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Dispute Settlement Body
25 February 2019

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 25 FEBRUARY 2019

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

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1.1. The Chairperson noted that there were eight sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. She recalled that Article 21.6 requires 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, she invited delegations to provide up-to-date information about their compliance efforts. She 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". She 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.192)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.192, 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 14 February 2019, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect

to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country wished to thank the United States for its most recent status report and the 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.167)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.167, 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 14 February 2019, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that his country noted that the United States had submitted its 168th status report for this dispute. This most recent status report, as was the case for the status reports submitted by the United States ahead of previous DSB meetings, was not different from the very first status report submitted in this dispute 14 years ago. Almost two decades after the DSB had adopted the Appellate Body report in this dispute, and without further implementation, the United States had continuously failed to provide the minimum standard of protection as required by the WTO TRIPS Agreement. 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, therefore, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute without further delay.

1.10. The representative of the United States said that as the United States had noted at prior DSB meetings, by intervening under this item, China attempted to give the appearance of concern for intellectual property rights. Yet, China had been engaging in industrial policy which had resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and its workers and businesses. In contrast, the intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other Member. Indeed, none of the damaging technology transfer practices of China that the United States had discussed at recent DSB meetings were practices that Chinese companies or innovators faced in the United States.

1.11. The representative of China said that the United States had tried to derail the discussion to other irrelevant issues. However, distraction was not the solution. The issue under this Agenda item was whether the United States had fully implemented the DSB's recommendation and rulings in this dispute. Obviously, the answer was negative. In its statement under this Agenda item, the United States appeared to suggest its supremacy on the protection of intellectual property rights. However, given the simple fact that the United States had deliberately delayed its compliance with the DSB's recommendations and rulings in this dispute for more than 14 years, and that the United States had become the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement, the US suggestion was clearly flawed in the absence of valid legal benchmarks. Regarding the US claims on China's intellectual property protection issues, China

wished to refer to its statements delivered at various forums, including its statement made at the 28 May 2018 DSB meeting. His country took its commitments under the TRIPS Agreement seriously. China welcomed and always stood ready to engage in good faith discussions with other Members concerning any intellectual property issue. Under this Agenda item, China, once again, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by complying fully with the DSB's recommendations and rulings in this dispute without further delay. In addition, China invited the United States to consider including in its next status report the specific reasons as to why implementation of the DSB's recommendations and rulings in this dispute could not take place for this long in this dispute.

1.12. 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.130)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.130, 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.

1.14. The representative of the European Union said that his delegation 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. On 14 January 2019, four draft authorizations had been presented for a vote in the Appeal Committee, with a "no opinion" result. One authorization had been for the renewal of a genetically modified oilseed rape, two had been for new genetically modified maize seeds and one had been for a genetically modified cotton seed. Going forward, it was for the European Commission to decide on these authorizations. Also, on 14 January 2019, three draft authorizations for new genetically modified maize seeds had been presented for a vote in a member States Committee with a "no opinion" result. These measures would then be submitted for a vote in the Appeal Committee on 22 February 2019. The EU continued to be committed to act in line with its WTO obligations. More generally and as the EU had stated many times at previous DSB meetings, the EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.15. The representative of the United States said that the United States thanked the European Union (EU) for its status report and its statement at the present meeting. The United States continued to be concerned with the EU's measures affecting the approval of biotech products. Delays persisted and affected dozens of applications that had been awaiting approval for months or years, or that had already received approval. Further, even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. As the United States had highlighted at prior DSB meetings, the EU maintained legislation, in the form of the amendment of EU Directive 2001/18 through EU Directive 2015/413, that permitted EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (GMOs), even where the European Food Safety Authority ("EFSA") had concluded that the product was safe. This legislation permitted EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least 17 EU member States, as well as certain regions within EU member States, had submitted such requests. The United States again highlighted a public statement issued by the EU's Group of Chief Scientific Advisors on 13 November 2018, in response to the 25 July 2018 European Court of Justice (ECJ) ruling that addressed the forms of mutagenesis that qualified for the exemption contained in EU Directive 2001/18/EC. The Directive had been a central issue in dispute in these WTO proceedings, and concerned the deliberate release into the environment of GMOs. The United States took issue with the EU statement made at prior DSB meetings that this ECJ ruling did not relate to previously authorized GMOs. This statement was contradicted by the EU Group of Chief Scientific Advisors' statement, which recognized that, "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose". The EU Group of Chief Scientific Advisors' statement spoke to the lack of scientific support for the regulatory framework under EU Directive 2001/18/EC. Further, the statement noted that current scientific knowledge called into question the definition of "GMOs" under the Directive and noted that mutagenesis, as well as transgenesis, occurred naturally. The United States urged

the EU to act in a manner that would bring into compliance the measures at issue in this dispute. The United States further 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.

1.16. The representative of the European Union said that, in response to the US statement, the EU wished to clarify that no EU member State had imposed any ban thus far. Moreover, under the terms of the "opt-out" Directive, an EU member State could adopt measures restricting or prohibiting cultivation only if such measures were in line with EU law, reasoned, proportional, non-discriminatory and based on compelling grounds. His delegation wished to recall that the opt-out Directive was not covered by the DSB's recommendations and rulings in this dispute. In its statement at the present meeting, the United States had also referred to a judgment of the European Court of Justice (ECJ), which had been issued in July 2018. That judgment provided important clarification on the scope of application of the legislation on genetically modified organisms (GMOs), in relation to organisms obtained by mutagenesis techniques. The ECJ had ruled that organisms obtained by means of new techniques and methods of mutagenesis, which had appeared or had been mostly developed after the adoption of Directive 2001/18, fell within the scope of that Directive. The ECJ judgment had not extended the scope of the legislation. It had clarified how it should be read. The European Commission was currently working to ensure proper implementation of the ECJ judgment, together with the EU member States. The EU member States were responsible at the national level for the relevant control activities regarding the placing on the market of both products produced in the EU and products that were imported into the EU. To this effect, the Joint Research Centre was helping national laboratories to develop relevant detection methods. There had been many reactions to the ECJ judgment, bringing forward a wide range of different views. Among these, the Group of Chief Scientific Advisors of the Scientific Advice Mechanism had issued a statement which provided a scientific perspective on the regulatory status of products derived from gene editing. This statement focused on the new mutagenesis techniques and did not question previously authorized GMOs. The Group of Chief Scientific Advisors provided independent scientific advice to the European Commission. Its work fed into ongoing discussions with all stakeholders.

1.17. 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.14)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.14, 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.

1.19. The representative of the United States said that the United States had provided a status report in this dispute on 14 February 2019, in accordance with Article 21.6 of the DSU. On 15 December 2017, the US Trade Representative had requested that the US Department of Commerce make a determination under section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce had reviewed those comments and rebuttal comments and had taken them into account for purposes of preparing the final determination. On 4 June 2018, Commerce had issued a final determination, in which Commerce had revised certain aspects of its original determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programmes, in response to the findings adopted by the DSB. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to anti-dumping measures challenged in this dispute.

1.20. The representative of Korea said that his country wished to thank the United States for its status reports and the statement made at the present meeting. Korea wished to note that on 8 February 2019, the WTO Arbitrator had issued a decision on the level of suspension equivalent to the level of nullification and impairment. Korea wished to refer to its statements made at previous DSB meetings and urged the United States to faithfully implement the DSB's rulings and recommendations in this dispute.

1.21. The representative of Canada said that his country was concerned that the United States had not implemented the DSB's recommendations and rulings in this dispute. In particular, Canada was deeply disappointed that, despite the expiry of the reasonable period of time, the United States continued to collect cash deposits from Canadian exporters based on a methodology that was found to be "as such" inconsistent with WTO obligations in this dispute.

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

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.6)

1.23. The Chairperson drew attention to document WT/DS471/17/Add.6, 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.

1.24. The representative of the United States said that the United States had provided a status report in this dispute on 14 February 2019, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.25. The representative of China said that the Appellate Body report in this dispute had been circulated to Members on 11 May 2017. On 22 May 2017, the DSB had adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. The Arbitration pursuant to Article 21.3(c) of the DSU had determined the reasonable period of time (RPT) to be 15 months. The RPT had expired on 22 August 2018. On 9 September 2018, China had requested authorization from the DSB to suspend concessions or other obligations and the matter had been referred to arbitration in line with Article 22.6 of the DSU. Thus far, the United States had submitted six status reports. None of the status reports indicated any substantive implementation progress by the United States to address the DSB's recommendations in this dispute other than "consulting with the interested parties". Due to its consistent non-compliance, 21 months after the DSB had adopted the Appellate Body report and the panel report in this dispute, and six months after the expiry of the RPT, this dispute continued to be unresolved. China was very disappointed and deeply concerned with the progress of the United States in implementing the DSB's adopted recommendations and rulings. The WTO-inconsistent measures taken by the United States had seriously infringed China's legitimate economic and trade interests, distorted the relevant international market as well as seriously damaged the rules-based multilateral trading system. This should alert all Members and the international community. China, once again, urged the United States to take concrete actions, to fully respect WTO rules, and faithfully implement the DSB's recommendations and rulings in this dispute.

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

F. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18/Add.5)

1.27. The Chairperson drew attention to document WT/DS484/18/Add.5, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case on measures concerning the importation of chicken meat and chicken products.

1.28. The representative of Indonesia said that her country had submitted its status report in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted its recommendations and rulings in this dispute. At the 22 January 2018 DSB meeting, Indonesia had informed the DSB of its intention to implement the DSB's recommendations and rulings in this dispute. Indonesia and Brazil had also informed the DSB, on 15 March 2018, of their agreement on a reasonable period of time (RPT) for Indonesia to implement the DSB's recommendations and rulings in this dispute. The RPT had expired on 22 July 2018. She said that her country had undertaken necessary adjustments for the relevant measures. Indonesia wished to reiterate that all animals and animal products, both fresh and processed, imported into Indonesia had to be accompanied with health or veterinary certificates from their country of origin. Any modification made by an importer to information contained in the import licenses would not be subject to any sanction, as long as it was made in compliance with the applicable procedure. Indonesia was processing Brazil's veterinary certification questionnaire by referring to the relevant regulations without delay. Indonesia stood ready to continue to consult and would remain in constant communication with Brazil with respect to any matter relating thereto.

1.29. The representative of Brazil said that her country wished to thank Indonesia for its status report, which Brazil was currently reviewing. Brazil's concerns about Indonesia's implementation of the DSB's recommendations and rulings in this dispute remained. These concerns related, *inter alia*, to the "positive list requirement", which was still in force. Indonesia had chosen to maintain the list and include some of the HS codes of chicken meat and chicken products that had been the subject of Brazil's complaint. One HS code, however, still remained to be included in Indonesia's positive list. In addition, Brazil noted that Indonesia had eliminated the requirement of distribution reports with information regarding use or place of sale of imported chicken meat and chicken products. The requirement of distribution plans nonetheless still existed by force of Article 22(1)(l) of Ministry of Agriculture Regulation 34/2016. Brazil was aware of the possibility of making amendments to the terms of import licenses. However, it was Brazil's understanding that the amendments still subjected importers to several sanctions in the event that some requirements were not strictly observed. Brazil wished to highlight, as a final point, the unsatisfactory status of the analysis of Brazil's veterinary health certificate for the importation of chicken meat and chicken products. Brazil believed that undue delay continued with Indonesia's approval of the certificate. The reasonable period of time (RPT) for Indonesia to comply with the DSB's recommendations and rulings in this dispute had expired on 22 July 2018. Full implementation, as Brazil had previously explained, remained to be seen. Brazil thus urged Indonesia to fully comply with the DSB's recommendations and rulings in this dispute. Brazil stood ready to work with Indonesia with respect to any aspect of this dispute.

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

G. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.5)

1.31. The Chairperson drew attention to document WT/DS488/12/Add.5, 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 measures on certain oil country tubular goods from Korea.

1.32. The representative of the United States said that on 11 January 2019, the United States and Korea had informed the DSB that the parties had mutually agreed to modify the previously notified reasonable period of time (RPT) for implementation of the DSB's recommendations and rulings in this dispute pursuant to Article 21.3(b) of the DSU. The RPT would expire on 12 July 2019. The United States had provided a status report in this dispute on 14 February 2019, in accordance with Article 21.6 of the DSU. On 23 November 2018, the US Department of Commerce had provided notice in the US Federal Register that it had commenced a proceeding to gather information, analyse record evidence, and consider the determinations which would be necessary to bring the anti-dumping investigation at issue in this dispute into conformity with the DSB's recommendations and rulings. The notice was available at 83 F.R. 59359. The United States would continue to consult with interested parties on options to address the DSB's recommendations.

1.33. The representative of Korea said that his country wished to thank the United States for its status reports and the statement made at the present meeting. Korea wished to refer to its statements made at previous DSB meetings and urged the United States to faithfully implement the

DSB's recommendations and rulings within the reasonable period of time, which would expire on 12 July 2019.

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

H. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.1 – WT/DS478/22/Add.1)

1.35. The Chairperson drew attention to document WT/DS477/21/Add.1 – WT/DS478/22/ Add.1, 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.

1.36. The representative of Indonesia said that her delegation had submitted its status report in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted the recommendations and rulings in this dispute. At the 28 February 2018 DSB meeting, Indonesia had informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute, but that it would need a reasonable period of time (RPT) to do so. Pursuant to Article 21.3 (b) of the DSU, Indonesia, the United States and New Zealand had mutually agreed on the RPT to implement the DSB's recommendations and rulings. That RPT had expired on 22 July 2018. Nevertheless, with regard to the DSB's recommendations and rulings concerning Measure 18, Indonesia, the United States and New Zealand also had mutually agreed that Indonesia would have more time to make statutory changes to comply with the DSB's recommendations and rulings in this dispute. Accordingly, the United States and New Zealand would not initiate further proceedings concerning Measure 18 until at least 22 June 2019. From the 28 January 2019 DSB meeting, Indonesia had noted that the United States and New Zealand had underscored some measures including requirements on harvest period, import realization, warehouse capacity, application windows, validity period and fixed licensed terms. Indonesia had conducted intensive bilateral consultations with the United States and New Zealand to discuss implementation progress in order to pursue full compliance. In general, Indonesia had been improving its system of importation to address concerns raised by the United States and New Zealand. Indonesia would continue to hold such consultations with the United States and New Zealand to provide further detailed explanations on these matters.

1.37. The representative of the United States said that, regrettably, Indonesia continued to fail to bring its measures into compliance. The United States and New Zealand agreed that significant concerns remained with the measures at issue including: harvest period restrictions, import realization, warehouse capacity, application windows, validity period, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. Although Indonesia and the United States had engaged in bilateral discussions, the United States was still waiting to hear from Indonesia what concrete actions it would take to bring its measures into full compliance. The United States also looked forward to hearing the statutory changes Indonesia intended to make with respect to Measure 18.

1.38. The representative of New Zealand said that his country acknowledged the steps that had been taken by Indonesia to bring its regulations into compliance with the DSB's recommendations and rulings. His country also welcomed Indonesia's commitment to comply fully with these recommendations and rulings. New Zealand did not consider, however, that full compliance had been reached in respect of a number of measures addressed in this dispute. Of particular concern was the continued enforcement by Indonesia of limited application windows, harvest period import bans, import realization requirements, and restrictions placed on import volumes based on storage capacity. New Zealand wished to thank Indonesia for its continued engagement, including for its most recent status report. New Zealand welcomed Indonesia's commitment in this status report to engage intensively with New Zealand and the United States, and also wished to use these discussions to learn more about progress on the further legislative change that was due to come into effect by the June 2019 deadline. New Zealand would continue to work with Indonesia to achieve long-term, commercially meaningful compliance with the DSB's recommendations and rulings in this dispute.

1.39. 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 Chairperson said that this item was on the Agenda of the present meeting at the request of the European Union. She then invited the representative of the European Union to speak.

2.2. The representative of the European Union said that his delegation requested, once again, that the United States stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports in this dispute. The EU would continue to place this item on the Agenda as long as the United States had not implemented the DSB's recommendations and rulings in this dispute.

2.3. The representative of Brazil said that as an original party to this dispute, his country wished to thank the EU, once again, for placing this item on the Agenda of the DSB. Beyond the discussion about whether or not the concerned Member had an obligation to continue submitting status reports in this dispute, the reason that Members had to return to this Agenda item at every DSB meeting was that millions of dollars in anti-dumping and countervailing duties were still being *illegally* disbursed to US domestic petitioners. After more than 16 years since the adoption of the DSB's recommendations and rulings in this dispute, and after more than 13 years after the date on which the Deficit Reduction Act that had repealed the Amendment, Brazil called on the United States to comply fully with the DSB's recommendations and rulings in this dispute.

2.4. 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 shared the EU's view that this dispute had to remain under surveillance of the DSB until the United States ceased to apply the measures at issue in this dispute.

2.5. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 10 years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. The practice of Members confirmed this widespread understanding of Article 21.6 of the DSU. Responding party Members did not continue submitting status reports where the responding Member had claimed compliance and the complaining Member disagreed, as Members would see under the next Agenda item concerning the "EC – Large Civil Aircraft" dispute (DS316). As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance.

2.6. The DSB took note of the statements.

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

A. Statement by the United States

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

3.2. The representative of the United States said that the United States noted that, once again, the EU had not provided Members with a status report concerning the "EC – Large Civil Aircraft" dispute (DS316). The United States had raised this same issue at recent past DSB meetings, where the EU had similarly chosen not to provide a status report. As the United States had noted at several recent DSB meetings, the EU had argued that Article 21.6 of the DSU required that: "the issue of implementation shall remain on the DSB's agenda until the issue is resolved". And the EU had argued that where the EU as a complaining party did not agree with another responding party Member's "assertion that it has implemented the DSB recommendations and rulings", "the issue remains unresolved for the purposes of Article 21.6 DSU". Yet for this dispute, the EU had conceded at the last DSB meeting on 28 January 2019 that: "compliance proceedings in this dispute are still ongoing and whether or not the matter is resolved is the very subject matter of th[e] ongoing litigation". This stated EU position simply contradicted the EU's actions in this dispute. Given the EU's failure to provide a status report in this dispute again ahead of the present meeting, the United States failed to see how the EU's behaviour was consistent with the alleged systemic view it had been espousing for more than 10 years. Under the EU's own view, the EU should have been providing status reports. Yet it had failed to do so. The only difference that the United States could see was that, now that the EU was a *responding* party, the EU was choosing to contradict the reading of Article 21.6 of the DSU it had long erroneously promoted. The EU's purported rationale was that it need not provide a status report because it was pursuing a second compliance panel under Article 21.5 of the DSU. But as the United States had explained at previous DSB meetings, there was nothing in Article 21.6 of the DSU to support this position. By way of contrast, under Article 21.6 of the DSU, a responding party Member provided the DSB with a status report "of its progress in the implementation" of the DSB's recommendations. But once the Member had announced compliance there was no further "progress" on which it could report, and therefore no obligation to provide a report. And the conduct of every Member when acting as a responding party, including the EU, showed that WTO Members understood that a Member concerned had no obligation under Article 21.6 of the DSU to continue supplying status reports once that Member announced that it had implemented the DSB's recommendations. As the EU allegedly disagreed with this position, it should for future DSB meetings provide status reports in this dispute.

3.3. The representative of the European Union said that the United States had implied that his delegation 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. This US assertion was without merit. As the EU had repeatedly explained at previous DSB meetings, the crucial point for the responding party's obligation to provide status reports to the DSB was the stage of the dispute. In the "EC – Large Civil Aircraft" dispute (DS316), the dispute was at a stage where the responding party did not have the obligation to submit status reports to the DSB. The EU wished to recall that in the "EC – Large Civil Aircraft" dispute (DS316), the EU had notified to the WTO a new set of measures in a compliance communication, submitted at the 28 May 2018 DSB meeting. The United States had responded that the measures included in that communication did not bring the EU in full compliance with the DSB's recommendations and rulings in that dispute. In light of the US position, on 29 May 2018, the EU had requested consultations with the United States pursuant to Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the dispute. Consequently, the EU had then asked for the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. That compliance panel was currently reviewing "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. He repeated that there was a compliance proceeding still ongoing in this dispute. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU was the very subject matter of this ongoing litigation. He asked how it could be said that the responding party should submit "status reports" to the DSB in these circumstances. In the "US — Offset Act (Byrd Amendment)" disputes (DS217, DS234), referred to as the "Byrd Amendment" dispute, the situation was completely different. These disputes had been adjudicated and there were no further proceedings pending. Under Article 21.6 DSU, the issue of implementation had to remain on the DSB's Agenda until the issue was resolved. In the "US — Offset Act (Byrd Amendment)" disputes (DS217, DS234), the EU did not agree with the US assertion that it had implemented the DSB's recommendations and rulings. This meant that the issue remained unresolved for purposes of Article 21.6 of the DSU. If the United States did not agree that the issue remained unresolved, nothing prevented the United States from seeking a multilateral determination through a compliance procedure, just like the EU was doing in the "EC – Large Civil Aircraft" dispute (DS316). In conclusion, the EU would be very concerned with a reading of Article 21.6 of the DSU that would require the responding 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 view of the EU was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance.

3.4. The DSB took note of the statements.

4 TURKEY – ADDITIONAL DUTIES ON IMPORTS OF AIR CONDITIONING MACHINES FROM THAILAND

A. Request for the establishment of a panel by Thailand (WT/DS573/2)

4.1. The Chairperson drew attention to the communication from Thailand contained in document WT/DS573/2. She then invited the representative of Thailand to speak.

4.2. The representative of Thailand said that on 4 December 2018, his country had requested consultations with Turkey regarding this dispute. Thailand had engaged in good faith consultations with Turkey with a view to reaching a mutually satisfactory solution. Unfortunately, these consultations had not been fruitful and had failed to resolve this dispute. His country, therefore, felt obliged, at the present meeting, to request the establishment of a panel to resolve this dispute. For the reasons indicated in its request for establishment of a panel, dated 14 February 2019, Thailand was concerned that the additional duties imposed by Turkey on air conditioning machines from Thailand were inconsistent with Turkey's obligations under the GATT 1994 and the Agreement on Safeguards. In particular, Thailand noted that the additional duties had been imposed by Turkey in response to the June 2017 extension for a period of three years of Thailand's safeguard measure on certain steel products. However, since Turkey was not an affected Member with a substantial interest as an exporter of the products covered by the safeguard measure, it was not entitled to suspend an equivalent level of concessions in response to the safeguard measure. Furthermore, even assuming that Turkey had the right to suspend concessions, the level of the additional duties imposed by Turkey and the duration of its measure were not in line with its obligation to suspend only "substantially equivalent" concessions or other obligations. Thailand was, therefore, concerned that Turkey had imposed additional duties that were not justified under Article XIX of the GATT 1994 and the Agreement on Safeguards. Turkey's additional duties violated its tariff commitments and related obligations with respect to imports from Thailand. Accordingly, Thailand requested that the DSB establish a panel to examine the matter set out in its request for establishment of a panel, with standard terms of reference.

4.3. The representative of Turkey said that his country regretted Thailand's decision to request the establishment of a panel in this dispute. Thailand's request was premature because, in Turkey's view, the parties had not yet exhausted all possibilities to arrive at a mutually convenient solution for this dispute. Turkey wished to express its sincere hope that a mutually agreeable solution could be found to resolve this dispute. Turkey stood ready to engage in meaningful and constructive discussions with Thailand on how this could be done. In these circumstances, Turkey was unable to agree to the establishment of a panel at the present meeting.

4.4. The DSB took note of the statements and agreed to revert to this matter.

5 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; BENIN; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; CUBA; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; LIECHTENSTEIN; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA; TURKEY; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA AND VIET NAM (WT/DSB/W/609/REV.8)

5.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. In this regard, she drew attention to the proposal contained in document WT/DSB/W/609/Rev.8 and invited the representative of Mexico to speak.

5.2. The representative of Mexico, speaking on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.8, said that the delegations in question had agreed to submit the joint proposal dated 14 February 2019 to launch the AB selection processes. Her delegation welcomed Benin as a new co-sponsor of the proposal in addition to Rwanda who had expressed its intention to co-sponsor this proposal. Mexico, on behalf of these 73 Members, wished to state the following. The considerable number of Members submitting this joint proposal reflected a common concern with the current situation in the Appellate Body that was seriously affecting its workings and the overall dispute settlement system against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out in the joint proposal before the DSB at the present meeting. This proposal sought to: (i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy that 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 expired on 11 December, 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidates; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates". The proponents were flexible with regard to the deadlines for the selection processes, but believed that Members should take into account the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

5.3. The representative of Mexico, speaking on behalf of Mexico only, said that her country found it regrettable that, despite many attempts made by various delegations, the Appellate Body continued to have only three of the seven members that it should comprise. In this regard, Mexico had grave concerns, which were becoming increasingly pressing. Mexico, once again, called on Members to address, in a responsible manner, the current situation whereby, for nearly two years, Members had been unable to launch the AB selection processes. In failing to do this, Members were clearly disregarding their obligation set out in Article 17.2 of the DSU to fill such vacancies as soon as they arose. This situation was unacceptable and would have a serious systemic impact for the Organization. The Appellate Body had recently found itself faced with a growing accumulation of pending appeals, and this would continue to escalate, as it was only the same three remaining members that would consider all appeals submitted since October 2018. There were currently proposals before the General Council that sought to address the concerns that had been raised, and that alone should be sufficient for the launch of the AB selection processes to be agreed to by Members at the present meeting in compliance with the DSU, so that the vacancies could be filled as quickly as possible. Accordingly, Mexico strongly urged all Members, including the one that had raised concerns, to take part constructively in the informal process conducted under the auspices of the General Council. Time continued to pass and resolving this issue was a matter of increasing urgency, therefore, filling the AB vacancies should be the primary objective of Members. The current situation was already critical, but in December 2019 the terms of two of the three remaining members of the Appellate Body would expire and the Appellate Body would not have the minimum number of members required to deal with appeals. As Mexico had stated on various occasions, the Appellate Body was a key element of the dispute settlement system, which was why it should be a priority for all Members to ensure its proper functioning. To that end, it was essential for the Appellate Body to have its full complement of members.

5.4. The representative of the European Union said that his delegation wished to refer to its statements made on this matter at previous DSB meetings, starting in February 2017. WTO Members had a shared responsibility to resolve this issue as soon as possible and to fill the vacancies as required by Article 17.2 of the DSU. The EU thanked all Members that co-sponsored the proposal contained in document WT/DSB/W/609/Rev.8 to launch the AB selection processes. The EU invited all other Members to endorse this proposal, so that the appointments could be made as soon as possible. The EU recalled that concrete proposals had been submitted to the General Council with a view to unblocking the AB selection processes. These proposals constituted a serious effort to address the concerns that had been voiced in connection with the functioning of the Appellate Body. They were currently being discussed under the auspices of the General Council. The EU invited all Members to engage constructively in these discussions so that the AB vacancies could be filled as soon as possible.

5.5. The representative of Ukraine said that her country wished to recall its statements made at previous DSB meetings related to this Agenda item on the AB selection processes. She reiterated her country's willingness to participate in the discussions and to contribute towards finding solutions to the issues of concern. With each DSB meeting in 2019 where no agreement had been reached, the dispute settlement system would soon be paralyzed since in December 2019, the terms of two of the three remaining Appellate Body members would expire. Therefore, it was extremely important to make every effort which could possibly lead to launching of the AB selection processes. In this regard, Ukraine wished to thank all Members who participated in the discussions on AB matters and provided proposals regarding the modernization of the WTO. Ukraine was closely examining these proposals and believed that they could help address this matter. At this point, many concerns were raised and several proposals were submitted regarding the WTO reform. Thus, Ukraine suggested to delink the matters concerning the functioning of the dispute settlement system from other issues related to the modernization of the WTO. With regard to the functioning of the dispute settlement system, Ukraine deemed it necessary to review the proposals in order to see what were the major obstacles that prevented Members from finding a common solution and launching the AB selection processes. Ukraine believed that this would increase active engagement of Members, and could speed up the process of finding a solution with regard to the functioning of the dispute settlement system. Ukraine thanked for the opportunity to express its views on this matter and welcomed further discussions in this regard.

5.6. The representative of the United States said that the United States wished to thank the Chairperson for the continued work on these issues. As the United States had explained at prior DSB meetings, the United States was not in a position to support the proposed decision contained in document WT/DSB/W/609/Rev.8. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at recent DSB meetings, for more than 15 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members. Through persistent overreaching, the WTO Appellate Body had been adding obligations that had never been agreed by the United States and other WTO Members. The 2018 US Trade Policy Agenda had outlined several long-standing US concerns.[1] The United States had raised repeated concerns that appellate reports had gone far beyond the text setting out WTO rules in varied areas, such as subsidies, anti-dumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, all restricting the ability of the United States to regulate in the public interest or protect US workers and businesses against unfair trading practices. And as the United States had explained at recent DSB meetings, the Appellate Body had issued advisory opinions on issues not necessary to resolve a dispute and had reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body had asserted that panels must follow its reports although Members had not agreed to a system of precedent in the WTO, and had continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules. And for more than a year, the United States had been calling for WTO Members to correct the situation where the Appellate Body acted as if it had the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – had expired. This so-called "Rule 15" was, on its face, another example of the Appellate Body's disregard for the WTO's rules. US concerns had not been addressed. When the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system, and would continue its efforts and its discussions with Members and with the Chairperson to seek a solution on these important issues.

5.7. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its serious concerns regarding the DSB's inability to launch the AB selection processes. Australia welcomed the leadership provided by Ambassador Walker, as Facilitator of the General Council's informal process on Appellate Body matters. Australia expected that through the pragmatic and solution-focused work of all Members, it would be possible to find mutually agreeable outcomes and it would allow Members to fill the vacancies on the Appellate Body as soon as possible. Australia remained committed to continuing this process after the 28 February 2019 General Council meeting. There were many more points to discuss to narrow down the issues and build a package of solutions. Australia looked forward to further discussing the proposals put forward to date and encouraged others with constructive

[1] Office of the US Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.

contributions to come forward to help steer the debate towards solutions in the interest of all Members.

5.8. The representative of New Zealand said that his delegation wished to reiterate its support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.8 and emphasized the importance of commencing the AB selection processes as soon as possible. New Zealand welcomed discussions on the current impasse through the informal process under the auspices of the General Council, with their emphasis on a solution-oriented discussion.

5.9. The representative of India said that her country wished to reiterate the statements made by India at previous DSB meetings on this matter.

5.10. The representative of Cuba, speaking on behalf of the GRULAC, said that Cuba wished to reiterate their deepest concern with regard to the status of the AB selection processes. The GRULAC welcomed the informal process on AB matters established under the auspices of the General Council to unblocking the ongoing paralysis of the AB selection processes, which demonstrated the urgency of the matter. A number of proposals had been submitted, which were aimed at achieving this objective. Some of these proposals had been submitted by WTO Members from the GRULAC region. Cuba wished to underline that under Article 17.2 of the DSU, the vacant posts should be filled "as they arise". Compliance with this obligation had been violated repeatedly. Members had heard the concerns that had been raised with regard to the functioning of the Appellate Body, which had impeded the initiation of the AB selection processes. However, the process of seeking a solution to these concerns should not be an obstacle vis-à-vis the continued functioning of the system. All Members should demonstrate willingness to find solutions. Cuba wished to reiterate the willingness of GRULAC WTO Members to contribute to finding a definite and urgent solution to this problem, as well as supporting the efforts to this end.

5.11. The representative of Brazil said that his country wished to refer to its statements made at previous DSB meetings regarding the urgency of launching the AB selection processes. As Members were well aware, if nothing was done, in December 2019, the Appellate Body would no longer be able to hear new appeals and the dispute settlement system as a whole would be compromised. Brazil, therefore, believed that the Members' main goal should be to trace a clear path to filling the AB vacancies. To this end, Members had to understand what solutions were possible. Brazil believed that this could be achieved in the context of the informal process under the General Council. Brazil was ready to engage in pragmatic discussions to resolve these issues. Finally, Brazil urged the Membership to meet its obligation of filling the AB vacancies as they arose.

5.12. The representative of China said that his country wished to echo the statement made by Mexico on behalf of 73 Members under this Agenda item. China regretted that the collective efforts by these Members was, once again, frustrated by a particular Member's persistent blockage of the AB selection processes without any legitimacy. Article 17.2 of the DSU clearly stated that: "[v]acancies shall be filled as they arise". The clear text was more than adequate to suggest the Members' duty to launch the AB selection processes without any precondition attached and to ensure the integrity and the well-functioning of the Appellate Body. China noted that Members had made and were continuing to make earnest efforts to address concerns raised by a particular Member. Various proposals, including the joint proposals co-sponsored by the EU, China and other Members, had been tabled and discussed in informal meetings under the auspices of the General Council. Such endeavours had already formed a solid basis for future consultations. It was time for the Member concerned, the United States, to table its constructive proposals so as to substantiate the discussions. The Appellate Body was facing unprecedented challenges. Members had to act swiftly and constructively. China called on all Members to have meaningful and substantive discussion in informal meetings and to strive to solve the current AB selection impasse without further delay.

5.13. The representative of Hong Kong, China said that his delegation wished to reiterate its disappointment and concern that the impasse in the AB selection processes remained unresolved. His delegation appreciated the work done by various Members to address a Member's concerns with the Appellate Body in the informal process under the auspices of the General Council. Hong Kong, China was committed to engaging constructively to find a solution as soon as possible. Hong Kong, China urged all Members, in particular those who had raised concerns with the system, to do the same. Nevertheless, Hong Kong, China had to emphasize, once again, that a discussion on improving the Appellate Body should not be a reason to delay the AB appointments. Hong Kong, China called on all Members to agree to start the AB selection processes immediately.

5.14. The representative of Switzerland said that his country wished to refer to its statements made at previous DSB meetings on this matter. Switzerland regretted that the DSB continued to be unable to launch the AB selection processes. Switzerland noted with satisfaction the discussions that were taking place in the context of the informal process under the auspices of the General Council, and called on all Members to engage in it constructively, with a view to finding concrete solutions. Switzerland looked forward to continuing and deepening the discussion in that process.

5.15. The representative of Nigeria said that in light of the current impasse in the AB selection processes, her country wished to underscore the importance of ensuring the effective functioning of the dispute settlement system. It was relevant for Members to cultivate a solution-based approach to this matter while upholding the integrity of the rules-based multilateral system. She urged the Chairperson to continue to facilitate consultations in order to help address the concerns of Members. The clock was ticking and Members faced the risk of an Appellate Body devoid of members by the end of 2019. Nigeria, therefore, called on Members to engage in solution-based discussions with each other, aimed at resolving the Appellate Body impasse.

5.16. The representative of Norway said that her country, once again, wished to refer to its statements made at previous DSB meetings under this Agenda item Norway wished to reiterate its serious concerns about the current impasse in the dispute settlement system. Norway deeply regretted that the United States still could not join consensus on the proposal to launch the AB selection processes. Norway was hopeful that discussions would continue, and progress would be made, in the informal process established under the auspices of the General Council. Norway encouraged all Members to actively seek solutions and engage in those important discussions.

5.17. The representative of Thailand said that his country wished to refer to its statements made at previous DSB meetings on this matter. Thailand supported the launching of the AB selection processes as soon as possible. The discussions of any systemic concerns which had been raised, including at the informal process under the auspices of the General Council, could be worked out separately and should not prevent the start of the AB selection processes. Thailand remained committed to working constructively with all Members to resolve the Appellate Body impasse as a priority.

5.18. The representative of Singapore said that his country wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its serious systemic concerns over the failure to launch the AB selection processes. In less than 10 months from the present meeting, the Appellate Body would be down to just one member if vacancies remained unfilled. Given the strain that the Appellate Body was facing, Singapore called on Members to bear this in mind when considering the filing of appeals. Systemic issues which had been raised could be discussed in a separate process. In this regard, even as Members continued to engage in the informal process for focused discussions led by the Facilitator under the auspices of the General Council, Singapore wished to emphasize that the AB selection processes should be allowed to proceed unconditionally. Singapore stood ready to engage constructively and collaboratively to help resolve this impasse.

5.19. The representative of Chinese Taipei said that his delegation wished to refer to its statements made at previous DSB meetings. Chinese Taipei wished to join other Members in thanking the Chair of the General Council and Ambassador Walker for their efforts in facilitating and organizing the informal process of discussions on this matter. Chinese Taipei hoped this impasse could be resolved as soon as possible.

5.20. The representative of Canada said that his country supported the statement made at the present meeting by Mexico. It had been twenty-one months since the launch of the AB selection processes had been first proposed. Canada deeply regretted that the DSB had not been able to comply with its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members to fill the vacancies. The text of the DSU was clear: "[v]acancies shall be filled as they arise". This requirement did not provide for exceptions or justifications not to replenish the Appellate Body. The inability to select and appoint new Appellate Body members could only increase the necessity to rely on Rule 15 of the Working Procedures for Appellate Review. This situation was at odds with the concerns that the United States had expressed regarding that practice. Canada shared the disappointment expressed by several other Members regarding the US decision not to join the consensus to move forward with the proposal contained in document WT/DSB/W/609/Rev.8. Canada was pleased that the Chair of the General Council had initiated an informal process to discuss the various proposals to address US concerns. Canada called on the United States to engage in

solution-focused discussions with interested Members in this regard. Canada remained committed to working with other interested Members, including the United States, with a view to addressing those concerns and undertake the AB selection processes expeditiously. Canada invited the Members that had not yet sponsored the proposal contained in document WT/DSB/W/609/Rev.8 to give it the attention it deserved, and to support it. Canada welcomed Benin to the group of proponents to this joint proposal as well as Rwanda's notification of its intention to co-sponsor the proposal.

5.21. The representative of Korea said that his country shared the deep concerns and the sense of urgency regarding the need to fill the vacancies in the Appellate Body. Korea, as one of its co-sponsors, supported the joint proposal contained in document WT/DSB/W/609/Rev.8 which intended to launch the AB selection processes promptly. At the same time, Korea also supported the discussion in the informal discussions under the auspices of the General Council and looked forward to achieving substantial progress in the near future.

5.22. The representative of Japan said that his country wished to thank the co-sponsored for the proposal contained in document WT/DSB/W/609/Rev.8 which it supported. Japan also supported the informal process under the auspices of the General Council, which was well underway. Japan hoped that, through WTO Members' active engagement in this process, Members could make good progress in a timely manner and the DSB would soon be in a position to fill the vacancies in the Appellate Body.

5.23. The representative of Afghanistan said that his country believed that a well-functioning dispute settlement system was an imperative for the multilateral trading system and the WTO to ensure a full and fair enforcement of rules and obligations by Members. Afghanistan reiterated the importance of these aims and the importance of promoting a rules-based, open, transparent and inclusive international trading system. Afghanistan welcomed and supported any initiative and effort to address the impasse in the AB selection processes and asked that the discussions to amend the rules and procedures governing the dispute settlement system be conducted in a manner acceptable to all Members. Afghanistan appreciated the efforts to find solutions for the impasse in AB vacancies as facilitated by Ambassador Walker and called all Members to positively contribute in these discussions to take this matter forward without delay.

5.24. The representative of Mexico said that her delegation, speaking on behalf of the 73 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.8, wished to express its regret that for the twenty-first occasion, Members had still not been able to start the AB selection processes, and that they 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 could not serve as pretext to impair and disrupt the work of this body. There was no legal justification for the current blocking of the AB selection processes, which resulted in nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". By failing to act at the present meeting, Members would maintain the current situation, which was seriously affecting the work of the Appellate Body against the best interest of all WTO Members.

5.25. The representative of the United States said that the United States noted that several Members, including Mexico, the EU, Canada, and China, had referenced the "shall" in the third sentence of Article 17.2 of the DSU. The United States would ask these Members to share their views on the "shall" in the first sentence of that Article. That sentence read, in part, that: "[t]he DSB shall appoint persons to serve on the Appellate Body". The United States asked whether these Members agreed that this provision made clear that it was the DSB that had the authority to appoint and reappoint members of the Appellate Body. And that the DSB – not the Appellate Body – had the responsibility to decide whether a person whose term of appointment had expired should continue serving, as if a member of the Appellate Body, on any pending appeals. The United States asked whether these Members could share their views on the "shall" in Article 17.5 of the DSU. As the text of Article 17.5 of the DSU provided that: "[i]n no case shall the proceedings exceed 90 days", the United States asked whether these Members agreed that the Appellate Body breached this provision when it issued a report beyond the 90-day deadline. The United States asked what these Members' views were on the "shall" in Article 17.6 of the DSU. Article 17.6 provided that: "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". The United States asked whether these Members agreed that the Appellate Body did not respect this text when it engaged in review of panel findings of fact. The United States looked forward to hearing these Members' views on these questions. The United States also noted that at least one

Member had said that the United States should table its own proposal. The United States had made its views on these issues very clear: if WTO Members said that Members supported a rules-based trading system, then the WTO Appellate Body had to follow the rules Members had agreed to in 1995. And thus, for instance, the Appellate Body had to circulate its reports within 90 days of an appeal.[2] A person who had ceased to be an Appellate Body member could not continue deciding appeals as if their term had been extended by the DSB.[3] The Appellate Body could not make findings on issues of fact, including but not limited to those relating to domestic law.[4] The Appellate Body could not give advisory opinions on issues that would not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into compliance with WTO rules.[5] The Appellate Body could not assert that its reports served as precedent or provided authoritative interpretations.[6] And the Appellate Body could not change Members' substantive rights or obligations as set out in the text of the WTO agreements.[7] Rather than seeking to make revisions to the text of the DSU to permit what was currently prohibited, the United States believed it was necessary for Members to engage in a deeper discussion of the concerns raised, to consider *why* the Appellate Body had felt free to depart from what WTO Members had agreed to, and to discuss *how best* to ensure that the system adhered to WTO rules as written.

5.26. The Chairperson thanked all delegations for their statements. She said that as in the past, the DSB would take note of the statements expressing the respective positions, which would be duly reflected in the minutes of this meeting. As Members were aware, this matter required a political engagement on the part of all WTO Members. In this regard, she recalled that, under the auspices of the General Council, Ambassador David Walker of New Zealand had agreed to assist the Chair of the General Council, as Facilitator, in an informal process of focused discussions on Appellate Body matters. The first informal open-ended meeting chaired by Ambassador Walker had been held on 17 January 2019. Subsequently, she said that Ambassador Walker had held informal consultations with a small group of delegations and his report on the results of his consultations had been presented at the second open-ended informal meeting held on 18 February 2019. He would also provide a report on his consultations to the General Council at its 28 February 2019 meeting.

5.27. The DSB took note of the statements.

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[2] Article 17.5 of the DSU. Statement by the United States Concerning Article 17.5 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes", 22 June 2018 DSB Meeting, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

[3] Articles 17.1 and 17.2 of the DSU. US Statement at the 31 August 2017 DSB Meeting, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf and US Statement at the 28 February 2018 DSB Meeting, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf.

[4] Article 17.6 of the DSU. Statement by the United States Concerning Article 17.6 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" and Appellate Review of Panel Findings of Fact, Including Domestic Law, 27 August 2018 DSB Meeting, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[5] Articles 7.1, 11 and 17.6 of the DSU. Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, 29 October 2018 DSB Meeting, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[6] Article 3.9 of the DSU, Article IX:2 of the WTO Agreement.

[7] Articles 3.2 and 19.2 of the DSU.