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Dispute Settlement Body
18 December 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 18 DECEMBER 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: "Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products: Recourse to Article 21.5 of the DSU by Brazil" (DS484) was removed from the proposed Agenda following Indonesia's decision 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.210)

1.2. The Chairman drew attention to document WT/DS184/15/Add.210, 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 7 December 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 the 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.185)

1.6. The Chairman drew attention to document WT/DS160/24/Add.185, 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 7 December 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 with the DSB's recommendations and rulings in this dispute. More than two decades after the DSB had adopted recommendations and rulings in DS160, this dispute remained unresolved. None of the 186 US status reports provided thus far indicated any progress in 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. To ensure effective resolution of disputes, Article 21.1 of the DSU required Members to promptly bring its WTO-inconsistent measures into conformity. Therefore, 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.148)

1.11. The Chairman drew attention to document WT/DS291/37/Add.148, 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 during the online meetings of the Standing Committee on GM Food and Feed held on 15 September and 7 October 2020, the European Commission had presented for vote eight authorizations representing 38 possible GMOs.[1] Due to the current public health situation, the voting was carried out by written procedure ending ten working days after the date of the meeting concerned. The Standing Committee had not reached an opinion on the eight authorizations. The European Commission had presented those eight authorizations for a vote during the online Appeals Committee meetings of 12 November and 3 December 2020. The Appeals Committee could not reach an opinion on the three authorizations presented at the 12 November 2020 meeting.[2] The outcome of the voting by written procedure following the 3 December Appeals Committee should be available before the next regular DSB meeting. The Standing Committee meeting had been held online on 16 December 2020. The European Commission had presented two authorizations[3] on which there would be a written voting procedure. The EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and concluded that there were no safety concerns. As repeatedly explained by the EU and confirmed by the United States during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level at all stages of the authorization procedure. The United States frequently referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover 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. Since the previous DSB meeting, the United States and the EU had conducted the semi-annual US-EU Biotechnology Dialogue on 22 October 2020. The EU had agreed to those consultations to normalize trade in light of the findings in this "EC – Approval and Marketing of Biotech Products" dispute (DS291). During that meeting, the United States had emphasized its concern with the persistent delays arising from the EU's biotechnology approval process. A large number of applications had been awaiting approval for an extended period. To be clear, these delays had existed long before any COVID-19 restrictions had come into effect. The EU had 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. Recent outcomes of both the Standing Committee and Appeals Committee on Genetically Modified Food and Feed and Environmental Risk Assessment demonstrated the political nature of the comitology process – which repeatedly delayed safe products from receiving approval in the European market. During the most recent Standing Committee meetings (15 September 2020 and 7 October 2020), EU member States had cited the "Precautionary Principle" and "scientific reasons" as justification for not issuing approvals. However, these claims contradicted the fact that the European Food Safety Authority (EFSA) had successfully completed a science-based risk assessment for every product under consideration at these meetings. EU member States at the Standing Committee had also cited "no agreed national position", "negative public opinion", and "political reasons" as justifications for reaching "no opinion" and for not approving these products. As could be seen, none of these justifications were science-based. The Appeals Committee meeting held on 12 November 2020, which had been meant to address those

[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).

[2] Meeting of 12 November 2020: Soybean SYHT0H2, Maize MON 87427 x MON 89034 x MIR162 x NK603 (stack + 10 possible sub-combinations), Maize MON 87427 x MON 87460 x MON 89034 x MIR162 x NK603 (stack + 14 possible sub-combinations).

[3] Meeting of 16 December 2020: Maize MZIR086 and Cotton GHB614 × T304-40 × GHB119.

instances where member States reached "no opinion" regarding product approvals, cited the foregoing reasons as justification for not issuing biotech product approvals. The United States failed to see how this approval process addressed the undue delays contemplated in this "EC – Approval and Marketing of Biotech Products" dispute (DS291). In this light, and taking into account the EU's statement made at the present meeting, the United States requested a further update from the EU regarding the outcomes of the Appeals Committee meeting held on 3 December 2020 and the Standing Committee meeting held on 16 December 2020. The United States also urged and requested that the EU issue final approvals for those products that had completed science-based risk assessments at the EFSA, including those products that were with the Standing Committee, Appeals Committee, and the European Commission under these "internal procedures". At the time of the present meeting, approximately 20 applications were pending risk management decisions in the Standing Committee and Appeals Committee and two awaited final approval by the European Commission. Three of these applications had been going through the EU approval system for over a decade.

1.14. As the United States had stated at the 26 October 2020 DSB meeting, the United States did not acknowledge the EU's claims that there was no ban on genetically engineered (GE) products in the EU. Rather, the EU had failed to lift all of the WTO-inconsistent member-State bans covered by the DSB recommendation. The DSB had adopted findings that, even where the EU had approved a particular product, in many instances EU member States had banned those products for certain uses without a scientific basis. This included not only the two EU member States subject to panel findings – Austria and Italy. There were also 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 26 October 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 26 October 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. 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.32)

1.17. The Chairman drew attention to document WT/DS464/17/Add.32, 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 7 December 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. In fact, the United States continued to ignore the DSB and its own obligations. In the November 2020 final results of an anti-dumping administrative review with respect to softwood lumber from Canada, the United States had persisted in applying the DPM to Canadian companies. The United States had expressly noted that "[the US Department of] Commerce has not revised or changed its use of the differential pricing analysis, nor has the United States adopted changes to its practice pursuant to the URAA's implementation procedure".[4] Finally, 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 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 representative of the United States said that the United States recalled that Canada had commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing. Canada had lost that dispute before the panel. The Panel had rejected Canada's arguments because they were unpersuasive and did not make sense of the text of the Anti-Dumping Agreement.

1.22. The representative of Canada said that his country wished to recall that the Panel report in the "US – Differential Pricing Methodology" dispute (DS534) was currently under appeal. However, that appeal could not be heard because the Appellate Body was unable to function due to the blockage of the appointment of AB members by the United States.

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

[4] US Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2017-2018 Anti-Dumping Duty Administrative Review Certain Softwood Lumber Products from Canada, p. 38.

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.24)

1.24. The Chairman drew attention to document WT/DS471/17/Add.24, 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.

1.25. The representative of the United States said that the United States had provided a status report in this dispute on 7 December 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.

1.26. 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 various provisions of the Anti-Dumping Agreement, which included: (i) the use of zeroing under the W-T methodology was as such incompatible with Article 2.4.2; (ii) the so-called single rate presumption as such violated Articles 6.10 and 9.2; and (iii) the adverse facts available was a norm of general and prospective application, which could be subject to future "as such" challenges. 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 requested the authorization to retaliate pursuant to Article 22.2 of the DSU. The arbitration under Article 22.6 of the DSU had later determined that the level of nullification or impairment caused by the United States was US$ 3.579 billion. China expressed grave concern over the stalled US implementation. None of its 25 status reports provided thus far indicated any implementation action. Nearly 43 months after the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in this dispute, and 28 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. Unfortunately, what China had experienced in this dispute was not exceptional. While the United States continued to insist on prompt implementation in its offensive cases, its standard changed when it came to its defensive cases. Substantial delays or even complete disregard of its implementation obligations had repeatedly occurred. This severely undermined the effectiveness of the dispute settlement system and eroded Members' confidence in the rules-based multilateral trading system. 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 fulfil its implementation obligation in this dispute without further delay.

1.27. The representative of the United States said that the United States was aware that the reasonable period of time, as determined by an arbitrator under Article 21.3(c) of the DSU, had expired on 22 August 2018. As explained in the US status report, the United States continued to consult with interested parties on options to address the DSB's recommendations. The United States was willing to discuss this matter with China on a bilateral basis.

1.28. 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.19 – WT/DS478/22/Add.19)

1.29. The Chairman drew attention to document WT/DS477/21/Add.19 – WT/DS478/22/Add.19, 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.

1.30. 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. Indonesia had also taken note of the continued concerns raised by New Zealand and the United States at previous DSB meetings, in particular with regard to measures 1–17. With respect to measure 18, Indonesia wished to inform the DSB that the

draft amendments to the relevant laws, which addressed this specific measure and had been previously agreed by the Government and the Parliament, had been officially signed by the President. The new Law had been promulgated and had entered into force on 2 November 2020. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings.

1.31. The representative of the United States thanked Indonesia for its status report. The United States understood that Indonesia had recently amended the relevant laws that would address Measure 18. The United States looked forward to receiving further detail from Indonesia regarding these legislative changes and their implementation by the government. The United States hoped to work with Indonesia to ensure that Indonesia's import licensing regime was free from the measures at issue, including the 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.

1.32. 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 at the present meeting and had therefore requested that its statement be delivered on behalf of New Zealand under this sub-item. He then requested the Secretariat to read out the statement on behalf of New Zealand.

1.33. 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. These 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 in this dispute.

1.34. 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 repeated indications by the United States 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. For this Agenda item to be considered resolved and removed from the DSB's surveillance, the United States had to fully stop transferring collected duties. 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 since 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. As it had done many times before, at the 26 October 2020 DSB meeting, the EU had once again called on the United States to abide by its "clear obligation" under Article 21.6 of the DSU for the United States to submit a status report in this dispute. Notably, the EU had not called on any other Member in any other dispute to abide by this so-called "clear obligation", despite the fact that several Members were in the same situation as the United States. 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 in that dispute, 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 the 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 continued to engage with the EU 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 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 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 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. The EU noted that these considerations did not, however, alter the fact that the compliance proceeding in this dispute had not been concluded. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU remained the very subject matter of this ongoing litigation. The EU asked how it could be 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. 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. 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 proceed to, or continue, mutually assured retaliation, and certainly not in the current economic climate.

3.5. The representative of the United States said that the United States was aware that the EU had recently filed yet another notice of supposed compliance. The United States disagreed that the EU had achieved compliance. Instead, the United States agreed with the second compliance panel report, which had rejected the EU's assertions and had found that eight EU launch aid subsidies continued to cause adverse effects. The EU asserted that it had amended two of these eight measures; and 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 and the sole basis for countermeasures authorized by the WTO. As it clearly had been withdrawn, the EU had no basis for countermeasures of any kind. However, the United States continued to engage with the EU 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.

3.6. The representative of the European Union said that the United States had stated that the EU asserted that it had amended only two of its eight measures at issue and had admitted that there had been no changes to the other six measures. The EU simply wished to mention that 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. Finally, it also had to be noted that the other contested measures related to the Repayable Launch Investment 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 production line was closed, and employees had been moved to other operations. Therefore, the A380 RLI could not cause any more adverse effects on the United States.

3.7. The DSB took note of the statements.

4 AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by Indonesia

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

4.2. The representative of Indonesia said that on 4 December 2019, the Panel report in this dispute had been circulated to WTO Members. The Panel had recommended that Australia bring its measure into conformity with its obligations under the Anti–Dumping Agreement. The DSB had adopted the Panel report on 27 January 2020. Following the adoption of the Panel report, Article 21.6 of the DSU provides 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 pursuant to paragraph 3". In this regard, Indonesia noted that Australia had provided a status report ahead of the 28 September 2020 DSB meeting. In that status report, Australia had stated that it had brought itself into full compliance with the DSB's recommendations and rulings following the decision by the Australian Minister for Industry, Science, and Technology dated 11 September 2020. However, while Indonesia appreciated the current efforts of Australia to implement the DSB's rulings and recommendations in this dispute, Indonesia had yet to agree with Australia's assertion of full compliance.

4.3. Indonesia's position in this context was based on a reasonable concern over the lack of finality of the Australian Industry Minister's decision. Upon the publication of the Industry Minister's decision on 14 September 2020, Indonesia understood there had been an opportunity for interested parties

to submit an application for review within 30 days of such publication. Indonesia had found that an application for the review the Minister's decision had been filed by an interested party in October 2020, and that Australia's Anti–Dumping Review Panel had initiated a review on 30 October 2020. Indonesia believed that the ongoing review might lead to the revocation of the Minister's decision to revoke the anti-dumping order and to substitute it with a new decision which could reinstate the anti-dumping order. Should that occur, Indonesia believed that this would continue to infringe on Indonesia's export of A4 Copy Paper to Australian market and consequently, on Australia's compliance with the DSB's recommendations and rulings. Considering that the resolution of this dispute had yet to be reached, Indonesia wished to draw attention to Article 21.6 of the DSU which provided 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 … and shall remain on the DSB's agenda until the issue is resolved". However, Indonesia believed that Members would not find any status report from Australia on the Agenda of the present meeting with regard to this issue. Indonesia, therefore, strongly encouraged Australia to provide a status report in respect of this dispute to the DSB, as its obligation to do so was clearly set out in Article 21.6 of the DSU.

4.4. The representative of Australia said that her country took note of Indonesia's statement on this matter. As Australia had notified at the 28 September 2020 DSB meeting, the decision of the Minister for Industry, Science, and Technology to revoke the anti-dumping measures at issue in this dispute had brought Australia into full compliance with the DSB's recommendations and rulings. Since the relevant anti-dumping measures had been – and remained – revoked, there was nothing further for Australia to report to the DSB regarding the status of its implementation. As required by Article 13 of the Anti-Dumping Agreement, Australia's anti-dumping system provided procedures for independent administrative and judicial review of anti-dumping decisions. As Indonesia had noted, on 30 October 2020, the Australian Anti-Dumping Review Panel (Review Panel) had initiated a review of the Minister's decision following an application by Paper Australia Pty Ltd. The Government of Indonesia and the two relevant Indonesian exporters had made submissions to the Review Panel. The Review Panel was due to provide its report and recommendations to the Minister on or before 18 January 2021. In usual circumstances, the Minister would then have 30 days to make a decision. Unless and until anything happened to alter the Minister's original revocation decision in a manner that raised a dispute about whether Australia had implemented the Panel's findings, Australia considered the issue of implementation to be resolved. Australia would continue to engage constructively with Indonesia in this matter.

4.5. The representative of Indonesia said that his country thanked Australia for its response to its previous statement. In that regard, Indonesia wished to highlight that Indonesia was not in a position to agree with Australia's arguments and position with regard to Article 21.6 of the DSU. It was clearly set out in Article 21.6 that the issue of implementation of the recommendations and rulings "shall remain on the DSB's agenda until the issue is resolved". Hence, Indonesia believed that the lack of any progress or development on the Australian Minister's decision, as indicated by Australia, did not exempt Australia from its obligation to provide status reports to the DSB. Therefore, Indonesia wished, once again, to strongly encourage Australia to fulfil its obligation under Article 21.6 DSU by providing status reports to the DSB.

4.6. The DSB took note of the statements.

5 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

5.1. The Chairman said that, under the first sub-item, he wished to make a statement under his own responsibility in order to report to delegations on his consultations with Thailand and the Philippines in the "Thailand – Cigarettes (Philippines)" dispute (DS371). His statement was without prejudice to the rights and obligations of the parties to this dispute or of any other Member. He recalled that these consultations had first been conducted by the previous DSB Chairman,

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. The Chairman said that, following his appointment as DSB Chairman 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 2020 DSB meeting. Following that meeting, he had continued to consult with the parties to this dispute and had had written exchanges with both parties on this subject. He had held another in-person meeting on 23 September to further discuss this matter. He had 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 and had reported to delegations on this matter at the 26 October 2020 DSB meeting. During the month of November and in the beginning of December, he had held several meetings with the parties to this dispute, both virtually and in-person. As a result of this consultative process, he was pleased to announce that the parties had agreed to a new step, namely the appointment of Amb. George Mina of Australia as a Facilitator to deepen the Chairman's consultative process. The Facilitator would seek to identify and make recommendations to the parties on ways and means of resolving the relevant outstanding issues, which would include both procedural and/or substantive approaches, including a potential comprehensive settlement, subject to the parties' agreement. A communication to this effect would be circulated shortly to all delegations. He wished to congratulate Thailand and the Philippines on this step forward aimed at resolving this important matter and thanked Amb. Mina for his willingness to take on this important role.

5.2. The DSB took note of the statement.

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

5.4. The representative of the Philippines said that his country wished to thank the Chairman for his report. The Philippines, once again, wished to express its sincere appreciation for the Chairman's ongoing efforts. The Philippines had been patient and cooperative throughout the Chairman-led process that had transpired in 2020. The Philippines took note of the Chairman's proposal for a Facilitator-assisted consultative process in terms of next steps. While the Philippines remained concerned that this Facilitator-assisted process could delay resolution of the issue at hand, the Philippines trusted that the Facilitator would build on the clarification process that the Chairman had undertaken in 2020 and arrived at a time-bound recommendation. The Philippines expressed its appreciation to the Facilitator for accepting this responsibility. The Philippines acknowledged and welcomed the Facilitator's intention to begin work on this new process as soon as possible. The Philippines also expressed its appreciation to its ASEAN Member and colleague, Thailand, and Amb. Sunanta for making this process possible. However, the Philippines wished to underscore that the more important consideration was to preserve the dispute resolution system and to arrive at an early resolution or a comprehensive resolution of the issues at hand and further enhance the dispute resolution system despite the current impasse. The Philippines wished to reiterate its statements made at the past five DSB meetings. The Philippines sincerely hoped that the "question-response-comment" phase of the Chairman-led process had provided the much-needed clarity to move forward with the Philippines' request under Article 22.2 of the DSU. As the Philippines had set out in its statements made at previous DSB meetings under this Agenda item, as well as in the consultations with the Chairman, the Philippines remained open, ready, and willing to engage constructively with Thailand. At the present meeting, therefore, the Philippines reiterated its positions on the legal procedures necessary to move forward or to arrive at a comprehensive settlement.

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

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

5.7. The representative of Thailand said that, as mentioned by the Chairman, the latest development was indeed very good news. Thailand wished to express its sincere appreciation for the Chairman's continued assistance on this issue. Thailand welcomed the Understanding that had been agreed upon between the parties to deepen the process of consultations with the assistance of a Facilitator. In this regard, Thailand greatly appreciated the willingness of Ambassador of Australia

to take up this challenging task in assisting the parties to identify solutions that could resolve the outstanding differences in this dispute. Thailand also thanked the Philippines for its cooperative spirit. Thailand looked forward to the next steps in this consultative process.

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

5.9. The representative of Australia said that he believed that he spoke for the entire Membership in recognizing the very positive step forward that the Philippines and Thailand had taken in agreeing to engage in Facilitator-assisted discussions. It was a significant and positive move that Members were witnessing being taken at the present meeting by both parties – and it demonstrated the good faith that was evident on both sides. Their decision to take this step augured well for the next steps in the dispute resolution process. He wished to thank the Chairman, as well as his friends, Amb. Sunanta of Thailand and Amb. Teehanke of the Philippines, for entrusting him with the role of Facilitator in this important process. The prompt resolution of disputes was of course one of the core principles of the WTO dispute settlement system. Members should be using all means available to them – such as the process that was beginning at the present meeting – to facilitate the orderly resolution of disputes. He looked forward to working constructively with Thailand and the Philippines to find a path towards resolution.

5.10. The representative of Japan said that, at the outset, his country wished to emphasize that Japan did not intend to make a statement that would take side either with Thailand or the Philippines in this matter. Japan appreciated the assistance of the Chairman, as well as that of the Facilitator. Japan continued to believe that Thailand and the Philippines should cooperate in good faith to find a realistic solution to their disagreement over the procedural aspects of this dispute, with the necessary assistance of the Chairman and the Facilitator.

5.11. The Chairman, once again, congratulated Thailand and the Philippines on reaching this important agreement for a further Facilitator-assisted consultative process at this point in time. This was of course a positive sign for the entire dispute settlement system.

5.12. The DSB took note of the statements.

6 STATEMENT BY CANADA ON PRACTICES CONCERNING THE USE OF FLEXIBLE ARRANGEMENTS IN DISPUTE SETTLEMENT PROCEEDINGS DURING THE COVID-19 PANDEMIC (JOB/DSB/1/ADD.13)

6.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Canada. He drew attention to document JOB/DSB/1/Add.13 and invited the representative of Canada to speak.

6.2. The representative of Canada said that his country wished to make a statement on behalf of the following delegations: Australia; Brazil; Canada; Colombia; Ecuador; the European Union; Guatemala; Hong Kong, China; Mexico; New Zealand; Peru; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Ukraine; and the United Kingdom. All of these Members had already indicated their intention to endorse the practice document on practices concerning the use of flexible arrangements in dispute settlement proceedings during the COVID-19 pandemic. This practice document had been circulated in document JOB/DSB/1/Add.13. The COVID-19 pandemic had had terrible consequences around the world on human life and activity. It had also significantly affected the functioning of the WTO, including the dispute settlement system. Understandably, authorities had had to set out restrictions regarding international travel as well as in-person meetings. WTO Members had had to adjust to these challenging circumstances to enable their work to move forward in all WTO fora, and so had the WTO as an Organization. This was also true in the context of dispute settlement, where panels and parties had had to adapt. Members had seen such adaptation in several disputes, in which panels had established procedures to allow flexible arrangements, including virtual and hybrid panel meetings. The practice document recognized the Panels' powers and responsibilities in that regard, in line with the principle of prompt settlement of disputes.

6.3. Canada said that through the practice document presented under this Agenda item, endorsing Members wished to support the effective functioning of the dispute settlement system during the pandemic. The practice document set out how endorsing Members intended to act in dispute

settlement proceedings in which they were involved during this challenging period. In the practice document, the endorsing Members indicated their intention to cooperate with the panel and the other party or parties to favour flexible arrangements, including recourse to virtual or hybrid hearings, to ensure that disputes could progress in a timely manner during the pandemic. The endorsing Members also indicated their intention to cooperate with the panel and the other party or parties, when considering flexible arrangements, to preserve the parties' due process rights in the light of each dispute's unique context and factors. Through cooperation with the panel and the other party or parties, the endorsing Members also intended to facilitate a level of participation in virtual or hybrid hearings that was as close as technically feasible to that of in-person hearings. Canada invited all WTO Members that supported the prompt settlement of disputes during the COVID-19 pandemic, to consider endorsing the practice document. Support for the document would send a positive signal in these challenging times. Canada intended to circulate, by mid-January 2021, a revision to document JOB/DSB/1/Add.1/Rev.1, which would include a list of the WTO Members that endorsed this practice document. Canada hoped that by that time the ranks of endorsing Members would have grown. Canada looked forward to further engaging with other delegations in that context.

6.4. The representative of India said that his country wished to thank the delegation of Canada for its statement on practices concerning the use of flexible arrangements in dispute settlement proceedings during the COVID-19 pandemic. The COVID-19 pandemic had posed an unprecedented crisis to the global community. The pandemic continued to spread around the world at an alarming rate. For India, a party's right to an oral hearing was an intrinsic aspect of its due process rights and could not be dispensed with, except with the agreement of the parties to the dispute. Several provisions of the DSU, including the procedure set out in Appendix 3, expressly provided for substantive meetings, notably Article 15.1 which made an express reference to oral arguments. India noted that Paragraph 1 of Appendix 3 was couched in mandatory terms regarding the rights guaranteed to parties and third parties in a dispute. A panel could not exercise its margin of discretion to truncate these rights, without the parties' agreement. India also noted that Paragraph 5 of Appendix 3 provided that: "[a]t its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, *and still, at the same meeting*, the party against which the complaint has been brought shall be asked to present its point of view" (emphasis added). Further, Paragraph 10 of Appendix 3 provided that: "in the interest of *transparency*, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 *shall be made in the presence of the parties*" (emphasis added). Therefore, the importance that the DSU attached to oral hearings was unquestionable. For India, the written submissions *and* the substantive meetings (i.e., oral hearings in a physical setting) together constituted the suite of fair processes and due process rights guaranteed by the DSU. While India noted that Article 3.3 of the DSU recognized the importance of "prompt settlement" of disputes, this did not mean that such prompt settlement could whittle away "fundamental" due process rights such as a right to an oral hearing. This right was particularly important for developing countries which were used to presenting submissions in person in a physical setting, as it provided an opportunity for further refining and presenting their arguments.

6.5. India considered that physical oral hearings were indispensable since such hearings were conducive to a contemporaneous oral exchange and observation of demeanour among other elements essential to oral advocacy. This was simply not possible in technologically enabled virtual oral hearings. In the case of virtual oral hearings, there were issues of technological limitations such as internet connection failures, camera malfunctions, acoustical problems within the videoconferencing rooms and choppy video streams. Such limitations could quickly make the hearings frustrating or useless. India also noted that there would be complex coordination issues during virtual oral hearings for Members who wished to involve officials from disparate domestic departments and regions. Further, there were issues of security and confidentiality for virtual hearings. These elements were burdensome for seasoned litigants and were too difficult for developing countries. Consequently, physical oral hearings were vital for meaningful participation in dispute settlement proceedings under the DSU and, ultimately, for the proper functioning of a WTO panel. WTO disputes, being high stakes litigation amongst international actors, demanded nothing less than every procedural right guaranteed by the DSU in the light of due process and based on an agreement of the parties. In view of the above, India could not consider that a settlement of the matter had been reached unless two substantive meetings as guaranteed by the DSU had been held face to face in a physical setting.

6.6. The representative of the United States thanked Canada for its statement at the present meeting, which raised issues of systemic importance. The United States again wished to extend its

sympathies to all those who had directly borne the impact of the novel coronavirus pandemic. The global pandemic had caused significant disruptions to the work of the WTO, including panel proceedings. Travel restrictions imposed by WTO Members had made it difficult to schedule a substantive meeting of the panel with parties in Geneva. In some instances, this had resulted in a postponement of the meeting. Under these extraordinary circumstances, the United States encouraged each panel to consult with the parties to the dispute on how to proceed, bearing in mind the views of the parties and the relevant provisions of the DSU. Where the rights of the parties and third parties under the DSU could not be fully protected, a virtual session in lieu of a physical meeting in the presence of the parties and third parties could not be considered an adequate substitute. For example, the United States noted that several parties and third parties in ongoing disputes had raised pertinent concerns in relation to the conduct of virtual sessions. These included not only DSU considerations, but also the effect on a party's right of participation, including situations where health or technology considerations precluded or seriously undermined a party's ability to participate remotely. The circumstances of each dispute and each party would vary. It would be misguided for all panels to adopt a single solution to the challenge posed by the global pandemic to the work of panel proceedings. Members had to keep in mind and be respectful of the different circumstances that each Member faced at home. As WTO panels navigated these extraordinary circumstances, the United States encouraged each panel to consult with the parties to the dispute and to consider carefully the feasibility and implications of a possible course of action before taking a decision.

6.7. The representative of Guatemala said that, at the outset, his country wished to thank Canada for this initiative and the statement made on behalf of a group of endorsing Members, including Guatemala. His country was endorsing the practices for the use of flexible arrangements in dispute settlement proceedings during the COVID-19 pandemic as contained in the document under consideration. The reason for this endorsement was simple: in view of the health challenges posed by the current COVID-19 pandemic and the related travel restrictions, it remained unclear when it would be feasible to resume face-to-face hearings. Therefore, there was no question that it was necessary to find alternative arrangements to ensure the continuation of dispute settlement proceedings and to seek a prompt resolution of disputes as stated in Article 3.3 of the DSU, while preserving the parties' due process rights. Guatemala considered that the practices contained in the document under consideration constituted an appropriate approach to finding alternative arrangements that would help ensure the continuation of dispute settlement proceedings under the current circumstances. Essentially, these practices were consistent with the DSU and simply called for the cooperation of the disputing parties and panels which, ultimately, should be the norm in all dispute settlement proceedings.

6.8. The representative of Tunisia said that his country wished to thank Canada for its communication contained in document JOB/DSB/1/Add.13. Tunisia supported Canada's proposal regarding the use of flexible arrangements in dispute settlement proceedings throughout the COVID-19 period. Indeed, all WTO working groups had adjusted to the limitations and demands that had arisen during the COVID-19 pandemic by efficiently using various remote connection platforms. This had made it possible, without major difficulties, to ensure the continuity of their work and to achieve progress in ongoing negotiations. Decisions had been taken by a number of panels, with the parties' agreement, to continue progressing with dispute settlement proceedings, and notably hearings, in a virtual or hybrid format. This demonstrated the Secretariat's sound adaptation in providing operational conditions for the proper hearings through logistical and technical support measures, in accordance with dispute settlement proceedings. Tunisia recognized the efficiency of current information and communication technologies, as well as the level of security and confidentiality. Tunisia recalled the margin of flexibility granted to panels under Article 12 of the DSU for the purposes of providing high-quality reports without delaying their work. Accordingly, Tunisia would welcome a consensus amongst Members to adopt the flexible arrangements due to the COVID-19 pandemic.

6.9. The representative of Chinese Taipei said that his delegation supported the statement concerning the flexible arrangements in dispute settlement proceedings during the COVID-19 pandemic. For a long time, it had been Chinese Taipei's position that the functioning of the WTO dispute settlement mechanism should be maintained. Given the limits on physical meetings that had arisen from the COVID-19 pandemic, Chinese Taipei also wished to encourage panels to adopt alternative arrangements in dispute settlement proceedings, including virtual meetings, to overcome the difficulties associated with holding in-person meetings due to the COVID-19 pandemic. While recognizing the importance of preserving due process, Article 3.3 of the DSU provided that the prompt settlement of disputes was essential to the effective functioning of the WTO. Chinese Taipei

believed that a balance could be struck between prompt settlement of disputes and due process by encouraging parties to cooperate with panels to utilize the latest information and communication technologies to ensure that virtual or hybrid meetings were held in a way that was as close to in-person meetings as possible. These virtual or hybrid meetings could allow for the delivery of oral statements, as well as engagement by parties in substantive discussions with panels and third parties.

6.10. The representative of Japan said that his country thanked Canada for sharing its views and its practice document. Japan very much appreciated Canada's initiative. Japan understood that the practice document called for panels to consider adopting flexible arrangements for advancing dispute settlement proceedings in light of the various restrictions due to the COVID-19 pandemic. While paying close attention to the latest situation of COVID-19 infections, Japan wished to continue to consider how to utilize online means (e.g., virtual and hybrid hearings) during the COVID-19 pandemic and would consider the practice document.

6.11. The representative of Nigeria, speaking on behalf of the African Group, thanked Canada for its statement made under this Agenda item. The African Group welcomed discussions in this area as the COVID-19 crisis had required that many governments adapt to new measures that ensured the sustenance of their economies. Most African Group Members were still considering this submission in their respective capitals. However, the African Group had a few preliminary questions for the proponent, the answers to which would assist with its internal deliberations. First, Nigeria asked how, given the prevailing digital divide among Members, Members could ensure inclusiveness for all Members under these guidelines. Nigeria asked this question as Members were aware that the level of technological capacity differed among Members, and capital engagement could be required during panel proceedings in light of the travel restrictions. Nigeria was also aware of the technical difficulties associated with virtual meetings which, in practice, had seriously undermined participation of some Members. While the prompt settlement of disputes was desirable, it should not undermine the requirements of due process under the DSU. Second, having recalled that Article 14 of the DSU provided for panel deliberations to be confidential, Nigeria asked how confidentiality requirements could be complied with, if information was transmitted via online technology while proceedings were ongoing in a virtual or hybrid format, bearing in mind the unique requirements of each dispute.

6.12. The representative of Australia said that her country thanked Canada for its practice document initiative and for its joint statement delivered on behalf of endorsing Members. Members had to show pragmatism and cooperation to ensure the ongoing and effective functioning of the dispute settlement system amid the challenges arising from the COVID-19 pandemic. Australia encouraged all Members to endorse the practice document as a signal of their support for the dispute settlement system.

6.13. The representative of China said that his country thanked Canada for its statement made under this Agenda item on behalf of many WTO Members. China was well aware of the continuing difficulties posed by the ongoing COVID-19 pandemic, both in terms of public health concerns and its impact on working conditions, and consequently over legal proceedings. Nevertheless, the prompt resolution of disputes remained the core of the WTO dispute settlement system, as evidenced by Articles 3.3 and 12.2 of the DSU. In light of this, China considered it fundamental to provide certainty to dispute settlement proceedings so as to avoid any undue delay in the process. While addressing legitimate public health interests, it was equally necessary to preserve the protection awarded by the WTO legal framework against unjustified trade restrictions, and to keep the global trade system functioning during the economic downturn. China noted that some panels had demonstrated flexibility to avoid excessive delays in proceedings. China supported and encouraged more adjudicators and the Secretariat to continue their work under the present extraordinary circumstances.

6.14. The representative of Korea said that his country shared Canada's views on the need for flexibility in dispute settlement proceedings during the COVID-19 pandemic. As Members had continuously emphasized, revitalizing international trade could greatly contribute to economic recovery efforts. However, in order to maximize this contribution, Members needed the security and predictability provided by WTO rules and its dispute settlement mechanism. Korea appreciated the efforts led by Canada to maintain the effectiveness of the panel process and thereby preserve the relevance of the WTO dispute settlement function in these unprecedented circumstances. The practice document was well-timed and the flexibilities proposed provided timely and effective solutions to current challenges, while seeking to preserve parties' due process rights. Korea agreed

on the overarching need for parties to cooperate in addressing the particular challenges that current circumstances posed for dispute settlement proceedings. In this regard, Korea recalled that Article 3.10 of the DSU called on Members to "engage in these procedures in good faith in an effort to resolve the dispute". Korea looked forward to discussing the practice document in more detail with Canada and with other Members.

6.15. The representative of Turkey said that his country wished to thank Canada for having shared the practice document and for its statement made under this Agenda item. Turkey agreed that there was a need for dispute settlement proceedings to progress as swiftly as possible and for minimizing disruptions due to the COVID-19 pandemic. Turkey believed that panels already acted pursuant to such guidance, as provided by the DSU. The DSU referred to the prompt settlement of disputes in Articles 3.3 and 12.1. These Articles of the DSU provided that in order to ensure progress in their proceedings, panels could adopt alternative working procedures that differed from Appendix 3 of the DSU, after having consulted with the parties. In this respect, although Turkey considered an in-person hearing to be by far the most preferable option, and given the uncertainties posed by the current pandemic, Turkey believed that panels could exercise their discretion under the DSU, on a case-by-case basis, while consulting with the parties and considering capacity constraints of Members. However, Turkey also underlined that no matter how hard Members tried to accelerate progress in dispute settlement proceedings, Members were still faced with the reality of a paralyzed Appellate Body which was a dead-end for all avenues that Members would choose to follow.

6.16. The representative of the United Kingdom said that his country was pleased to support this practice document. The United Kingdom thanked Canada for its efforts on this issue. WTO dispute settlement, and the broader multilateral trading system, had come under significant strain in 2020 due to the impacts of the COVID-19 pandemic. The United Kingdom was mindful that for various Members there had been considerations of decreased capacity and technological constraints. The United Kingdom would continue to support Members facing such constraints, as it had done throughout 2020. There was a balance to be struck between acknowledging the wider strain that the system, and individual Members were under, and ensuring that this strain did not unnecessarily prevent prompt dispute settlement, which was in the interest of all Members. In particular, the United Kingdom noted that the practice document placed importance on cooperation with the panel and the other party or parties, when considering flexible arrangements, to ensure that each dispute's unique context and factors were taken into consideration in order to preserve the parties' due process rights. The United Kingdom welcomed this initiative to support the pursuit of prompt dispute settlement while ensuring that parties and third parties' ability to fully participate was considered in the circumstances of each dispute.

6.17. The representative of Colombia said that, as mentioned by Canada under this Agenda item, Colombia endorsed the practice document. In the context of the COVID-19 pandemic, Colombia believed that Members should try to find solutions to the current difficulties in carrying out activities of dispute settlement system, which was a fundamental pillar of the WTO. Recognizing the difficulties that some Members, including Colombia, could have in engaging in virtual meetings, Colombia believed that this initiative was an appropriate and good faith attempt to do so. Colombia encouraged other Members to endorse this solution-seeking practice document.

6.18. The representative of South Africa said that her country wished to thank Canada for its practice document. South Africa aligned itself with the statement made by Nigeria on behalf of the African Group. COVID-19 had unleashed a devastating health, economic and social crisis unprecedented in recent times. Since the outbreak, the loss of life had been the immediate consequence that governments had had to grapple with, eventually leading to confinement schemes and lockdowns to reduce the spread of the virus. COVID-19 had forced, or likely would still force, governments to take drastic measures in the public interest that were unimaginable in normal times, leading to possible disputes over whether there was a violation of the covered agreements. South Africa believed that Members needed a more substantive discussion within the DSB. These discussions should not only deal with procedural issues related to dispute settlement. As Nigeria had stated, Members had to take into account the importance of due process, as well as constraints that were faced by many Members in relation to the digital divide. South Africa was currently studying the document and would come back with further comments.

6.19. The DSB took note of the statements.

7 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/673)

7.1. The Chairman drew attention to document WT/DSB/W/673 which contained a new nomination proposed by Kenya 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/673.

7.2. The DSB so agreed.

8 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; BANGLADESH; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CANADA; CENTRAL AFRICAN REPUBLIC; CHAD; CHILE; CHINA; COLOMBIA; CONGO; COSTA RICA; CÔTE D'IVOIRE; CUBA; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; ESWATINI; THE EUROPEAN UNION; GABON; THE GAMBIA; GHANA; GUATEMALA; GUINEA; GUINEA BISSAU; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KENYA; REPUBLIC OF KOREA; LESOTHO; LIECHTENSTEIN; MADAGASCAR; MALAWI; MALAYSIA; MALDIVES; MALI; MAURITANIA; MAURITIUS; MEXICO; REPUBLIC OF MOLDOVA; MOROCCO; MOZAMBIQUE; NAMIBIA; NEPAL; NEW ZEALAND; NICARAGUA; NIGER; NIGERIA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; QATAR; RUSSIAN FEDERATION; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SINGAPORE; SOUTH AFRICA; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TANZANIA; THAILAND; TOGO; TUNISIA; TURKEY; UGANDA; UKRAINE; UNITED KINGDOM; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.19)

8.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He then drew attention to the proposal contained in document WT/DSB/W/609/Rev.19 and invited the representative of Mexico to speak.

8.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.19, said that the delegations in question had agreed to submit the joint proposal dated 7 December 2020 to launch the AB selection processes. His 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 seven 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; a sixth process to replace Mr Thomas R. Graham whose second term had expired on 10 December 2019; and a seventh process to replace Ms. Hong Zhao, whose first four-year term of office had expired on 30 November 2020; (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. He said that the proponents were flexible in the determination of the deadlines for the AB selection processes. However, they believed that Members should consider the urgency of the situation. They continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

8.3. The representative of the European Union said that his delegation wished to refer to the EU statements made on this issue at previous DSB meetings, starting in February 2017, as well as to its statements made at 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.

8.4. The representative of the United States said that as the United States had explained in prior meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified for more than 16 years and across multiple US Administrations remained unaddressed. Over the past three years, the United States had engaged in many discussions with Members – on a bilateral basis, in small groups, and in large settings. After three years of effort, the United States asked what had been learned. First, the United States had learned that *the Appellate Body thought it had done no wrong*. The United States knew this because, despite US action on appointments under both the Obama Administration and the Trump Administration, the Appellate Body had not changed its approach. In fact, it had expanded and deepened its WTO-inconsistent practices and interpretations. This reflected an institution that had come to view itself as more important than the rules – and the Members – that had created it. The United States had learned that the *Appellate Body turned out to be less expert than panelists* in adjudicating disputes under the DSU. The United States knew this because the United States had catalogued numerous substantive interpretive errors by the Appellate Body.[5] In most cases, a panel had reached a correct interpretation, and the Appellate Body had gotten it wrong. And so, while some Members might think the Appellate Body had done a better job than panels – the United States believed that the record showed the opposite: panels had generally respected WTO rules, and the Appellate Body far too often had not. The United States had learned that *some Members thought the Appellate Body had done no wrong*. This was regrettable because the United States had not heard any convincing defence of the Appellate Body's errors in interpreting the DSU or substantive WTO rules. The ongoing denial by some Members of any AB errors reflected, in part, a fundamental divide among Members on the proper role of the Appellate Body in the WTO and the global trading system more generally. The United States had learned that *some other Members might think the Appellate Body had done wrong, but were content to maintain the status quo*. The United States did not understand how a Membership that proclaimed its support for a rules-based trading system could nonetheless accept persistent rule-breaking by its dispute settlement system. This unwillingness on the part of some Members might unfortunately reflect a Membership incapable of holding WTO institutions, including the Appellate Body, accountable. Experience showed, however, that without accountability, there could be no reform. And the United States had learned that *some reform-minded Members thought the Appellate Body had committed serious errors, and bravely saw a need for real, fundamental reform* – reform so that the WTO dispute settlement system supported the WTO as a venue for discussion and negotiation between Members, rather than undermining the WTO and converting it into a mere litigation forum.

8.5. The United States believed it was fair to say that the United States had learned a considerable amount. Members had deepened their understanding of the issues and, in some cases, had sincerely wrestled with the challenge before them. But of course, many questions remained. There was the question that every Member knew well – the "why" question. Some Members might be tired of hearing it, and the United States could similarly tire of having to ask it – but the question was too important to the future of the WTO to ignore it. Despite best efforts by the United States to push the conversation forward, the United States had heard very little from other Members on their views as to how Members had arrived at this situation – where the Appellate Body had ignored the clear

[5] See US Trade Representative Report on the Appellate Body of the World Trade Organization, February 2020, pp. 81-119, available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; see also, e.g., Dispute Settlement Body, Minutes of the Meetings WT/DSB/M/294, paras. 103-127 (statement of the United States concerning the Appellate Body report in US – Anti-Dumping and Countervailing Duties (China) (AB)); WT/DSB/M/346, para. 7.7 (statement of the United States concerning the Appellate Body report in EC – Seal Products (AB)); WT/DSB/M/211, paras. 37-40 (expressing concerns with the Appellate Body's interpretation of Article 2.4.2 of the Anti-Dumping Agreement); WT/DSB/M/225, paras. 73-76 (expressing concerns with the Appellate Body's interpretation of the Anti-Dumping Agreement with regard to zeroing); WT/DSB/M/250, paras. 47-55 (expressing concerns that the Appellate Body wrongly claimed that its reports were entitled to be treated as precedent and had to be followed by panels absent "cogent reasons"); WT/DSB/265, paras. 75-81 (expressing concern that the Appellate Body's findings had incorrectly expanded the scope of the proceedings, concern with the Appellate Body's interpretation of the Anti-Dumping Agreement with regard to zeroing, and concern that the Appellate Body had failed to apply the special standard of review under the Anti-Dumping Agreement); WT/DSB/M/385, paras. 8.8-8.19; WT/DSB/M/73 (expressing concerns with the Appellate Body's interpretation of the Safeguards Agreement).

limits placed on it under the DSU and had rewritten the substantive rules set out in the WTO agreements. In meeting after meeting, the United States had posed this question to the Members. The United States had explained why the "why question" was so important. But most Members had not wanted to undertake this critical, reflective exercise. In the absence of engagement from Members, the United States had offered several potential explanations based on conversations and on its own reflections. For example, the United States had noted: one cause could be the ongoing challenges facing the WTO negotiating function and its oversight function, leading to unchecked "institutional creep" by the Appellate Body. Another cause could be that some WTO Members believed that the Appellate Body was an independent "international court" and its members were like "judges" who had more authority to make rules than the focused review provided in the DSU. Relatedly, some Appellate Body members had viewed themselves as "appellate judges"[6] serving on a "World Trade Court" that was the "centerpiece" of the WTO dispute settlement system.[7] Of course, such an expansive vision of the Appellate Body was not reflected in the DSU. Finally, the United States had also noted that the compensation arrangements for AB members had rewarded their delays and staying on beyond the end of their terms, and the United States had learned that there had been very little transparency and accountability for the compensation claimed.

8.6. Besides these, Members had also heard from a former member of the Appellate Body, Mr Graham, who had been willing to speak out candidly on these issues.[8] He had put forward a number of reasons "why" the Appellate Body had erred and had been unwilling to correct those errors – and these remarks deserved attention from all WTO Members. Among his observations on why the Appellate Body had behaved as it had: (1) a "prevailing ethos" to act like a court, and not be accountable to WTO Members; (2) the degree of control by Appellate Body staff; (3) an over-emphasis on "collegiality" that created "peer pressure to conform"; (4) an "excessive striving for consensus" that "led to excessively long and unclear compromise reports" and "encouraged over-reach, gap filling, and advisory opinions"; (5) "a sense of infallibility and of entitlement, to stretch the words of agreed texts, and to stretch decisions beyond merely resolving a particular dispute, so as to create a body of jurisprudence"; and, finally, an "undue adherence to precedent", "not only as to outcomes, but also as to reasoning, definitions, and obiter dicta", which had "made it more important to know the past" than to "openly consider[] whether the past should be reconsidered".

8.7. None of these potential reasons "why" were addressed in the decision before the DSB at the present meeting. Starting a selection process would therefore simply revive the interpretations and practices that the United States had, for years, explained as contrary to the WTO agreement and unacceptable to the United States. Nor did these potential reasons "why" suggest a problem that could be resolved by simply agreeing on words that repeated, with feeling, existing WTO principles. Many Members had been unwilling to confront this difficult reality. Looking ahead, Members had to find ways to ensure that the limitations Members imposed on all WTO adjudicators in the DSU were respected. Members had to consider and grapple with the damage to the WTO, as a forum for discussion and negotiation, and as a rules-based system, for continued failure to adhere to those limitations. While there were many problems in international trade that required discussion of new norms and rules, the United States considered that the rules that Members had been able to agree in 1995 represented some important progress in bringing greater fairness and market-orientation to international trade. As the United States saw it, the Appellate Body had effectively written a new, less-market-oriented, less reciprocal, and less mutually beneficial WTO agreement, which the United States had never agreed to, and which the representative of the United States believed no US Government would agree to. The United States would continue – as it always had – to engage with Members on these important issues.

8.8. The representative of Brazil said that his country wished to thank Mexico for presenting the proposal, contained in document WT/DSB/W/609/Rev.19, on behalf of the co-sponsors. Brazil stood ready, as it always had, to engage with all Members in order to find a lasting solution to this impasse.

[6] Farewell Speech of Appellate Body member Peter Van den Bossche, available at https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

[7] Peter Van den Bossche, From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System (2005).

[8] Farewell speech of Appellate Body member Thomas R. Graham, available at https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm.

8.9. The representative of Thailand said that her country supported the statement made by Mexico on behalf of the co-sponsors. While the time had come when there was no Appellate Body member left, Thailand continued to witness Members filing appeals before the Appellate Body. This reflected the value and importance that Members placed on the two-tier dispute settlement system. Thus, Thailand strongly urged Members to further review possible means and to redouble their efforts to reach a solution and to bring back the Appellate Body as soon as possible. Thailand stood ready to engage in constructive dialogue with Members in these efforts.

8.10. The representative of Switzerland said that her country wished to refer to its statements made at previous DSB meetings on this matter. Members should continue to try to resolve the current impasse. Switzerland called on all Members to engage constructively to find concrete solutions. Switzerland continued to commit itself to working with all Members to achieve this objective. It was Switzerland's priority to ensure that the appellate stage could function fully again in the interest of all Members.

8.11. The representative of Iceland said that as one of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.19, his country was deeply concerned about the lack of progress in filling the current vacancies in the Appellate Body. Iceland believed that the two-stage WTO dispute settlement system played a central role in providing predictability within the international trading system and securing a fair playing field for all participating Members, regardless of their political influence or economic might. Therefore, Iceland called on all Members and stood ready to engage constructively and solve this impasse without further delay.

8.12. 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 month of December 2020 marked a year since the Appellate Body had been able to hear new appeals, and a year since Members had had recourse to a two-stage dispute settlement system with the support of all Members. At a time when the wider trading system was under strain, ensuring the fulfilment of rights and obligations of all Members under the DSU was essential. The United Kingdom had listened carefully to the concerns raised and recognized the need for reform. The United Kingdom encouraged all Members to reaffirm the value of, and Members' investment in, the rules-based multilateral trading system. The United Kingdom looked forward to working with all Members to ensure that they did not become accustomed to the current impasse on dispute settlement. Finding a solution and engaging in reform discussions should not stand in the way of Members accessing two-stage dispute settlement, a central pillar of the multilateral trading system. Therefore, the United Kingdom called on all Members to launch the AB selection processes for all seven vacancies so that Members could restore the system to full functioning while they prioritized discussions on a permanent solution.

8.13. 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. As one of the co-sponsors of the proposal, the Group wished to express regret that up to the present meeting 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.19 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. Therefore, the Group urged the DSB to urgently fulfil its obligation under the DSU, which was to fill vacancies as they arose, so as to ensure that the Appellate Body did not collapse permanently. The African Group believed that procedural matters could be addressed alongside substantive issues. The African Group wished to remind other Members that there had been a dedicated process that had addressed many of the substantive concerns raised by some Members, i.e., the informal process of focused discussions on Appellate Body matters with Amb. Walker as Facilitator ("the Walker process"), in which the African Group had presented a proposal on AB reform. The African Group encouraged the resumption of that process. The African Group was ready to engage constructively with other Members based on its proposal.

8.14. The representative of Peru said that his country wished to thank Mexico for its efforts in respect of this Agenda item. Peru wished to reiterate its support for Mexico. As this was the first DSB meeting since the Appellate Body did not have a single member, Peru wished to reiterate the urgency and importance of filling the AB vacancies. Peru wished to reiterate its readiness to address the concerns of some Members regarding the functioning of the Appellate Body. Peru invited all Members to resume a constructive dialogue on this matter as soon as possible, so that Members could collectively find concrete avenues for exiting the impasse in which they found themselves.

8.15. The representative of Japan said that his country wished to thank Mexico for the proposal contained in document WT/DSB/W/609/Rev.19, which Japan supported. It was regrettable that the last AB member, Ms Zhao, had left office on 30 November 2020, and that the Appellate Body no longer existed other than in the text of the DSU. Japan completely shared the sense of urgency of other WTO Members regarding an expeditious reform of the WTO dispute settlement system. As mentioned at previous DSB meetings, Japan's top priority was to reform the WTO dispute settlement system in a manner that would serve to achieve a long-lasting solution to Appellate Body matters. To that end, Japan considered it essential that Members, while bearing in mind the present situation in which the Appellate Body had essentially disappeared, participated actively in the discussions on reform of the dispute settlement system. Such reform could be achieved only through active discussion among Members, as they were the owners of the system. For that purpose, Japan would spare no effort in collaborating with other Members.

8.16. The representative of South Africa said that her country supported the statement made by Mexico as well as that of Nigeria. South Africa wished to recall its statements made at previous DSB meetings on this matter. South Africa also wished to emphasize a few issues. As Japan had stated, the remaining Appellate Body member's term had expired on 30 November 2020. Members were witnessing a rise in the number of disputes that were appealed into the void. The dysfunctionality of the Appellate Body was a systemic issue that undermined the enforcement function of the WTO. South Africa emphasized the need to resolve the current impasse urgently and find a permanent solution to the appointment of AB members. A functional dispute settlement system was the cornerstone of the multilateral trading system and was essential to the functioning of the WTO. The restoration of an independent, impartial, two-stage dispute settlement system would ensure efficiency in the resolution of disputes in the WTO. South Africa reiterated that the biggest risk of a dysfunctional Appellate Body was borne by smaller WTO Members who were more likely to be subjected to unilateralism and power dynamics. Without the Appellate Body, the WTO dispute settlement system was losing much of its predictability. This, in turn, had serious implications for the rights and obligations of Members. There were also serious consequences for future rule-making efforts in the WTO, as the value of negotiated outcomes depended on the ability of signatories to enforce them. South Africa was ready to engage in a constructive discussion towards a multilateral solution that addressed the concerns of all, including the African Group's concerns about the accessibility of the system. Therefore, South Africa called on all Members to ensure that they discharged their collective duty to select and appoint AB members as soon as possible. The launching of the AB selection processes had to be high on the WTO's agenda.

8.17. The representative of Korea said that his country noted that many Members had continuously voiced their concerns over the Appellate Body's impasse and the urgency to revive the two-tier dispute settlement system. 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.19. Korea urged all Members to engage constructively in the discussions aimed at resolving this important issue as soon as possible.

8.18. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this matter. India reiterated its serious concerns regarding the DSB's inability to commence the AB selection processes. Since 11 December 2019, the Appellate Body was no longer available for the review of panel reports. The defunct Appellate Body had created many problems for Members. The binding, two-stage, impartial dispute settlement system, which was the central element in providing security and predictability to the multilateral trading system, was a core priority for India. India stood ready to engage in constructive dialogue with Members to reach a shared understanding of the concerns raised and to agree on pragmatic solutions in the interest of all Members.

8.19. The representative of Singapore said that his country thanked Mexico for its statement. He said that Singapore supported Mexico's statement and 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. With the expiry of the final Appellate Body member's term at the end of November 2020, Members had the task of filling all seven AB vacancies. The unblocking of the AB selection processes had to remain the paramount priority for all Members, especially with the continued filing of more appeals. Singapore urged all Members, including the United States, to constructively engage in finding a lasting multilateral solution to this matter.

8.20. The representative of Indonesia said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. It was unfortunate that the present meeting had marked one year for the WTO without a fully functioning Appellate Body. Nevertheless, despite the adverse impact arising from its absence, Members had yet to agree on a solution to resolve this crisis. This situation had severely impacted all Members. The absence of a two–tier dispute settlement system had jeopardized the essential element that the WTO could offer to global trade: i.e., certainty. Resolving this issue should be the utmost priority for all Members. Indonesia reiterated its long-standing commitment to constructively engage with other Members and contribute to efforts aimed at resolving this issue. Indonesia, once again, urged all Members to pay serious attention to, and display willingness and commitment for, the immediate appointment of the Appellate Body members.

8.21. The representative of Turkey said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. As a co-sponsor of this proposal, Turkey stressed the urgent need to start the AB selection processes. The Appellate Body was one of the institutional centrepieces of this Organization, to which all Members had adhered at its inception. The Appellate Body was essential to the multilateral trading system. Its demise would undermine the rule of law character of this Organization and risked the collapse of the entire system. Like other Members, Turkey recognized the importance of maintaining a two-tier dispute settlement system, which offered binding adjudication and provided security and predictability to the multilateral trading system. Turkey considered it important and necessary to resume multilateral discussions on ways to improve the system and to address the concerns of Members. Turkey stood ready to engage constructively to help overcome this impasse and invited all Members to engage in discussions.

8.22. 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.19 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.

8.23. 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. After the departure of its last sitting member, the Appellate Body had become a standing body on paper. Restoring the function of this entity became even more urgent. The Appellate Body was the hallmark of multilateralism and international rule of law. WTO Members bore the collective and unconditional obligation under the DSU to fill the AB vacancies. Nothing could serve as a pretext to ignore this negotiated treaty obligation. As Members had observed in 2020, the paralysis of the Appellate Body had seriously undermined the security of the rules-based multilateral trading system, especially under this once-in-a-century pandemic when the world needed such security the most. More

"appeals into the void" meant that violations of current rules could easily escape sanctions. Measures that were WTO-inconsistent were still being applied. If old rules could not be enforced, there wouldn't be any appetite for the negotiation of new rules. In this regard, absent a strong dispute settlement system, the negotiating and monitoring pillars would incur collateral damage and 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 live with a damaged WTO dispute settlement system. Various alternative arrangements, such as non-appeal agreement, amounted to damage control under the circumstances. None of them, including the MPIA, could fully replace a functional Appellate Body in terms of providing the same degree of security and predictability to the multilateral trading system. In light of this, maintaining a two-tier dispute settlement system should remain the priority for the entire Membership. Therefore, China called on every Member, including the United States, to participate constructively in 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.

8.24. The representative of the European Union noted that the United States had stated that the past had to be reconsidered. The EU wished to reiterate that Members should have a forward-looking discussion and should not continuously re-litigate their differences as to the reading of the current rules. The draft General Council decision presented by Amb. Walker could have been the right basis for unblocking the appointments. However, it had not been accepted by the United States who had not made any proposal or counter-proposals. The EU stood ready to continue a forward-looking discussion.

8.25. The representative of Mexico, speaking on behalf of the 121 co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.19, expressed regret that for the thirty-eighth 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.

8.26. The representative of Mexico said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. For more than two years, Mexico had continuously been deeply concerned by this unprecedented situation with a non-operative and non-existing Appellate Body. The proposal supported by 121 Members sought the launch of seven AB selection processes to fill the seven seats on the Appellate Body. This situation was unsustainable. As noted at recent DSB meetings, all ongoing disputes were being affected by the lack of a fully functioning dispute settlement system. This undermined the right of all Members to resort to an appellate stage and jeopardized speedy compliance with and adoption of panel reports. There existed a shared concern and willingness among the Membership to comply with the obligation to fill vacancies as they arose in accordance with Article 17.2 of the DSU. Mexico urged those Members that had not already done so to support the proposal contained in document WT/DSB/W/609/Rev.19, and to engage constructively and make concrete proposals aimed at resolving this matter.

8.27. 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.

8.28. The DSB took note of the statements.

9 STATEMENT BY BRAZIL REGARDING THE PANEL REPORT ON: "INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY BRAZIL"

9.1. The representative of Brazil, speaking under "Other Business", said that his country was surprised and deeply disappointed by Indonesia's decision to appeal "into the void" the report by the compliance panel in this dispute. Brazil had initiated this dispute in October 2014. When the original Panel had been established, Brazil had stressed that, since 2009, Brazil had been trying to export chicken meat and chicken products to Indonesia. Over the years, several attempts had been made by Brazil to overcome the barriers imposed by Indonesia against its exports, to no avail. Brazil had noted at that time that there was no justification for the import ban imposed by Indonesia on Brazilian exports. The original Panel had found that Indonesia had indeed been in breach of its obligations under the GATT and the SPS Agreement. After the DSB had adopted the recommendations of the original Panel in November 2017, Indonesia had agreed to a period of eight months to comply with the DSB rulings and bring its measures into conformity with its obligations. In its report circulated in November 2020, three years after the original Panel report had been adopted, the compliance Panel had found that Indonesia had failed to comply. By appealing the compliance Panel report to an Appellate Body that it knew was unable to function, Indonesia sought to evade its obligations and the consequences of its decade-long inaction. This was all the more regrettable because Indonesia had expressly assured Brazil, by a letter from its Permanent Representative dated 13 August 2020, that it would not resort to appeal under Article 16.4 of the DSU in this dispute. Brazil wished to note, in particular, the assurance by Indonesia in the following paragraph of that letter: "[i]n this regard, we believe that both Parties are of the mutual view that appellate review proceedings under Article 16.4 DSU would not be productive in delivering a positive outcome for this dispute, bearing in mind the current circumstance surrounding the Appellate Body. Hence, we would like to provide the assurance that Indonesia would resist to exercise its rights to file an appeal under Article 16.4 and Article 17 of the DSU for the report of the Article 21.5 panel. This is without prejudice to the rights of Indonesia to resort to alternative appellate procedure, including through arbitration under Article 25 DSU based on agreement by both Parties". Indeed, in light of this assurance, Brazil had agreed on three occasions to request the compliance Panel to suspend its work - and thus not circulate its report - so as to give the parties more time to negotiate a solution. In fact, every time that Indonesia had asked Brazil to request the compliance Panel to suspend or keep suspended its work, Brazil had agreed.

9.2. He said that, at first, Brazil had sought to negotiate a framework for compliance that could lead to a mutually agreed solution to this dispute. After some iterations had indicated that Indonesia seemed intent on keeping its market effectively closed to chicken imports for an unreasonably long time, Brazil proposed an appeal-arbitration agreement. The procedures set out in such an agreement should not be a matter of controversy, and Brazil had expected that its conclusion should be rather straightforward. Indonesia, however, had presented Brazil with a number of unreasonable demands that would have rendered the arbitration proceedings inexplicably lengthy or it would have possibly deprived Brazil of any remedies, even if the arbitrator had confirmed, as the compliance Panel had done so, that Indonesia had failed to comply with the DSB's rulings. The compliance Panel had then circulated its report. It was worth noting that, just prior to circulation, and unlike on previous occasions, Indonesia had not asked Brazil to request the Panel to keep its work suspended. That was why Brazil was so surprised and disappointed with Indonesia's decision to appeal into the void. This disappointment was compounded by the fact that Indonesia had formally not only committed, but indeed had given an assurance not to appeal into the void. After years of attempts at negotiation and WTO litigation, Brazil's producers were left without any prospect of resolution of this dispute. Brazil would consider all options that might be available to safeguard its rights in response to Indonesia's continued ban on its exports.

9.3. The representative of Indonesia said that his country wished to thank Brazil for its statement. At the same time, Indonesia wished to thank the Panel and the WTO Secretariat for their hard work and contribution to the compliance review in this dispute. Nevertheless, Indonesia expressed regret at the compliance Panel's decision that Indonesia, in respect of certain measures, had failed to comply with the recommendations and rulings of the original Panel. Meanwhile, as Indonesia had reiterated on numerous occasions, significant corrective actions had been carried out in order to implement the original Panel's recommendations and rulings. Therefore, Indonesia truly believed that full compliance had been successfully achieved. Given the current, non-functioning state of the Appellate Body, Indonesia and Brazil had made serious efforts, in good faith, to find an amicable solution to this dispute. Both parties had also attempted to find common ground to address the legal

issues arising from the compliance Panel report in this dispute. This included an attempt at reaching agreement on an alternative appellate mechanism through arbitration under Article 25 of the DSU. However, despite intensive discussions, an agreement had yet to be reached between the Parties. Considering the importance of addressing the legal errors in the compliance Panel report, Indonesia had been left with no option other than to use its legitimate right to file an appeal in accordance with Articles 16.4 and 17 of the DSU. Indonesia believed that this avenue offered a solution to the absence of objective assessment carried out in the compliance Panel proceedings. Indonesia wished to inform the DSB that it had submitted its notice of appeal along with its appellate submission, and that it had requested that the Appellate Body modify or reverse the compliance Panel's recommendations and rulings in this dispute. Indonesia stood ready to communicate with Brazil and the Secretariat regarding the appellate procedure in accordance with the DSU.

9.4. The representative of the European Union said that this was yet 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 statement 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.

9.5. The representative of Canada said that since 11 December 2019, the Appellate Body had effectively been non-functioning. Article 3.10 of the DSU provided that, where a dispute arose, Members would engage in dispute settlement proceedings in good faith and in an effort to resolve the dispute. The inability of the Appellate Body to carry out its appellate review responsibilities had undermined the established process under the DSU for dispute settlement. But the obligation in Article 3.10 to make good faith efforts to resolve the dispute still stood. No Member should seek to benefit unfairly from the current impasse. In the context of specific disputes, solutions existed to address the current Appellate Body impasse. In particular, disputing parties could agree to resort to procedures such as those set out in Annex 1 to the MPIA (document JOB/DSB/1/Add.12) to complete the appeal process. Canada believed that it was crucial for all disputing parties to adhere to their good faith commitment under Article 3.10 of the DSU by making every effort to find an acceptable solution. Failure to find such a solution would risk resort to self-help measures, which in turn would erode confidence in the rules-based framework for governing international trade. No Member would gain from this situation in the long term. A Member acting in good faith should find no comfort in benefitting from an unfair – and short-term – advantage it possessed due to the absence of a functioning Appellate Body.

9.6. The representative of the Russian Federation said that her country wished to refer to its statements made at previous DSB meetings with respect to the practice of appealing panel reports "into the void". The Russian Federation reiterated its disappointment with the fact that WTO Members continued to file appeals notwithstanding the Appellate Body's critical state. In fact, the last AB member's term had expired on 30 November 2020. With the recent appeal notified by Indonesia, the resolution of six disputes was effectively blocked.

9.7. The DSB took note of the statements.