down. The EU continued to stand ready to discuss such an approach with the United States, even at this late hour. But if the United States remained out of compliance, and did not suspend its countermeasures, the EU had no choice but to exercise its rights.

5.3. The representative of the United States said that the United States regretted that the EU had requested to move forward with this request for authorization to impose countermeasures. As the United States would explain, the Arbitrator's decision related only to Washington State's Business and Occupation tax rate reduction that had been eliminated over six months ago. If the EU were to impose duties on US goods in response to a measure that had been terminated, that would be contrary to WTO rules and would force a US response that would move the United States and the EU away from finding a solution to the Aircraft disputes. The United States had recently provided proposals for a reasonable settlement that would provide a level playing field for the United States, the EU and the United Kingdom. With serious engagement by its close trading partners, the United States considered that they should be able to find a solution in a short period of time. As the EU was well aware, Washington State's termination of the tax rate reduction had taken effect on 1 April 2020, over six months ago. The elimination of the preferential aerospace tax rate was straightforward. The EU had not disputed that this action taken by Washington State had eliminated the preferential tax rate subject to the DSB's non-compliance findings and the Arbitrator's decision. Thus, Washington State's termination of the preferential tax rate had withdrawn the WTO-inconsistent subsidy. Under WTO rules, countermeasures could not be imposed following removal of the WTO-inconsistent measure. Article 22.8 of the DSU stated that: "The suspension of concessions or other obligations shall be temporary and *shall only be applied until* such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits . . .". Accordingly, the EU had known for more than six months that it was not entitled to *apply* any countermeasures in any amount in relation to the Washington State tax measure that "has been removed". If the EU imposed countermeasures despite the withdrawal of the Washington State tax measure, the EU would not only breach WTO rules; it would seriously undermine the WTO system. The EU had litigated successfully against the Washington State tax measure. And the system had contributed to the desired change – the United States had withdrawn the WTO-inconsistent measure, eliminating any adverse effects.[17]

5.4. The United States said that the EU had previously referred to NASA and Department of Defense research and development measures, as well as certain state and local measures. However, there should be no confusion. First, *none* of these measures had been found to continue causing adverse effects in the compliance proceeding both parties had agreed to. Therefore, there was *no* WTO finding of non-compliance for the NASA, Department of Defense, or other state and local measures. Second, the Arbitrator had identified the level of countermeasures *only* for Washington State's tax measure in a past time period (2012-15). The Arbitrator had explicitly said it would *not* examine Washington State's elimination of the tax measure earlier in 2020. The Arbitrator had also explicitly *rejected* an EU request to assign countermeasures for the NASA or Department of Defense measures. Thus, any DSB action at the present meeting to authorize countermeasures did *not* concern NASA or Department of Defense measures. And as the United States had explained, the EU had no right to apply countermeasures under WTO rules against the Washington State tax measure that had

[17] Article 3.7 of the DSU: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".

already been removed.[18] In conclusion, the United States strongly favoured a negotiated resolution of its dispute with the EU over the massive launch aid subsidies it provided to Airbus. The United States had recently provided proposals for a reasonable settlement that would provide a level playing field. The United States considered that a solution to these disputes was within reach with serious engagement by its close trading partners.

5.5. The representative of European Union said that the EU did not agree with the US unilateral assertion that it had fully implemented the DSB's recommendations and rulings in the Boeing dispute. In accordance with the DSU, the decision of the Arbitrator gave the EU the right to impose countermeasures against the United States for its lack of compliance, once authorized by the DSB. In addition, while the EU was still examining the impact of the legislative action regarding the Washington State tax measures, the EU noted that the rulings in this dispute covered a number of additional measures where the US remained non-compliant, including the Foreign Sales Corporation and Extraterritorial Income Exclusion, NASA and Department of Defense research and development measures, and certain state and local measures. As already referred to in the previous statements made by the EU on this matter, following the Appellate Body Report on compliance in the Airbus case, the EU had notified a set of compliance measures to the WTO that had brought the EU in compliance with the ruling. The United States had disagreed. On the basis of its disagreement, the United States continued to apply countermeasures against products from the EU. At the same time, the United States was blocking the two-step, multilateral dispute settlement system, thus depriving the EU from seeking a multilateral determination of compliance regarding its measures.

5.6. The representative of the United Kingdom said that his country supported a rapid settlement of the Airbus and Boeing disputes and believed that the circumstances were ripe to conclude one. The United Kingdom was pleased that nearly USD 4 billion in countermeasures had been awarded in relation to the Boeing dispute. The level determined by the Arbitrator recognized the adverse effects caused to the United Kingdom and the European Union in this matter. The United Kingdom hoped that this decision and the steps the DSB would take at the present meeting would lead to substantive progress in negotiations for a fair and balanced settlement, in order to finally put an end to these disputes. It was the UK's preference to find a negotiated outcome that would resolve the disputes, end countermeasures and re-establish effective subsidy discipline for the aerospace sector. The United Kingdom was determined to settle these disputes in a fair and comprehensive manner as soon as possible. For sixteen years the United Kingdom had worked closely with the European Union and the United States to find a long-term resolution and would continue to do so. From January 2021, the United Kingdom would represent itself fully and independently at the WTO and would pursue all avenues to reach a satisfactory outcome.

5.7. The DSB took note of the statements and, pursuant to the request by the European Union under Article 7.9 of the SCM Agreement and Article 22.7 of the DSU contained in document WT/DS353/35, agreed to grant authorization to suspend the application to the United States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS353/ARB.

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). His statement was without prejudice to the rights and obligations of the parties to this dispute or of any other Member. He recalled that

[18] Article 22.8 of the DSU: "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached".

these consultations had first been conducted by the previous DSB Chair, Amb. Walker, prior to the 5 March 2020 DSB meeting. At that meeting, the matter had been suspended in order to allow more time for consultations. Following his appointment as DSB Chair on 20 May 2020, he had been consulting with Thailand and the Philippines on this matter. He had held virtual intensive consultations with the parties in preparation for the 29 June 2020 DSB meeting. Following the 29 June 2020 DSB meeting, he had continued his intensive consultations with the parties to this dispute and had held three meetings to discuss this matter. Immediately after the 29 July 2020 DSB meeting, he had held another meeting in-person with the parties to this dispute on 30 July 2020. Subsequently, he had reported back to the Membership on this matter at the 28 August DSB meeting. Since the 28 August 2020 DSB meeting, he had continued to consult with the parties to the dispute and had had written exchanges with both parties on this subject. He had then held another in-person meeting with the parties to the dispute on 23 September 2020 to further discuss this matter. He also reported back to the Membership on this matter at the 28 September 2020 DSB meeting. Subsequently, he had had additional written exchanges with both parties to this dispute on this subject. 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 said that he wished to inform delegations that the delegation of the Philippines was unable to be physically present in the meeting room today, and therefore requested that its statement be delivered on behalf of the Philippines under this Agenda item. He then requested the Secretariat to read out the statement on behalf of the Philippines.

6.4. As requested by the Chairman, the representative of the Secretariat read out the following statement on behalf of the delegation of the Philippines: The Philippines said that his country wished to thank the Chairman for his report. The Philippines reiterated its sincere appreciation of the Chairman's ongoing efforts. Further to its statements that had been made at the past four DSB meetings in June, July, August and September 2020, the Philippines wished to thank the Chairman and the DSB Secretariat for the additional set of questions sent to the Philippines on 30 September 2020. These questions were aimed at seeking to further explore possible pathways to resolving the parties' differences on the way forward with Thailand's pending appeals under Article 21.5 of the DSU and the Philippines' request under Article 22.2 of the DSU. Both parties had sent their responses to these questions on 21 October 2020. The Philippines and Thailand would also be given the opportunity to comment on their respective responses by 28 October 2020. The Philippines hoped that this supplemental exchange could finally provide much-needed clarity that would allow moving forward with the Philippines' request under Article 22.2 of the DSU, while protecting Thailand's right of appeal. The Philippines trusted that the latest responses had not only been helpful in confirming the parties' respective positions on the relevant issues, but also in shedding a bright light on the emerging means to resolve the *impasse* at hand. Once again, the Philippines wished to recall that in the spirit of cooperation and at the Chairman's suggestion, the Philippines had presented for consideration a non-exhaustive list of alternative arrangements, contained in document WT/DS371/40, dated 3 August 2020, that could allow the parties to fashion a constructive solution that would permit the completion of Thailand's appeals, which had been suspended as a result of the non-functioning of the Appellate Body. Any such alternative arrangements should not in any way prejudice the parallel rights of the Philippines under the DSU to seek automatic and mandatory authorization to suspend concessions. As the Philippines had set out in its statements made at previous DSB meetings under this Agenda item, and in the consultations with the DSB Chair, the Philippines remained open, ready and willing to engage constructively with Thailand. However, it should also become clear to the Chairman, and to the DSB, that Thailand, as the losing party in duly adopted Panel and AB reports, was utterly not able to constructively engage in a solution. The Philippines wished to reiterate, therefore, that the burden of applying the automatic and mandatory rules-based provisions of the DSU would be the duty and responsibility of the DSB. At the present meeting, therefore, the Philippines asked the DSB to grant the Philippines the authority it sought. The provisions of Article 22.6 of the DSU were clear: "[t]he DSB, upon request, *shall* grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request"; and "[i]f the Member concerned objects to the level of suspension proposed, […] the matter *shall* be referred to arbitration". Therefore, in the Philippines' view there were only two options under the reverse consensus rule under Article 22.6 of the DSU: first, the DSB granting authorization to suspend concessions; or, second, the DSB referring the matter to arbitration.

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 said that her country wished to take this opportunity to once again express Thailand's appreciation for the Chairman's active engagement in assisting Thailand and the Philippines in finding a way forward in this dispute. The consultations conducted under the Chairman's leadership were permitting a constructive dialogue between the parties. Thailand remains committed to continuing these consultations. As Thailand had explained in its prior statements at the DSB meetings of 5 March, 29 June, 29 July, 28 August and 28 September 2020, there was no possible interpretation of the DSU or of the Sequencing Agreement between the parties that would permit the Philippines to seek authority to retaliate at this point in the proceedings. The Philippines' retaliation request was without legal foundation because it had been made long after the expiry of the 30-day deadline under Article 22.6 of the DSU. Indeed, it was undisputed that the Philippines had not filed any retaliation request by 14 June 2012, which was the date on which the 30-day deadline in this dispute had expired. Additionally, the Philippines' retaliation request was contrary to the Sequencing Agreement concluded by both parties. The Sequencing Agreement stated that the Philippines first had to complete proceedings under Article 21.5 of the DSU; only thereafter, if non-compliance was determined, could the Philippines request retaliation under Article 22 of the DSU. Thailand was therefore disappointed that the Philippines was attempting to disavow the Sequencing Agreement that both parties had concluded precisely to avoid these types of procedural problems. Thailand was also surprised that the Philippines considered that Thailand remained bound by the Sequencing Agreement, but that the Philippines itself was not. It was obvious that the real problem was not the DSU or the Sequencing Agreement, but the Appellate Body crisis. It was imperative that a solution be found to this crisis. Thailand urged all WTO Members to focus on resolving this crisis. Members had seen, in other disputes, that parties had continued to file appeals before the Appellate Body notwithstanding the current crisis. This highlighted the importance placed by Members on having a two-tier system in order to ensure the quality and legitimacy of WTO dispute settlement. Thailand looked forward to continuing the multilateral efforts to solve the AB impasse with a view to preserving the two-tier dispute settlement system. In the meantime, Thailand remained committed to participating in good faith in the consultations organized by the DSB Chairman with the aim of finding a way forward in light of the present circumstances. As Members would understand, Thailand much preferred a solution that was not simply an *ad hoc* way of disposing of this case, but one that encompassed all pending appeals and, ideally, ensured that the multilaterally-approved dispute settlement system was back on track. Thailand wished to thank the DSB Chairman for the opportunity to make a statement at the present meeting and the Philippines for its ongoing engagement. Thailand looked forward to the next steps in the consultations facilitated by the DSB Chairman in this dispute.

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

6.9. The representative of Brazil said that his country wished to express, once again, its support for the Chairman's efforts to assist the parties in finding a solution to this problem. It was Brazil's understanding that while the current paralysis of the Appellate Body could not have been foreseen by Members concluding sequencing agreements a few years ago, the current situation amounted to a change in the circumstances that might render impracticable or impossible to make operational any steps of a sequencing agreement that had assumed and depended on the continuing operation of the Appellate Body. However, such steps should not be an excuse for stalling indefinitely the resolution of a dispute, which would seem to be rather contrary to the goal of sequencing agreements. The DSU was clear in that: "prompt settlement of [disputes] (…) is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Brazil trusted that with the help of the Chairman, the parties would, in good faith, move forward in this dispute.

6.10. The representative of Australia said that her country wished to emphasize that Australia's comments related only to the current procedural issues in this dispute and should not be taken as support for any substantive issue in the litigation. Australia recalled that prompt resolution of disputes was one of the core principles of the WTO dispute settlement system. Australia recognized that the lack of final resolution in this dispute had arisen in part from the AB impasse. Australia urged all Members to continue to prioritize a solution that that would restore the dispute settlement system to full functionality. In the meantime, Australia urged Thailand and the Philippines to work constructively to agree on procedural steps for resolving this dispute in a timely manner. Australia supported the Chairman's efforts to encourage dialogue to this end. Australia considered arbitration pursuant to Article 25 of the DSU as one option that parties could agree to as a way to resolve their

disputes while the Appellate Body was unable to complete appeals. As Members were aware, Australia was part of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), which used Article 25 of the DSU as an interim measure to preserve prompt and binding dispute settlement and independent and impartial appellate review.

6.11. The representative of the European Union said that in these extraordinary circumstances of the paralysis of the Appellate Body, his delegation called on the parties concerned to seek an agreed solution that would preserve the rights of both parties in a balanced manner. The EU wished to point out that the parties could decide to submit the suspended appeal for completion under an appeal arbitration procedure pursuant to Article 25 of the DSU, such as the MPIA. Such an appeal arbitration procedure could, for all practical purposes, replicate all substantive and procedural aspects of appellate review. The EU trusted that the DSB Chairman could assist the parties in reaching such a solution. The EU disagreed with the assumption that the sequencing agreement concluded between the Philippines and Thailand precluded the Philippines from requesting the suspension of concessions in this case. 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 ADOPTION OF THE 2019/2020 DRAFT ANNUAL REPORT OF THE DISPUTE SETTLEMENT BODY (WT/DSB/W/662)

7.1. The Chairman said that, under this Agenda item, he was submitting for adoption the draft text of the 2019/2020 Annual Report of the DSB contained in document WT/DSB/W/662. He did so pursuant to the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO, contained in document WT/L/105. This Report covered the work of the DSB since the previous Annual Report contained in document WT/DSB/76. In other words, it covered meetings of the DSB from 4 December 2018 through 28 September 2020. The Report contained a brief summary of DSB meetings during the period under review. As in the past, following the adoption of the Annual Report at the present meeting, the Secretariat would update the Report under its own responsibility in order to include the actions taken by the DSB at the present meeting. Subsequently, the updated Annual Report would be submitted for consideration by the General Council at its meeting scheduled for 16 and 17 December 2020. Consequently, the Chairman proposed that the DSB adopt the draft Annual Report of the DSB contained in document WT/DSB/W/662 on the understanding that it would be further updated by the Secretariat.

7.2. The DSB took note of the statement and adopted the draft Annual Report of the DSB contained in document WT/DSB/W/662 on the understanding that it would be further updated by the Secretariat.[19]

8 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/671)

8.1. The Chairman drew attention to document WT/DSB/W/671 which contained a new nomination proposed by the Philippines 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/671.

8.2. The DSB so agreed.

[19] Subsequently, the Annual Report of the DSB was circulated in document WT/DSB/81.

9 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)

9.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He then drew attention to the proposal contained in document WT/DSB/W/609/Rev.18 and invited the representative of Mexico to speak.

9.2. The representative of Mexico speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, said that the delegations in question had agreed to submit the joint proposal dated 18 June 2020 to launch the AB selection processes. Her delegation, on behalf of 121 Members, wished to make the following statement. The extensive number of Members submitting this joint proposal reflected a common concern with the current situation of the Appellate Body, which was seriously affecting the overall dispute settlement system against the best interest of WTO Members. Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes without further delay as set out in the joint proposal, which sought the following: (i) to 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 resulted from 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 nominating candidates; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates. She said that 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.

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

9.4. The representative of the United States said that as the United States had explained in prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. Instead, Members should consider how to achieve meaningful reform of the dispute settlement system. The US view across multiple US Administrations had been clear and consistent: When the Appellate Body overreached and itself broke WTO rules, it undermined the rules-based trading system. The Appellate Body's

abuse of the limited authority given by Members damaged the interests of all WTO Members who cared about a WTO in which the agreements were respected as they had been negotiated and agreed. Earlier in 2020, the Office of the US Trade Representative had published a Report on the Appellate Body of the World Trade Organization. The Report detailed how the Appellate Body had failed to apply WTO rules as agreed by WTO Members, imposing new obligations and violating Members' rights.[20] The United States appreciated the number of Members who had reviewed the Report and shared the view that the Report identified serious errors by the Appellate Body. As the United States had explained repeatedly, the fundamental problem was that the Appellate Body had not respected the current, clear language of the DSU. Members could not find meaningful solutions to this problem without understanding how they had arrived at this point. Without an accurate diagnosis, Members could not assess the likely effectiveness of any potential solution. The United States had actively sought engagement from Members on these issues. Yet, some Members had remained unwilling to admit there was even a problem, much less engage in a deeper discussion of the Appellate Body's failures. And rather than seeking to understand why the Appellate Body had departed from what Members had agreed, these Members and others had redirected the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body.[21] 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. The central objective of the dispute settlement system was to assist the parties to find a solution to their dispute. As in the past, Members had many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third-party adjudication. Parties should redouble their efforts to find such a positive solution to their disputes. 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 to seek a solution on these important issues.

9.5. The representative of Thailand said that her country supported the statement made by Mexico on behalf of the co-sponsors of the proposal to fill the AB vacancies. The importance of the Appellate Body to the viability of the WTO dispute settlement system could not be overstated. Thailand had worked alongside other Members as part of the informal process of focused discussions on AB matters with Amb. Walker as Facilitator (the Walker process) with a view to resolving the AB impasse. Unfortunately, the Members' efforts had not been fruitful. Thailand believed that the two-tiered dispute settlement system remained a crucial element in providing security and predictability to the multilateral trading system. In this regard, as one of the Members with pending appeals, it was clear that Thailand's rights had been substantially impaired as a result of the AB impasse. It was therefore Thailand's priority to restore a fully functioning dispute settlement system in order to preserve the rights and obligations of all WTO Members. To this end, Thailand, once again, urged Members to fully engage with a view to finding a common solution. Thailand looked forward to engaging with Members in these efforts.

9.6. The representative of Hong Kong, China said that his delegation supported the statement made by Mexico on behalf of the co-sponsors. Hong Kong, China wished to reiterate its concerns with the lack of progress in resolving the AB impasse. The selection processes of AB members should commence without delay. Hong Kong, China urged Members to continue with their efforts and their constructive engagement until a solution was found.

9.7. The representative of Korea said that his country supported the statement made by Mexico on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18. Korea urged all Members to engage constructively in the discussions aimed at resolving this important issue as soon as possible.

9.8. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Japan supported the proposal contained in document WT/DSB/W/609/Rev.18. Japan fully shared the sense of urgency expressed by other Members regarding the need for an expeditious reform of the WTO dispute settlement system. Japan wished to reiterate that its top priority was to reform the WTO dispute settlement system in a manner

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

[21] 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.

that would serve to achieve a long-lasting solution to the Appellate Body matters. Such a solution could be achieved only through active discussions by Members, as the owners of the system, including discussions on the challenges that the system presented. To that end, Japan would spare no effort in collaborating with other Members.

9.9. The representative of Iceland said that as one of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.18, his country was concerned about the long-standing inability of the WTO to make progress in filling the current vacancies in the Appellate Body. Iceland believed that a two-stage WTO dispute settlement system played a central role in providing predictability within the multilateral trading system and in securing a fair playing field among all economies, large and small. Therefore, Iceland called on all Members to engage constructively and solve this impasse without further delay.

9.10. The representative of Switzerland said that her country wished to refer to its statements made at previous DSB meetings on this matter. As time passed, Members' commitment to resolving the current AB impasse must not fade. Switzerland urged all Members to engage constructively in order to find concrete solutions. Switzerland continued to be committed to working with all Members towards that goal. It was Switzerland's priority to ensure that the appellate stage could fully function again, to the benefit of the entire Membership.

9.11. The representative of Nigeria, speaking on behalf of the African Group, said that the Group wished to refer to their statements made at previous DSB meetings on this very important issue. The Group also wished to thank Mexico for its statement made at the present meeting on behalf of the co-sponsors of the AB proposal. The Group wished to express regret that up to now the DSB had failed in the performance of its function under Article 17.2 of the DSU which clearly stated that: "[v]acancies shall be filled as they arise". The large number of Members that had submitted the joint proposal contained in document WT/DSB/W/609/Rev.18 reflected a common concern with the current situation of the Appellate Body's impasse that was seriously affecting the functioning of the Appellate Body and the whole dispute settlement system against the best interests of WTO Members. As things stood, the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. Members had the 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. The African Group thanked all Members that had co-sponsored this joint proposal to launch the AB selection processes and encouraged all other Members to endorse this proposal. The African Group stood ready to engage constructively with Members on this matter in order to find an amicable solution while taking into consideration the valuable concerns raised by Members in this regard. However, the African Group reiterated that finding a solution should not stand in the way of launching the AB selection processes.

9.12. The representative of the Republic of Moldova said that her country remained to be very concerned over the paralysis of the Appellate Body and continued to support the proposal submitted by Mexico, on behalf of the co-sponsors. Moldova wished to refer to its statements made at previous DSB meetings on this matter. Moldova expressed deep regret that the AB impasse was still not resolved and that the Appellate Body was not able to perform its functions over such a long period. Moldova was a strong and genuine supporter of an efficient, well-functioning and rules-based multilateral trading system. Notwithstanding some of its imperfections, this Organization was of vital importance to every Member, particularly for small and open economies such as the one of Moldova. The continuing AB crisis was detrimental, especially for small Members like Moldova, and was highly damaging for the multilateral trading system. This was a matter of great concern to Moldova because the properly functioning, two-tiered dispute settlement system was essential for safeguarding Moldova's rights and obligations. Although Moldova was not a frequent user of the system given the complexity and high demands in terms of capacities and resources, Moldova wanted this system to be fully functional as a guardian and a legal guarantee of Members' rights. Therefore, Moldova would continue to support this proposal and called for an urgent resolution of the problems affecting the DSB. As previously mentioned by the previous speakers, Members shall not get used to this situation. To resolve this crisis had to be a priority for every Member whether or not they were frequent users of the dispute settlement system because in the end this situation affected all Members either directly or indirectly.

9.13. The representative of Indonesia said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Indonesia wished to raise its continued concern

over the inability to appoint Appellate Body members, which had resulted in the absence of a fully-functioning two–tier system for the resolution of disputes at the WTO. Indonesia was also concerned about the adverse impact resulting from the current crisis, such as Members being unable to reach mutually agreed solutions on the way forward to resolve their disputes, the mounting backlog of cases, and any future cases that might be appealed into the void. Given this situation, Members should look at any action that might be taken to resolve the current situation and find a way forward with regard to their disputes. Indonesia believed that Members should respect their commitment under WTO rules to find positive solutions to their disputes and to preserve the rules-based multilateral trading system. Indonesia also urged all Members to give meaningful attention, willingness and commitment to resolving the issue of appointments of new Appellate Body members.

9.14. The representative of Singapore said that his country thanked Mexico for its statement and said that Singapore supported Mexico's 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 to this matter.

9.15. The representative of Turkey said that her country wished to thank Mexico for including this item on the Agenda of the present meeting. As a co-sponsor of this proposal, Turkey wished to refer to its statements made at previous DSB meetings and recalled the urgent need to launch the AB selection processes, in accordance with Article 17.2 of the DSU. Once more, Turkey reiterated its support for maintaining the two-tier character of the dispute settlement system. Turkey believed that as this impasse persisted, the predictability of the dispute settlement system would gradually fade away. In fact, Members had already begun to be exposed to the consequences of this impasse. Turkey stood ready to work constructively with all Members to break the current AB impasse. Turkey invited all Members to engage in discussions to launch the AB selection processes.

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

9.17. 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. The increasingly frequent impairment of rights arising from this situation could not be in the interest of any Member, or the system more broadly. The United Kingdom had listened carefully to the concerns raised and recognized the need for reform. The United Kingdom also understood that there would be many challenges involved in agreeing on a reform. However, the United Kingdom continued to view two-stage dispute settlement with the support of all Members as a central pillar of the multilateral trading system. The United Kingdom called on all Members to engage in a solutions-based discussion on permanent reform.

9.18. The representative of Chinese Taipei said that his delegation thanked Mexico for its proposal made on behalf of the co-sponsors and continued to support that proposal. Chinese Taipei wished

to refer to its statements made at previous DSB meetings on this matter. Chinese Taipei noted that appeals into the void had become a serious problem for the operation of the WTO dispute settlement mechanism. Chinese Taipei wished to encourage Members to find an innovative solution to overcome the current AB impasse through more positive dialogues.

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

9.20. The representative of Mexico, speaking on behalf of the 121 co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, expressed regret that for the thirty-seventh 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 in general. There was no legal justification for the current blockage of the AB selection processes, which resulted in nullification and impairment of Members' rights. Article 17.2 of the DSU clearly stated that: "[v]acancies shall be filled as they arise". Nothing 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.

9.21. 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 this item had remained on the Agenda of DSB meetings for the past three years due to the lack of consensus to launch the AB selection processes that would allow Members to fulfil their obligation under Article 17.2 of the DSU and, thus, to rely on a fully functioning dispute settlement system. As Mexico had noted at the most recent DSB meetings, all ongoing disputes were being affected. This undermined the right to appellate review for all Members, which was an integral part of the dispute settlement system. Members could not become accustomed to this situation. Mexico called on those Members that had not yet done so to support the proposal contained in document WT/DSB/W/609/Rev.18.

9.22. The representative of China said that his country supported the statement made by Mexico on behalf of 121 Members co-sponsoring this important proposal. China wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its firm support for a two-tier, binding, independent and impartial dispute settlement system, of which the Appellate Body was an integral part. Filling the AB vacancies was an unconditional legal obligation that should be borne collectively by the entire Membership. Nothing could serve as a pretext to ignore this negotiated treaty obligation. The need to reinforce the negotiating and monitoring pillars of the WTO could not be a legitimate cause to dismantle the Appellate Body and to cripple the dispute settlement system. On the contrary, the lack of multilateral enforcement would eventually impact the interest in negotiating new rules. With the Appellate Body being paralyzed, the violation of current rules could easily escape from sanctions. In that regard, without a strong dispute settlement system, the WTO's negotiating and monitoring pillars could not be genuinely reinforced. Moreover, the fact that disputes continued to be brought before the WTO dispute settlement system, and that various means had been adopted to cope with the Appellate Body's paralysis did not mean that Members could accept the damaged WTO dispute settlement system as it currently stood. With respect to various arrangements such as non-appeal arrangements, they were damage control measures aimed at minimizing the legal uncertainty resulting from the Appellate Body's demise. None of these arrangements, including the MPIA, could offer equal security and predictability to the multilateral trading system as a dispute settlement system that comprised a functioning Appellate Body. If the status quo became the new normal, the WTO dispute settlement system would collapse. Such collapse would, at the same time, fundamentally destroy the multilateral trading system. In light of this, maintaining a two-tier, independent and binding dispute settlement system should remain the priority of the entire Membership. China called on every Member, including the United States, to participate constructively in the solutions-based discussions with a view to restoring the Appellate Body at the earliest date. China stood ready to further engage with other Members on this urgent matter.

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

9.24. The DSB took note of the statements.

10 AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

A. Statement by Indonesia

10.1. The representative of Indonesia, speaking under "Other Business", said that his country wished to refer to its statement made at the 28 September 2020 DSB meeting under the Agenda item related to the surveillance of implementation of the DSB's recommendations in the dispute on: "Australia – Anti-Dumping Measures on A4 Copy Paper" (DS529). Indonesia wished to reiterate its position on the need to further observe developments following the issuance of Anti–Dumping Notice No. 2020/090 on 11 September 2020 by Australia's Minister for Industry, Science, and Technology. This was to ensure the finality of the mentioned decision, given the possibility for any interested parties to seek review of the decision. Therefore, Indonesia believed that at least the assurance of finality of the decision should be obtained prior to confirming that this matter was resolved. Indonesia and Australia would work closely together towards the resolution of this dispute, including the need to meet the obligations under Article 21.6 of the DSU.

10.2. The representative of Australia said that her country wished to thank Indonesia for its ongoing cooperation in this matter. Australia noted the statement made by Indonesia at the present meeting. As Australia had stated at the 28 September DSB 2020 meeting, and in its status report dated 17 September 2020, the Industry Minister's decision to revoke the anti-dumping measures at issue in this dispute had brought Australia into full compliance with the DSB's recommendations and rulings. Unless and until anything happened to alter the Minister's decision in a manner that raised a dispute about whether Australia had implemented the Panel's findings, Australia considered the issue of implementation to have been resolved. Australia would continue to engage constructively with Indonesia in this matter.

10.3. The DSB took note of the statements.