



Dispute Settlement Body
28 February and 5 March 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 28 FEBRUARY AND 5 MARCH 2020

Chairman: H.E. Dr David Walker (New Zealand)

Prior to the adoption of the Agenda1

Table of contents

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB..... 2
A. United States – Anti-dumping measures on certain hot rolled steel products from Japan: Status report by the United States 5
B. United States – Section 110(5) of the US Copyright Act: Status report by the United States..... 5
C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union..... 6
D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States..... 7
E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States..... 8
F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia..... 8
G. China – Domestic support for agricultural producers: Status report by China..... 9
H. China – Tariff rate quotas for certain agricultural products: Status report by China10
2 UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB 11
A. Statement by the European Union11
3 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB..... 12
A. Statement by the United States12
4 INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR..... 13
A. Request for the establishment of a panel by the European Union.....13

1 See pages 2, 3 and 4.

5 COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES FROM BELGIUM, GERMANY AND THE NETHERLANDS	15
A. Request for the establishment of a panel by the European Union.....	15
6 RUSSIA – MEASURES AFFECTING THE IMPORTATION OF RAILWAY EQUIPMENT AND PARTS THEREOF	15
A. Report of the Appellate Body and Report of the Panel	15
7 UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA	18
A. Report of the Appellate Body and Report of the Panel	18
8 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; 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	26
9 AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER: STATEMENT BY AUSTRALIA	32
10 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES	32
A. Recourse to Article 22.2 of the DSU by the Philippines	32

Prior to the adoption of the Agenda of the 28 February 2020 DSB meeting, the representative of Thailand said that item 6 of the proposed Agenda², i.e., the Philippines' request for suspension of concessions in the "Thailand – Cigarettes" dispute (DS371), was not properly before the DSB because, among other things, of ongoing appellate proceedings under Article 21.5 of the DSU. In these circumstances, her country could not accept the adoption of the proposed Agenda. However, Thailand could accept the adoption of the proposed Agenda if item 6 were removed. Thailand did not take this step lightly. The Philippines' request raised broad systemic issues about the status and future of the dispute settlement system. The DSB should not rush into pre-judging these issues on the basis of an artificial deadline of the Philippines' creation. In effect, the Philippines was seeking the DSB's authorization to bypass ongoing appellate proceedings and to proceed on the basis of unadopted compliance panel reports. If this request were authorized, all parties to pending appeals would be entitled to insist that the DSB adopt panel reports in spite of pending appellate proceedings. Thailand did not believe that the DSB could or should allow this. The Appellate Body crisis had imposed significant challenges onto the rules-based multilateral trading system, including with respect to pending disputes such as the "Thailand – Cigarettes" dispute (DS371). The Philippines' request highlighted the urgency of resolving this crisis. The outcome of pending disputes would be deprived of any credibility if they were driven by the unilateral actions of a single party, in this case the Philippines. It was for that reason that Thailand had supported and continued to support efforts to resolve this crisis as quickly as possible. Thailand hoped a solution could be reached soon that would permit the matter to move forward. Therefore, Thailand opposed the adoption of the Agenda.

² See the original proposed Agenda contained in document WT/DSB/W/663.

The representative of the Philippines said that his country was disappointed by Thailand's efforts to block the DSB from conducting its regular work at the present meeting. This was a transparent attempt to prevent the Philippines from exercising its rights under Article 22 of the DSU to seek the DSB's authorization to suspend concessions in the "Thailand – Cigarettes" dispute (DS371). The Philippines had initiated this dispute on 7 February 2008, namely, 4,388 days ago. The Panel had issued its report on 15 November 2010, and the Appellate Body had issued a report on 17 June 2011. The DSB had adopted the recommendations of the Panel report, as modified by the Appellate Body report, on 15 July 2011. Thereafter, the reasonable period of time for Thailand to comply with the DSB's recommendations had been set to expire on 15 May 2012. From then on, and with the expiry of the reasonable period of time, the Philippines fully had the right to request the DSB to suspend concessions, and it fully had the right to initiate parallel proceedings under Article 21.5 of the DSU to address any future compliance issues. In good faith, the Philippines had initiated parallel compliance proceedings under Article 21.5 of the DSU. The first compliance Panel report had been issued on 12 March 2018. A second compliance Panel report had been issued on 23 July 2019. The Philippines' position had been fully upheld. Under the Sequencing Understanding between the two parties, all appeals under Article 21.5 of the DSU had to be mandatorily resolved within 90 days from their initiation. The 90-day periods for the appeals of the first and second compliance panel reports had expired in 2019. The Philippines was still waiting for full compliance by Thailand with the DSB ruling of 15 July 2011. The Philippines believed that Thailand's request to amend the Agenda by removing the Philippines' request under Article 22.2 of the DSU should be rejected. The Philippines believed that Thailand's request was not appropriate. The Philippines asked that the Chairman rule that Thailand's request was not appropriate. As Members would recall, in the "EC – Bananas III" dispute (DS27), two Members had sought the removal from the DSB's agenda of a request under Article 22.2 of the DSU. Such instances had been resolved in prior cases³ and the Philippines trusted that the DSB could continue, at the present meeting, to address the important items that figured on the proposed Agenda, including the Philippines' rights under Article 22.2 of the DSU. These issues had been the subject of an exchange of letters between Thailand and the Philippines, which had been circulated to Members in documents WT/DS371/33 and WT/DS371/34. The Philippines understood Thailand's position, and both parties looked to the WTO system and the DSB to proceed in accordance with all the rules.

The Chairman noted that there was a divergence of views regarding the way forward under item 6 of the proposed Agenda, he, therefore, proposed that the meeting be suspended in order to allow time for consultations between the parties to the dispute so as to find a solution. The Chairman said that the meeting would be reconvened at the latest on 5 March 2020.

The DSB took note of the statements and, as proposed by the Chairman, the meeting was suspended.

Upon resumption of the DSB meeting on 5 March 2020, the Chairman said that without prejudice to the rights of Thailand and the Philippines, he wished to propose that item 6 regarding the Philippines' request for suspension of concessions be taken up as the last item of the Agenda. He then proposed that the Agenda be adopted, as amended.⁴

The representative of Thailand said that her country considered that item 6 of the proposed Agenda, i.e., the Philippines' request for suspension of concessions in the "Thailand – Cigarettes" dispute (DS371), was not proper because of ongoing appellate proceedings and unadopted reports in the proceedings under Article 21.5 of the DSU. In any event, to the extent that the Philippines sought to ignore the agreed procedures under the Sequencing Understanding, the Philippines' request was made outside the 30-day deadline set out in Article 22.6 of the DSU. Thailand had been compelled to block the adoption of the proposed Agenda when this meeting had first convened on 28 February 2020. Thailand had not done so lightly. As Thailand had explained on 28 February 2020, the Philippines' request raised broad systemic issues about the status and future of the dispute settlement system. The DSB should not be rushed into pre-judging these issues on the basis of an artificial deadline of the Philippines' creation. Thailand appreciated the Chairman's involvement in consultations with the parties on this issue. As her country had explained during the consultations, Thailand did not wish for the Philippines' unilateral actions to unnecessarily impact the work of the

³ Minutes of the DSB meeting dated 25 January – 1 February 1999, WT/DSB/M/54, pp. 9-10.

⁴ Australia requested the inclusion of an item under "Other Business" regarding Australia's intentions in respect of implementation of the DSB's recommendations in the dispute DS529.

DSB, including the adoption of pending reports and consideration of efforts to unblock the AB selection processes. Members should collectively attempt to swiftly resolve the unprecedented crisis faced by this Organization rather than deepen it. In these circumstances, and in line with the agreement reached with the Chairman and the Philippines on 4 March 2020, Thailand had been willing to join consensus on adopting the Agenda for this meeting solely on the clear understanding that, following any discussion on the topic, item 6 would be suspended. In other words, the DSB would not authorize the Philippines to suspend concessions at the present meeting. If that understanding of the agreement reached on 4 March 2020 was in any way incorrect, Thailand would be forced to continue opposing adoption of the Agenda. In agreeing to this compromise for the purposes of this meeting, Thailand retained all of its rights under the DSU and the Sequencing Understanding between the parties. These included the right to oppose the inclusion of a request by the Philippines for authorization to suspend concessions on the Agenda of any future DSB meeting, and to oppose any action by the DSB regarding any such request as long as the conditions of the DSU and the Sequencing Understanding between the parties were not fulfilled. Thailand urged the Philippines to exercise restraint in the interest of the system as a whole and to refrain from placing this matter on the Agenda of the DSB. Thailand reiterated its willingness to enter into bilateral discussions with the Philippines to explore possible ways forward. Thailand also reiterated that the real issue was the Appellate Body crisis and not any individual dispute. As Thailand had stated at the 3 March 2020 General Council meeting, the Appellate Body crisis had imposed significant challenges on the rules-based multilateral trading system, including with respect to pending disputes, such as the "Thailand – Cigarettes" dispute (DS371). The Philippines' request highlighted the urgency of resolving this crisis. The outcome of pending disputes would be deprived of any credibility if they were driven by the unilateral actions of a single party, in this case the Philippines. In these circumstances, Thailand had supported, and continued to support, efforts to resolve this crisis as quickly as possible.⁵ Thailand encouraged the Philippines to do the same. Subject to the previously discussed understanding regarding item 6 of the Agenda, Thailand was willing to join consensus on the adoption of the Agenda.

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

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

- A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.204)
- B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.179)
- C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.142)
- D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.26)
- E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.18)
- F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.13 – WT/DS478/22/Add.13)
- G. China – Domestic support for agricultural producers: Status report by China (WT/DS511/15/Add.1)
- H. China – Tariff rate quotas for certain agricultural products: Status report by China (WT/DS517/12)

⁵ Appellate Body Appointments' proposal, WT/DSB/W/69/Rev.14, 18 February 2020; Communication from Thailand, WT/GC/W/769, 26 April 2019.

1.1. The Chairman 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. 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.204)

1.2. The Chairman drew attention to document WT/DS184/15/Add.204, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 17 February 2020, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country wished to thank the United States for its most recent status report and for 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.179)

1.6. The Chairman drew attention to document WT/DS160/24/Add.179, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 17 February 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 said that his delegation wished to thank the United States for its status report and for 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 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 180 nearly identical status reports in this dispute. None of them indicated any progress on implementation. Nearly two decades after the DSB had adopted the Panel report in this dispute, this dispute remained unresolved. The United States continued to fail to accord the minimum standard of protection prescribed by the TRIPS Agreement and had become the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement. Article 21.1 of the DSU stated very clearly that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Therefore, China urged the United States to adopt concrete implementation actions in this dispute

so as to faithfully honour its commitments under the DSU and the TRIPS Agreement 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.142)

1.11. The Chairman drew attention to document WT/DS291/37/Add.142, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that his delegation continued to progress with the authorizations where the European Food Safety Authority has finalized its scientific opinion and concluded that there were no safety concerns. The EU had a strong record regarding authorizations of GMO requests: over the past 12 months, 18 decisions had been adopted to authorize 65 new GMOs for feed and food, six GMOs had been renewed and one GM cut flower had been authorized. As repeatedly explained by the EU and confirmed by the 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. This had resulted in a clear improvement of the situation. During prior DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings in this dispute did not cover that "opt-out Directive". The EU acted in line with its WTO obligations. Finally, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States continued to see persistent delays that affected dozens of applications that had been awaiting approval for an extended period. The EU had previously suggested that the fault was with the applicants. The United States disagreed; the US concerns related to delays at every stage of the approval process that resulted from the actions or inactions of the EU and its member States. The EU also had suggested that the United States "appears" to acknowledge that there was no ban on genetically engineered products in the EU. The EU was incorrect. It was, and had consistently been, the position of the United States that 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 member States subject to panel findings – Austria and Italy. There were seven additional member States that had previously maintained bans on cultivation and had since opted out of cultivation under the EU's legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland. There were also eight 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, and Slovenia. Further, Austria and Italy appeared to maintain bans on other products subject to specific panel findings. The EU's only response, which it continued to repeat, was that the member States did not restrict marketing or free movement of MON-810 in the EU. As the United States had noted at the prior DSB meeting, this answer did nothing to address US concerns. The restrictions adopted by EU member States restricted international trade in these products and had no scientific justification. 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.

1.14. The representative the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The European Union had different regulatory approaches to non-GMOs and GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. No EU member State has imposed any "ban". Under the terms of the Directive, an EU Member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law

and were reasoned, proportional, non-discriminatory and based on compelling grounds. The free movement of seeds was embedded in Article 22 of Directive 2001/18/EC: "member 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 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 would invite the United States to provide any evidence they might have at their disposal substantiating the disruption of the free movement of MON-810 seeds in the EU.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.26)

1.16. The Chairman drew attention to document WT/DS464/17/Add.26, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping and countervailing measures on large residential washers from Korea.

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

1.18. The representative of Korea said that his country wished to thank the United States for its status report. Once again, Korea strongly urged the United States to take prompt and appropriate steps to implement the DSB's recommendation regarding the "as such" measure at issue in this dispute.

1.19. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" (DPM) was "as such" WTO-inconsistent. The United States had also ignored the DSB's recommendation that the United States bring itself into compliance with its obligations. Instead, the United States continued to apply the "as such" inconsistent differential pricing methodology in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters based on its inconsistent methodology. The reasonable period of time to implement the DSB's recommendations relating to the "as such" WTO-inconsistency of the DPM had expired more than two years ago. However, in its latest status report, the United States said that it continued to consult with interested parties. Moreover, the continued use by the United States of the DPM had forced Members to initiate multiple dispute settlement proceedings concerning this measure. This was an inefficient and unnecessary use of WTO dispute settlement resources. In particular, Canada had been forced to challenge the application of the "as such" WTO-inconsistent DPM to Canadian companies in the "US – Differential Pricing Methodology" dispute (DS534). The Panel had found that the DPM violated US obligations under the Anti-Dumping Agreement. However, it had also made certain findings that dramatically departed from prior Appellate Body findings relating to the DPM and zeroing. Canada had appealed these problematic panel findings, but that appeal could not be heard as the United States continued to block Appellate Body appointments. Canada remained deeply concerned about the continued US failure to comply with the DSB's recommendations and rulings in this dispute. This failure seriously undermined the security and stability of the multilateral trading system.

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

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.18)

1.21. The Chairman drew attention to document WT/DS471/17/Add.18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning certain methodologies and their application to anti-dumping proceedings involving China.

1.22. The representative of the United States said that the United States had provided a status report in this dispute on 17 February 2020, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.23. The representative of China said that on 22 May 2017, the DSB had adopted the Appellate Body Report and the modified Panel Report in this dispute which had found that certain measures taken by the United States were inconsistent with requirements of the Anti-Dumping Agreement, which included: (i) the use of zeroing under the W-T methodology was "as such" inconsistent with Article 2.4.2; (ii) the so-called "single rate presumption" as such violated Article 6.10 and 9.2; and (iii) the "adverse facts available" was a norm of general and prospective application which could be subject to future "as such" challenges. On 19 June 2017, the United States had stated its intention to implement the DSB's recommendations and rulings in this dispute. The arbitration pursuant to Article 21.3(c) of the DSU had decided that the reasonable period of time (RPT) for implementation would be 15 months, expiring on 22 August 2018. Regrettably, more than 18 months after the expiry of the RPT, US implementation efforts remained at a standstill. None of its 19 status reports submitted thus far indicated any concrete implementation action. On 1 November 2019, the Arbitration pursuant to Article 22.6 of the DSU had determined that the level of nullification or impairment incurred by China was US\$ 3.579 billion. This amount, the third largest in WTO history, revealed the level of damaging consequences borne by Chinese workers and companies as a result of the WTO-inconsistent measures adopted by the United States. In fact, what China had experienced in this dispute was not an exception. Over the past decade, implementation by the United States, especially in its defensive trade remedy disputes, had become a systemic problem for the entire Membership. Regarding adjudications not in favour of its interests, the United States had either left its WTO-inconsistent measures intact or applied cosmetic changes which had not fundamentally removed such non-conformity. Such problematic attitude severely undermined the authority and effectiveness of the dispute settlement system. It left WTO Members with no other choice but to repeatedly challenge those same issues before panels and the Appellate Body. This exacerbated the already heavy workload of the dispute settlement system. Article 21.1 of the DSU was clear: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China urged the United States to faithfully honour its implementation obligation and to fully comply with the DSB's recommendations and rulings in this dispute without further delay.

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

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.13 – WT/DS478/22/Add.13)

1.25. The Chairman drew attention to document WT/DS477/21/Add.13 – WT/DS478/22/Add.13, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case concerning importation of horticultural products, animals and animal products.

1.26. The representative of Indonesia said that her country had provided a status report pursuant to Article 21.6 of the DSU. As her country had stated at previous DSB meetings, Indonesia had committed to implementing the DSB's recommendations and rulings in these disputes. Substantial adjustments to the relevant Ministry of Agriculture (MoA) and Ministry of Trade (MoT) Regulations had been made. Indonesia wished to inform Members about the enactment of MoA Regulation No. 2/2020 which amended MoA Regulation No. 39/2019 concerning Recommendations for Importation of Horticultural Products with the aim of further facilitating import procedures. With regard to Measure 18, Indonesia wished to underline that the amendment of relevant laws had been

included in the National Legislation Program. The Indonesian Government would discuss it with the Parliament in the near future. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings in these disputes.

1.27. The representative of New Zealand said that his country acknowledged Indonesia's status report and the steps that had been taken by Indonesia towards compliance to date, as well as Indonesia's commitment to comply fully with the DSB's recommendations and rulings in this dispute. Both of the compliance deadlines that had been agreed between the parties had expired. New Zealand was seriously disappointed that full compliance had still not been achieved. New Zealand was particularly concerned about the ongoing failure to remove Measure 18 and the continued enforcement of limited application windows and validity periods, harvest period import bans, import realization requirements and restrictions placed on import volumes based on storage capacity. New Zealand was also seriously concerned that, to date, no import recommendations had been issued for the 2020 import period for New Zealand horticultural products. This blockage was adversely impacting New Zealand exporters. If it were not resolved promptly, it could undermine the progress made towards compliance to date. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve long-term, commercially meaningful, compliance with the DSB's recommendations and rulings in this dispute.

1.28. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance with WTO rules. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States understood that Indonesia claimed to have "completed its enactment process" of certain regulations. However, the United States was still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remained unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia would complete its process. The United States looked forward to receiving further detail from Indonesia regarding the changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 46/2019 on Strategic Horticultural Commodities.

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

G. China – Domestic support for agricultural producers: Status report by China (WT/DS511/15/Add.1)

1.30. The Chairman drew attention to document WT/DS511/15/Add.1, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning domestic support for agricultural producers.

1.31. The representative of China said that his country had provided its second status report in this dispute in accordance with Article 21.6 of the DSU. At its 26 April 2019 DSB meeting, the DSB had adopted the Panel report in this dispute. On 10 June 2019, China and the United States had informed the DSB that the reasonable period of time for China's implementation would be 11 months and 5 days and would expire on 31 March 2020. Following the adoption of the Panel Report, the relevant Chinese government agencies has conducted intensive consultations to address the DSB's recommendations in this dispute. Given the complexity of the measures at issue and the sensitivity of the subject matter in this dispute, China's internal process with respect to amending relevant measures was still ongoing. China remained committed to fulfilling its implementation obligation in accordance with the DSU in due course.

1.32. The representative of the United States noted that the parties had informed the DSB, on 10 June 2019, that the United States and China had agreed that the reasonable period of time for China to implement the DSB's recommendations and rulings in this dispute would expire on 31 March 2020. China informed the DSB, on 17 January 2020, that it had been actively studying implementation and would accelerate the process to amend the relevant measures. At the 27 January 2020 DSB meeting, the United States had requested details from China on the specific amendments it would make to bring its measures into compliance by 31 March 2020. On 17 February 2020, China had circulated a status report that did not provide any additional details

regarding China's compliance efforts. China's statement noted only that "relevant Chinese government agencies have conducted intensive consultations aiming at implementing the recommendations and rulings" and that the process was still ongoing. While the United States appreciated China's statement that it would continue to expedite the process, the United States reiterated its request for more detail regarding China's efforts. The United States wished to engage bilaterally with China on specific amendments that could serve to resolve this dispute.

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

H. China – Tariff rate quotas for certain agricultural products: Status report by China (WT/DS517/12)

1.34. The Chairman drew attention to document WT/DS517/12, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning tariff-rate quotas for certain agricultural products.

1.35. The representative of China said that his country had provided its status report in this dispute in accordance with Article 21.6 of the DSU. At its 28 May 2019 DSB meeting, the DSB had adopted the Panel report in this dispute. On 3 July 2019, China and the United States had informed the DSB that the reasonable period of time for China's implementation had been set to expire on 31 December 2019. As of 31 December 2019, China had fully implemented the DSB's recommendations and rulings in this matter. On 16 January 2020, China and the United States had agreed to extend the reasonable period of time to 29 February 2020 to allow the United States additional time to evaluate China's compliance measures. On 29 September 2019, the National Development and Reform Commission of China had promulgated the Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020 (Gonggao 2019 No.9). On 30 November 2019, the Ministry of Commerce of China (MOFCOM) had promulgated the Decision to Abolish and Modify Some Rules (Ling 2019 No.1), which had modified the Provisional Measures on the Administration of Import Tariff Rate Quotas for Agricultural Products (Ling 2003 No.4). Both the Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020 and the modified Provisional Measures on the Administration of Import Tariff Rate Quotas for Agricultural Products were consistent with the DSB's recommendations and rulings in this dispute and the WTO covered agreements, including China's commitments under its Protocol on Accession to the WTO. As set forth in the Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020, the overall objective of China's administration of the Tariff-Rate Quotas (TRQs) was to achieve full utilization of both STE and non-STE portions of each TRQ, consistent with market conditions. China's TRQs for wheat, rice and corn for the year 2020 had been fully allocated to end-users. In accordance with China's measures, all unused and returned TRQ amounts would be reallocated and penalties for non-use would be imposed in accordance with the Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products. Therefore, China was in full compliance with the DSB's recommendations and rulings in this dispute.

1.36. The representative of the United States thanked China for its first status report in this dispute, circulated on 17 February 2020. China referenced the 2020 Allocation Rules, which had been issued on 29 September 2019, and its decision to abolish and modify some rules in the Provisional Measures on the Administration of Import Tariff Rate Quotas for Agricultural Products, which had been promulgated on 30 November 2019. As China was aware, the findings of the Panel in this dispute related to China's *administration* of its tariff rate quotas ("TRQs"). Therefore, while the United States noted the changes made in China's underlying legal instruments, the United States was interested in the manner in which those measures were applied in practice. China had stated in its status report that the overall objective of China's administration of the TRQs was to achieve full utilization of both the STE and non-STE portions of each TRQ, consistent with market conditions. China had also stated that its TRQs for wheat, rice and corn for the year 2020 had been fully allocated to end-users. The United States had requested from China additional information to verify this allocation information and looked forward to meaningful engagement from China. China's status report also asserted that all unused and returned TRQ amounts would be reallocated and penalties for non-use would be imposed in accordance with the recently amended measures. The United States would be monitoring the reallocation process closely and looked forward to further updates from China regarding its administration. The United States noted that China's status report asserted that, as of 31 December 2019, China had fully implemented the DSB's recommendations and rulings in this matter. The United States was not in a position to agree with China's claim of compliance at this

time. As set out in this statement, the United States looked forward to continuing engagement with China on the information requested and on China's administration of its tariff-rate quotas.

1.37. The DSB took note of the statements.

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

A. Statement by the European Union

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

2.2. The representative of the European Union said that his delegation requested, once again, that the United States stop transferring anti-dumping and countervailing duties to the US industry. Even though the amounts had considerably decreased, the most recent report under the Continued Dumping and Subsidy Offset Act of 2000 (December 2018) showed that amounts were still being disbursed in practice. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. As long as the United States did not fully stop transferring collected duties, this item should rightly remain under the DSB's surveillance. The EU could assure Members that due to the long-standing nature of this breach, the EU would continue to insist on placing this item on the Agenda of DSB meetings, as a matter of principle, and independently from the cost resulting from the application of such limited duties. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit implementation reports in this dispute. The EU would continue to place this item on the Agenda of DSB meetings as long as the United States had not fully implemented the DSB's recommendations and rulings and as long as disbursements had not ceased completely.

2.3. 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 14 years ago in February 2006. Accordingly, the United States had implemented 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 12 years ago. Even aside from this, the United States questioned the trade rationale for inscribing this item on the DSB's Agenda. In May 2019, the EU had notified the DSB that disbursements related to pre-October 2007 EU exports to the United States totalled US\$ 4,660.86 in fiscal year 2018. As such, the EU had announced that it would apply an additional duty of 0.001% on certain imports of the United States. These minuscule tariffs vividly demonstrated what had been evident for years – it was not common sense that was driving the EU's approach to this Agenda item. The EU suggested it had requested the DSB's consideration of this item "as a matter of principle", but the EU's principles shifted depending on whether it was the complaining or responding party. As the United States had explained repeatedly, there was no obligation under the DSU for a Member to provide further status reports on the progress of its implementation once that Member announced that it had 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 of the DSU. Indeed, at the 27 January 2020 DSB meeting, one Member had informed the DSB that it had come into compliance with the DSB's recommendations in two disputes (DS472, DS497). That Member had not provided a status report for the present meeting, consistent with the understanding that there was no obligation for a Member to provide further status reports once that Member announced that it had implemented the DSB's recommendations. Accordingly, since the United States had informed the DSB that it had come into compliance in this dispute, there was nothing more for the United States to report in a status report.

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 agreed with the European Union that the Byrd Amendment should remain subject to the surveillance of the DSB until the United States ceased to administer it.

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 "EC – Large Civil Aircraft" dispute (DS316). As the United States had noted at several recent DSB meetings, the EU had argued – under a different Agenda item – that, where the EU as a complaining party did not *agree* with another responding party Member's "*assertion* that it has implemented the DSB ruling", "the issue remains unresolved for the purposes of Article 21.6 DSU". Under this Agenda item, however, the EU argued that by submitting a compliance communication, the EU no longer needed to file a status report, *even though* the United States as the complaining party did *not* agree with the EU's *assertion* that it had complied. The EU's position appeared to be premised on two unfounded assertions, neither of which was based on the text of the DSU. First, the EU had erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". There was nothing in the DSU text to support that argument, and the EU provided no explanation for how it read Article 21.6 of the DSU to contain this limitation. Of course, this would be a convenient limitation on Article 21.6 for purposes of this dispute, as the DSB had authorized the United States to impose countermeasures of approximately US\$ 7.5 billion annually due to the adverse effects on the United States from subsidies provided by the EU and four member States. But that limitation did not exist in the text of Article 21.6. Second, the EU once again relied on its incorrect assertion that the EU's initiation of compliance panel proceedings meant that the DSB was somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations". Yet again, there was nothing in Article 2 of the DSU or elsewhere that limited the DSB's authority in this manner. It was another invention of the EU. The EU was not providing a status report because of its assertion that it had complied, demonstrating the EU's principles varied depending on its status as complaining or responding party. Perhaps the EU chose not to report on the progress in its implementation because, rather than actually attempt to achieve compliance in this dispute, the EU had pursued a strategy of endless and meritless litigation. The report of the second compliance panel showed how misguided the EU's strategy was. The second compliance panel, like the prior one, had rejected the EU's claim of compliance. But despite yet another finding of non-compliance, the EU had chosen to appeal the panel report, seeking yet more litigation in this 15-year dispute. The representative of the United States asked the EU whether it would not be more productive for the EU and its member States to focus on resolving this dispute. In that regard, some four months after the United States had been compelled to impose countermeasures on EU imports, the United States was still awaiting a concrete proposal from the EU on how it would withdraw the WTO-illegal subsidies to resolve this dispute. In sum, the US position on status reports had been consistent and clear: under Article 21.6 of the DSU, once a responding Member announced to the DSB that it had complied, there was no further "progress" on which it could report, and therefore no further obligation to provide a status report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in this "EC – Large Civil Aircraft" dispute (DS316). The EU could report on the progress in its implementation in this dispute in light of the five separate WTO reports having found that the EU and four member States had failed to comply with WTO subsidy rules.

3.3. The representative of the European Union said that, as during previous DSB meetings, the United States had, once again, asserted 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 United States had also referred to the EU's appeal filed against the report of the second compliance panel as an example of the EU's "misguided approach" pursuing "endless and meritless litigation ... instead of attempting to achieve compliance". Both US assertions were without merit. As the EU had repeatedly explained at 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" dispute (DS316), the dispute was at a stage where the defending party did not have an obligation to submit status reports to the DSB. As previously mentioned, in this dispute the EU had notified a new set of compliance measures to the DSB. That new set of compliance measures had been a clear demonstration that the EU – contrary to the United States in the parallel "US – Large Civil Aircraft (2nd complaint)" dispute (DS353) – 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 the panel's report had been issued on 2 December 2019. As noted in the statement made by the EU at the 18 December 2019 DSB meeting, the EU believed that significant aspects of the compliance panel's report could not be regarded as legally correct and were very problematic from a systemic perspective when it came to assessing compliance with the subsidy disciplines of the WTO Agreements. It was in order to have these legal errors corrected, and not – as the United States seemed to imply – to continue litigation for the sake of litigation, that the EU had filed an appeal against the compliance panel's report on 6 December 2019. The EU was concerned that with the current blockage of the two-step multilateral dispute settlement system, the EU was losing the possibility of a proper appellate review of the serious flaws contained in the panel report. While the blockage continued, the EU stood ready to discuss with the United States alternative ways to deal with this appeal. The EU was also committed to finding a balanced negotiated solution with the United States that would allow leaving both aircrafts disputes behind. These considerations did not, however, alter the fact that the compliance proceeding in this dispute had not been concluded. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU remained the very subject matter of this ongoing litigation. The EU asked how it could be said that the defending party should submit "status reports" to the DSB in such 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 EU's view was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance. Under Article 21.6 of the 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)" dispute (DS217), the EU did not agree with the US assertion that it had implemented the DSB's recommendations and rulings. This meant that the issue remained unresolved for the purposes of Article 21.6 of the DSU. If the United States did not agree that this issue remained unresolved, nothing prevented the United States from seeking a multilateral determination through a compliance procedure, asking for a confirmation of its assertion that the CDSOA measure had been repealed in line with the DSB's recommendations and rulings, just like the EU was doing in the "EC – Large Civil Aircraft" dispute (DS316).

3.4. The DSB took note of the statements.

4 INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

A. Request for the establishment of a panel by the European Union (WT/DS582/9)

4.1. The Chairman drew attention to the communication from the European Union contained in document WT/DS582/9. He then invited the representative of the European Union to speak.

4.2. The representative of the European Union said that within the framework of the WTO, India had undertaken the commitment not to apply import duties on information and communications technology (ICT) products. However, for several years, India had adopted measures to reintroduce and regularly increase import duties on these products, up to 20%, and this despite the tariffs in its WTO bound Schedule of Concessions on these products. The EU had raised the issue of India's tariffs on ICT products a number of times both bilaterally and in various WTO fora. Unfortunately, the problem had not been solved. The value of the EU's annual exports of related goods to India amounted to approximately EUR 400 million. The EU had requested consultations with India on this matter on 2 April 2019. The consultations had taken place on 21 May 2019. These consultations had been very useful in clarifying a certain number of points, but they had failed to solve the problem. The EU urged India to bring its tariffs on ICT products in line with its WTO obligations. To that end, the EU requested the establishment of a panel to assess fully these measures.

4.3. The representative of India said that his country was disappointed with the European Union's decision to request the establishment of a panel regarding India's measures concerning the tariff treatment on certain goods in the Information and Communications Technology (ICT) Sector. India believed that consultations held with the European Union on 21 May 2019 had been constructive and that India had been able to address the concerns raised by the European Union by adequately

explaining its measures concerning the tariff treatment on certain goods in the ICT sector. India observed that both the EU's request for consultations and its request for the establishment of a panel had carefully avoided any reference to either the Ministerial Declaration on Trade in Information Technology Products (ITA-1) or the Declaration on the Expansion of Trade in Information Technology Products (ITA-2) which were key to understanding the issues. India's original WTO Schedule had been subject to various amendments. India believed that ITA-1 did not contain any obligation to eliminate customs duties (and other duties and charges of any kind) on the products mentioned by the EU in its request for consultations and its request for the establishment of a panel. However, the EU was essentially requesting that India implement a declaration made by select countries, namely, ITA-2, to which India was not a party. The dispute sought to take advantage of an inadvertent error of a purely formal character in the transposition of HS2002 to HS2007 committed while transposing the tariff lines and the description of the products recommended by the World Customs Organization (WCO). India had attempted to rectify the error through WTO document G/MA/TAR/RS/572, dated 25 September 2018, on which objections had been raised by certain Members, including the EU, despite the fact that the rectification request had been made in accordance with "the procedures for modification and rectification of Schedules of tariff concessions" contained in the Decision of 26 March 1980 (BISD 27S/25). The objections to the request for rectification and the dispute raised by the EU went against the requirements to interpret and implement a treaty in good faith. India was fully committed to its ITA-1 commitment and had been abiding by it over the years. India, upon signing ITA-1 in 1997, had presented its schedule of commitments, which had subsequently been certified in document WT/Let/181. India wished to reiterate that it had not intended to commit, and would not commit to, any obligations beyond the scope of India's ITA-1 commitment as inscribed in that document. India maintained that the products arising out of technological progression could not be covered by ITA-1. Similarly, purported concessions emanating solely from incorrect HS transpositions were not within the scope of the substantive obligations contained in ITA-1. It was evident from WTO document G/MA/TAR/RS/24, dated 2 April 1997, that India had made it very clear at the time of undertaking commitments under ITA-1 that India reserved the right to make technical changes to its schedule and to correct any errors, omissions or inaccuracies. India also noted that most of the products mentioned in the EU's request for consultations and in its request for the establishment of a panel were covered under the subsequent declaration made by select countries which had led to ITA-2, to which India was not a party. India considered that this dispute was an attempt to take advantage of its inadvertent error of a purely formal character. At this stage, India was deeply aware of its responsibilities and had always implemented decisions reached at the WTO, including decisions of the DSB. The issues raised in this dispute seriously undermined India's sovereignty as the purported commitment went beyond the consent provided by India when it had agreed to implement ITA-1. India was surprised that in spite of India's good faith explanation of the challenged measures and its offer for continuous bilateral engagement to resolve any issues, the EU had instead chosen to request the establishment of a panel which would put a strain on already scarce resources of the DSB. Therefore, India was not in a position to accept the establishment of a panel at the present meeting. India wished to reiterate its willingness to cooperate with the EU to seek a mutually satisfactory solution at a bilateral level. India believed that open and bilateral discussions in good faith between the parties would result in a more constructive and satisfactory outcome.

4.4. The representative of Japan said that his country shared the EU's concerns regarding the WTO-consistency of the measures challenged in this dispute. Japan had serious concerns that India had raised its customs duties on certain products in the information and communications technology (ICT) sector since 2014, in excess of the bound rates set forth in its Schedules of Concessions and Commitments annexed to the GATT 1994. Japan had repeatedly raised its concerns with India for years, but India had taken no action to rectify the situation. Subsequently, Japan had requested its own consultations with India pursuant to Articles 1 and 4 of the DSU on 10 May 2019 with a view to reaching a mutually satisfactory solution (DS584). These consultations had failed to settle the matter thus far. Regrettably, India had raised its customs duties further on certain ICT products in February 2020. Once the panel was established in this dispute, Japan stood ready to actively contribute to the panel proceedings.

4.5. The representative of the United States said that the United States was a significant exporter of goods in the information and communications technology (ICT) sector in the categories of products described in the European Union's panel request. The United States shared the EU's serious concerns regarding the customs duties applied by India on imports of certain ICT products. The United States would closely monitor the progress of this dispute, as well as any developments in the disputes

initiated by Japan (WT/DS584) and Chinese Taipei (WT/DS588) also concerning India's treatment of certain ICT products.

4.6. The DSB took note of the statements and agreed to revert to this matter should the requesting Member so wish.

5 COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES FROM BELGIUM, GERMANY AND THE NETHERLANDS

A. Request for the establishment of a panel by the European Union (WT/DS591/2)

5.1. The Chairman drew attention to the communication from the European Union contained in document WT/DS591/2. He then invited the representative of the European Union to speak.

5.2. The representative of the European Union said that his delegation had serious concerns about the investigation leading to the imposition by Colombia of anti-dumping duties on frozen fries from Belgium, the Netherlands and Germany. These related to nearly all aspects of the investigation, from initiation, to the analyses on dumping, injury and causality, as well as the respect of certain procedural rights. One of the more systemic concerns, which other WTO Members might be interested in, was the fact that in this investigation Colombia had disregarded the export price provided by the cooperating exporting producers in the questionnaire reply, and that Colombia had instead used the data in Colombia's national import database, also known as the "DIAN database". Another systemic concern was the fact that mandated under Colombian law, Colombia had published some of the import information from the DIAN database on clients, prices and volume, which was information that by its very nature was confidential and whose confidentiality had not been waived by the ones supplying the information. Such disclosure of confidential information was contrary to the provisions of the Customs Valuation and Anti-Dumping Agreements. The EU urged Colombia to bring its unwarranted anti-dumping duties imposed on frozen fries from Belgium, the Netherlands and Germany in line with its WTO obligations. To this end, the EU requested the establishment of a panel to assess the WTO-compatibility of these duties.

5.3. The representative of Colombia said that his country expressed regret at the EU's request for the establishment of a panel in this dispute. Colombia believed that this request was premature. The parties had not yet exhausted all possibilities of arriving at a mutually agreed solution in this dispute. In fact, Colombia was particularly surprised by the EU's decision to request the establishment of a panel at this time, given that efforts were currently under way in Bogota and in Brussels in order to amicably resolve this dispute. Therefore, Colombia could not accept the establishment of a panel at this time. Colombia remained fully available to work together with the EU in seeking to arrive at an amicable solution in this dispute and expressed the hope that this could be achieved.

5.4. The DSB took note of the statements and agreed to revert to this matter should the requesting Member so wish.

6 RUSSIA – MEASURES AFFECTING THE IMPORTATION OF RAILWAY EQUIPMENT AND PARTS THEREOF

A. Report of the Appellate Body (WT/DS499/AB/R and WT/DS499/AB/R/Add.1) and Report of the Panel (WT/DS499/R and WT/DS499/R/Add.1)

6.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS499/10 transmitting the Appellate Body Report in the dispute: "Russia – Measure Affecting the Importation of Railway Equipment and Parts Thereof", which had been circulated on 4 February 2020 in document WT/DS499/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

6.2. The representative of Ukraine said that his country welcomed the Report of the Appellate Body in this dispute and wished to compliment the members of the Appellate Body and the Panel for their work. Ukraine also wished to commend the WTO Secretariat team for its hard work in this case, as well as to thank all third parties for their constructive, thoughtful and active engagement throughout these proceedings. The outcome of this dispute was vital and beneficial for the entire Membership. Its outcome had contributed crucially important rulings regarding the interpretation and application of certain provisions of the TBT Agreement, *inter alia*, Articles 5.1.1 and 5.1.2, as well as of Article 11 of the DSU.

6.3. Ukraine wished to draw Members' attention to the fact that this case represented the first opportunity to interpret Article 5.1.1 of the TBT Agreement and in particular the phrase "in a comparable situation". More specifically, the Appellate Body had concluded that the assessment of whether access was granted under conditions no less favourable "in a comparable situation" should focus on factors having a bearing on the conditions for granting access to conformity assessment to suppliers of like products and the ability of the regulating Member to ensure compliance with the requirements.⁶ Ukraine was generally pleased that the Appellate Body ruling had vindicated most of the claims advanced by Ukraine and had openly rejected all of the claims of the Russian Federation, *inter alia*, claims concerning the Panel's preliminary ruling under Articles 6.2 and 11 of the DSU. Despite the conclusion of the Appellate Body regarding the non-existence of the systematic import prevention of Ukrainian railway products, Ukraine understood that the threshold for establishing the existence of an unwritten measure was high. Therefore, the detailed analysis provided by the Appellate Body in this case constituted a valuable contribution that would further improve the security and predictability of the multilateral trading system. In light of the long-standing difficulties and challenges faced by the dispute settlement system, Ukraine appreciated all contributions of the Appellate Body. The work done by the Appellate Body was of the utmost importance and would certainly have an impact on further developments in improving and building the rules-based multilateral trading system. Therefore, Ukraine requested that the DSB adopt the Appellate Body Report (WT/DS499/AB/R and WT/DS499/AB/R/Add.1) pursuant to Article 17.14 of the DSU and the Panel Report (WT/DS499/R and WT/DS499/R/Add.1) at the present meeting. Ukraine hoped that the Russian Federation would comply with the DSB's recommendations and rulings that would be adopted at the present meeting.

6.4. The representative of the Russian Federation said that her country wished to thank the Appellate Body, and the Secretariat staff having assisted it, for their hard work throughout the course of this dispute. Russia wished to raise certain concerns and share its views regarding specific findings of the Appellate Body. First, in respect of paragraph 5.148 of the Appellate Body Report which referred to Crimea, Russia believed that the relevant part of that paragraph was no more than a quote by the Appellate Body of the content of the UN High Commissioner for Human Rights Report and not the Appellate Body's own conclusion or statement. Russia firmly believed that questions of a political nature, including those concerning state sovereignty over certain territories, fell outside of the WTO's mandate and were not and could not be governed by the WTO Agreements. Therefore, they could not be the subject matter of a WTO dispute and, consequently, could not be subject to assessment or review by the WTO or any of its bodies, including the Appellate Body. Second, Russia also wished to raise concerns regarding certain substantive findings of the Appellate Body. Before proceeding with specific comments, Russia wished to remind Members of certain aspects relevant to the dispute. In August 2018, Ukraine had notified the DSB of its decision to appeal, among others, the Panel's conclusions in respect of the instructions suspending certificates and the decisions rejecting applications for certificates. The Panel had concluded that Ukraine had failed to establish the inconsistency of Russia's actions with its obligations under Articles 5.1.1 and 5.1.2 of the TBT Agreement. In this respect, the Appellate Body had found numerous errors made by the Panel during its objective assessment of the matter before it. In particular, the Appellate Body had found that the Panel had erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case. The Panel had also failed to make an objective assessment when allocating the burden of proof under Article 5.1.2 of the TBT Agreement. Therefore, the Appellate Body had reversed the relevant Panel's findings. However, it had not been in a position to complete the legal analysis due to the absence of sufficient factual findings and undisputed facts on the record. After several years of intensive work and defence of Russia's legitimate interests, conclusions that had resulted in "no decision" was something that could hardly be considered a satisfactory solution to this dispute. Russia welcomed the Appellate Body's statement that a threat to the life and health of governmental employees in performing part of the conformity assessment procedure could be a relevant factor in

⁶ Appellate Body Report, "Russia – Railway Equipment", para. 5.153.

comparing the situations for purposes of Article 5.1.1 of the TBT Agreement in a particular case. In light of this statement, Russia noted that the Federal Budgetary Organization's "Register of Certification on the Federal Railway Transport" would be in a position to conduct inspections in the territory of Ukraine subject to the safety of Russian officials, including the absence of any threat of criminal prosecution of Russian officials pursuant to the Criminal Code of Ukraine as amended by the Laws of Ukraine dated 15 April 2014 (No. 1207-VII) and 18 October 2018 (No. 2599-VIII), as well as any similar ongoing or future procedures in Ukraine.

6.5. Russia expressed disappointment at the manner in which the Appellate Body had analysed Russia's claim pertaining to the Panel's conduct when it had stepped into the shoes of the complainant while identifying one of the measures at issue. The Panel had described the measure in a manner that Ukraine had never presented. Consequently, the Panel had examined this measure from a perspective that had never been put forward by the complainant. Therefore, the Panel had acted inconsistently with Article 11 of the DSU. The Appellate Body had failed to address this separate claim based on a separate legal ground. The Appellate Body had simply stated that it rejected this claim on the same basis as Russia's preliminary ruling claims, even though the matter at issue was substantively different from the one regarding the preliminary ruling claims. However, despite these concerns, Russia believed that overall the Appellate Body's examination of this dispute and its outcomes more than ever underlined the importance of the Appellate Body in the WTO dispute settlement system. They also underlined the need for the Membership to resolve the Appellate Body crisis in order to ensure security and predictability to the multilateral trading system, as well as the attainment of the objectives of the WTO Agreements to the benefit of all Members. Therefore, Russia welcomed the Appellate Body Report in this dispute.

6.6. Russia also wished to state that most of the measures found by the Panel to be inconsistent with Russia's WTO obligations had already been brought into conformity with WTO rules. With respect to the so-called "non-recognition of the certificates of conformity", Russia noted that the Protocol of the Ministry of Transport and the letters of the Federal Railway Transport Administration challenged by Ukraine in its Panel request had been terminated in 2018 and revoked in March 2020, respectively. Thus, the existing legal framework applied by Russia did not contain any recognition requirements. With respect to the decisions rejecting the applications for certificates, Russian certification authorities had informed the relevant Ukrainian producers by mail of the specific requirements that had to be satisfied and the procedure that had to be followed in order to obtain the necessary certificates. Therefore, Russia wished to inform the Membership that as of now it had already complied with the recommendations by the Panel and the Appellate Body and brought all of its measures at issue into consistency with Russia's obligations under the WTO Agreements. As a final note, Russia was obliged to draw Ukraine's attention to Article 17.10 of the DSU. Article 17.10 established that the proceedings of the Appellate Body were confidential. In simple terms, it meant that prior to the official circulation of the Appellate Body report to Members, as determined by the Appellate Body, any disclosure of information and/or any comments related to the substance of the report in the media constituted an explicit violation of the WTO confidentiality requirements. Nevertheless, Ukraine had repeatedly disrespected these requirements. In this particular case, Ukraine's trade representative and deputy Minister had felt compelled to share the outcomes of the dispute on the Facebook page before the official issuance of the report. This was not the first time that confidentiality requirements were not respected by Ukraine. Russia asked that the DSB condemn the continued violation by Ukraine of such basic WTO rules of procedure.

6.7. The representative of the United States said that the United States wished to raise an important systemic concern. The United States considered that very serious issues were raised by the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and the continued service on this appeal of an individual who had ceased to be a member of the Appellate Body during the appeal, including with respect to the status of such a report. As the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. For this Agenda item, the United States did not understand any party to oppose adoption of the reports, nor had any other WTO Member raised an objection. The aim of the dispute settlement system was to find a positive solution to the dispute. As neither party to the dispute had objected, the United States understood that the parties considered that adoption of the reports would assist them in finding a positive solution. The United States would seek to support the parties' interests on this issue. Therefore, there was a consensus to adopt the reports before the DSB at the present meeting.

6.8. The representative of China said that his country strongly disagreed with the US view on the adoption of this Appellate Body Report. Article 17.14 of the DSU made it crystal clear that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members". China wished to underline that the Report before the DSB at the present meeting was an Appellate Body Report, and that there was no consensus not to adopt this report. Therefore, this Appellate Body Report and the Panel Report modified by it had to be adopted by negative consensus in accordance with Article 17.14 of the DSU. To suggest otherwise had no legal merit.

6.9. The representative of the European Union said that his delegation wished to stress that there was no doubt that this Report was a Report of the Appellate Body and that it would be adopted in accordance with the rules applicable for the adoption of Appellate Body Reports under Article 17.14 of the DSU, i.e., by negative consensus, just as had been the case for all other Appellate Body Reports.

6.10. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS499/AB/R and Add.1 and the Panel Report contained in document WT/DS499/R and Add.1, as modified by the Appellate Body Report

7 UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

A. Report of the Appellate Body (WT/DS505/AB/R and WT/DS505/AB/R/Add.1) and Report of the Panel (WT/DS505/R and WT/DS505/R/Add.1)

7.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS505/9 transmitting the Appellate Body Report in the dispute: "United States – Countervailing Measures on Supercalendered Paper from Canada", which was circulated on 6 February 2020 in document WT/DS505/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

7.2. The representative of Canada said that his country wished to thank the Appellate Body, the Panel and their Secretariats for their hard work, and expressed appreciation for the contribution of the third parties in this case. Canada welcomed the Appellate Body Report, which had upheld the Panel's finding that the US practice of applying adverse facts available in the circumstances at issue in this case was inconsistent with the SCM Agreement. Canada was pleased that the Appellate Body had found that the US practice constituted a measure, and that it had reaffirmed that a broad range of "measures" could be challenged under WTO dispute settlement. The Appellate Body and the Panel had recognized that the absence of a written measure did not shield a Member's conduct from scrutiny, nor did it make it any less inconsistent with its WTO obligations. The Appellate Body and Panel had found that the United States maintained a practice of applying adverse facts available when respondents failed to disclose information it deemed to be "other forms of assistance" in the context of countervailing duty investigations. The United States consistently applied adverse facts available in these circumstances without ascertaining whether that information was actually necessary to complete a subsidy determination. This US practice had resulted in the United States applying artificially inflated countervailing duty rates, including in the investigation into supercalendered paper. It remained a threat to respondent companies in both current and future US subsidy investigations. Canada recognized that a separate opinion had been issued by one member of the Division in this case. Canada noted that while separate opinions could be warranted under certain circumstances in the WTO dispute settlement system, they could not undermine the objectives of that system, including providing security and predictability to the multilateral trading system. Canada expressed regret that the separate opinion in this appeal did precisely that by ignoring previous Appellate Body findings that were directly relevant without providing adequate reasons. Canada observed that the fact that an Appellate Body Report had been circulated after 90 days did not modify its character as a valid Appellate Body Report subject to the negative consensus rule for its adoption. Canada looked forward to working with the United States to agree

to a reasonable period of time to implement the DSB's recommendation and rulings. In any event, Canada expressed the hope that the United States would implement them as soon as possible.

7.3. The representative of the United States said that the United States had serious concerns with the documents being considered by Members under this Agenda item. In particular, the document circulated as WT/DS505/AB/R heightened the concerns that the United States had been raising about the Appellate Body and its effect on the WTO dispute settlement system. As the United States would explain in this statement, the document was not a valid Appellate Body report and represented the latest example of the Appellate Body's failure to respect WTO rules. The document circulated by the Appellate Body was not a valid Appellate Body report under Article 17 of the DSU.⁷ The document had not been provided and circulated on behalf of three valid Appellate Body members as required by Article 17.1. Extraordinarily, none of the individuals who had served on this appeal – Mr. Ujal Bhatia (presiding member), Mr. Thomas Graham, or Ms. Hong Zhao – was a valid member of the Appellate Body when the document had been issued to WTO Members. With respect to the first two, this dispute presented the familiar issue of individuals continuing to serve and decide appeals after their term of appointment had expired. The US position that this was illegitimate was well known.

7.4. But the United States would first discuss service on this appeal by Ms. Zhao. This was an unprecedented situation. This individual could not be, and was not, a member of the Appellate Body because she was not eligible under the DSU. On 31 January 2020, the United States had informed the WTO Director-General and the DSB Chairperson that it had become aware of information that indicated that this individual was not "unaffiliated with any government" as required by Article 17.3 of the DSU and, therefore, was not a valid member of the Appellate Body. Article 17.3 of the DSU provided that persons comprising the Appellate Body "shall be unaffiliated with any government". To "affiliate" was to "attach to or connect with an organization"⁸, and an affiliation was a "connection, association".⁹ Ms. Zhao was affiliated with the Government of the People's Republic of China and therefore could not serve as a member of the Appellate Body. According to official Chinese government documents, Ms. Zhao currently serves as Vice President and a "leader" of China's "Ministry of Commerce Academy of International Trade and Economic Cooperation" (MOFCOM-AITEC). When Ms. Zhao had been nominated as a candidate for the Appellate Body, her *curriculum vitae* (CV) indicated that she was at that time serving as the "Vice President of the Chinese Academy of International Trade and Economic Cooperation".¹⁰ Ms. Zhao's CV had not reflected the official title for this entity: the "*Ministry of Commerce Academy of International Trade and Economic Cooperation*".¹¹ Although there were different potential translations for the name of this entity¹², the official title in Chinese included "Ministry of Commerce".

7.5. The representative of the United States said that Ms. Zhao had continued to serve as Vice President of the Ministry of Commerce Academy of International Trade and Economic Cooperation.¹³ The "leadership" page on the MOFCOM-AITEC website also had identified Ms. Zhao among its six current leaders.¹⁴ This entity was a "public institution" under Chinese law that was affiliated with and subordinate to China's Ministry of Commerce. In the "Notice of the Ministry of Commerce on the

⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

⁸ The New Shorter Oxford English Dictionary (1993) at p. 35 (definition 2: "Adopt as a subordinate member of a society, branch of an organization or company, etc.; attach to or connect with an organization etc."). WTO Members in 1995 had considered that, in light of Article 17.3, persons serving on the Appellate Body "should not therefore have any attachment to a government that would compromise their independence of judgment". Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7.

⁹ The New Shorter Oxford English Dictionary (1993) at p. 35 (definition 2(b)).

¹⁰ JOB/DSB/CV16/3.

¹¹ See, e.g., MOFCOM-AITEC Website, Profile page, Ms. Zhao's biography (indicating at the bottom of the webpage "All rights reserved: Ministry of Commerce Academy of International Trade and Economic Cooperation") The biographies for three of the six MOFCOM-AITEC vice presidents refer to the "Ministry of Commerce Academy of International Trade and Cooperation". Two did not refer to MOFCOM-AITEC. Ms. Zhao's biography was the only one that refers to MOFCOM-AITEC as the "Chinese Academy of International Trade and Economic Cooperation".

¹² See, e.g., Notice of the Ministry of Commerce on the Establishment of Institutions (translating the name of this entity as "International Trade and Economic Cooperation Research Institute of the Ministry of Commerce") (emphasis added).

¹³ MOFCOM-AITEC Website, Profile page, Ms. Zhao's biography.

¹⁴ MOFCOM-AITEC Website, Leadership.

Establishment of Institutions"¹⁵, China explicitly identified MOFCOM-AITEC's status as a "public institution". Under Chinese law, a "public institution" referred to "public service organizations that are established by the state organs or other organizations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene".¹⁶ MOFCOM-AITEC was also an "affiliated" entity "subordinate" to China's Ministry of Commerce. The "Notice of the Ministry of Commerce on the Establishment of Institutions" set out that MOFCOM-AITEC was a "Public Institution[] Directly under the Ministry of Commerce".¹⁷ MOFCOM's website similarly listed MOFCOM-AITEC as a "public institution under the Ministry of Commerce".¹⁸ Further, Article 3 of the "Regulations on the Personnel Management of Public Institutions" indicated that: the "competent departments of public institutions [e.g., MOFCOM] shall be specifically *responsible for* the personnel management of their *affiliated* public institutions [e.g., MOFCOM-AITEC]".¹⁹ And MOFCOM's 2019 annual budget stated that "[w]ork units under the Ministry of Commerce budget include ... *subordinate* public institutions"²⁰, of which MOFCOM-AITEC was one. MOFCOM-AITEC's budget was also part of MOFCOM's budget, such that the salary for Ms. Zhao's Vice President position at MOFCOM-AITEC was funded by the Government of the People's Republic of China.²¹ For example, MOFCOM's 2019 annual budget stated that "[w]ork units under the Ministry of Commerce budget include ... subordinate public institutions".²² The 2019 budget lists 33 constituent "work units" that fall under it, including both MOFCOM itself as well as MOFCOM-AITEC.²³ MOFCOM's 2019 budget indicated aggregate expenses for salaries, which would reflect the amount for all 33 constituent "work units", including MOFCOM-AITEC.²⁴ China's National Audit Office had carried out in 2016 an audit of MOFCOM's 2015 budget, and this audit indicated specific amounts from MOFCOM's budget allocated to and expended by MOFCOM-AITEC for salary expenses.²⁵ None of this information had been disclosed to WTO Members when this individual had been nominated as a candidate for the Appellate Body. In sum, Ms. Zhao was Vice-President of MOFCOM-AITEC, a "public institution" that was "affiliated", "directly under", and "subordinate" to MOFCOM. Salary expenses of MOFCOM-AITEC formed part of MOFCOM's budget, which meant the government funded Ms. Zhao's MOFCOM-AITEC salary. Thus, Ms. Zhao was affiliated with the Government of the People's Republic of China. Because Ms. Zhao was not "unaffiliated with any government", contrary to the requirement of Article 17.3 of the DSU, Ms. Zhao was not a valid member of the Appellate Body. This alone rendered the document circulated as WT/DS505/AB/R invalid and incapable of being an Appellate Body report because the appellate "report" had not been provided and circulated on behalf of three Appellate Body members, as required under Article 17.1 of the DSU.

7.6. The United States said that there were, in addition, two further reasons the document was not an Appellate Body report within the meaning of Article 17 of the DSU. With respect to Mr. Bhatia and Mr. Graham, the terms for these individuals had expired on 10 December 2019.²⁶ The document had been circulated to WTO Members on 6 February 2020, nearly two months after their terms had expired. The DSB had taken no action to permit either individual to continue to serve as an Appellate Body member. Therefore, neither individual was an Appellate Body member on the date of circulation

¹⁵ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III (listing the "Public Institutions Directly Under the Ministry of Commerce").

¹⁶ Interim Regulation on the Registration of Public Institutions, Article 2.

¹⁷ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III.

¹⁸ MOFCOM Website, Organization.

¹⁹ Regulation on the Personnel Management of Public Institutions, Article 3 (third paragraph) (emphasis added).

²⁰ MOFCOM 2019 Budget, p. 6. This was also represented graphically on p. 7.

²¹ MOFCOM-AITEC's status as a public institution that was affiliated with and subordinate to MOFCOM demonstrated that her position as Vice President, and one of six "leaders" of that entity, was not a function independent of the Government of the People's Republic of China. See Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7 (expressing a view that "[t]his requirement [of not having an attachment to a government] would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government").

²² MOFCOM 2019 Budget, p. 6. This was also represented graphically on p. 7.

²³ MOFCOM 2019 Budget, p. 7 (listing MOFCOM-AITEC in row 23).

²⁴ MOFCOM 2019 Budget, p. 17.

²⁵ Central Department Work Units 2015 Budget Implementation and Other Matters Audit Results (National Audit Office, Announcement Number 5 (2016), 29 June 2016), Ministry of Commerce 2015 Financial Appropriations Budget Implementation Status for Key Audit Work Units, Appendix 2.

²⁶ Dispute Settlement Body, Minutes of the Meeting Held on 25 November 2015 (WT/DSB/M/370), para. 7.3 ("[H]e wished to propose that the DSB agree, at the present meeting, to reappoint Mr. Ujal Singh Bhatia and Mr. Thomas Graham for a four-year term, respectively, starting on 11 December 2015") and para. 7.4 (The DSB so agreed").

of this document. The document was also not a valid Appellate Body report because it had not been issued within 90 days, consistent with Article 17 of the DSU. The mandatory language in Article 17.5 of the DSU stated that "[i]n no case shall the proceedings exceed 90 days". And that provision specifically stated that "the proceedings" encompass "the date the Appellate Body circulates its report". In fact, 528 days had passed between the date of the Notice of Appeal in this dispute (27 August 2018) and circulation of the document as a purported Appellate Body report (6 February 2020). Any one of these three reasons would suffice to prevent this document from serving as an Appellate Body report. But the concerns raised by the service of Ms. Zhao were compounded when Members consider the substance of this appeal.

7.7. The United States said that Members may recall that one appeal in this dispute had involved an alleged unwritten measure that was considered "ongoing conduct". The evidence that allegedly demonstrated the existence of that "ongoing conduct" measure consisted of actions by the US Department of Commerce in nine investigations. One of those involved Canada, and the countervailing duty had been terminated in the course of this proceeding. Another investigation had involved India. And seven of the nine investigations had involved subsidies provided by China. Thus, this individual, affiliated with the Government of China, had participated in an appeal in which the conduct complained about related almost exclusively to China. And so, besides the invalidity of this individual to serve on the Appellate Body, their participation in this particular appeal was impossible to see as impartial.

7.8. The United States had serious substantive concerns about the appellate document as well. But given the invalidity of this individual to serve on the Appellate Body, it was not necessary to consider that document further. There was no Appellate Body report before the DSB at the present meeting, and the United States objected to the adoption of this document. As discussed, the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. Rather, the DSB could consider its adoption subject to the positive consensus rule that governed DSB decisions, pursuant to Article 2.4 of the DSU and Article IX:1, note 3 of the WTO Agreement. In light of the significant procedural and substantive concerns with the document, as discussed in this statement, the United States objected to its adoption. The United States did not consider it appropriate to proceed with adoption of the appellate report in light of this extraordinary and unprecedented situation. Under the circumstances, it would be appropriate to suspend consideration of this Agenda item to allow the parties to consult on a path forward.

7.9. The representative of Canada said that in this particular dispute, his country noted that the three Appellate Body members who had signed the report had done so within their term, on 10 December 2019. There could be no doubt that this Appellate Body Report was a valid Appellate Body Report, subject to the negative consensus rule for its adoption. Canada noted that Appellate Body member Zhao had been in her position for some time. Allegations of lack of independence were serious and deserved full and impartial consideration. The Rules of Conduct adopted by the Members addressed squarely such a situation and those rules were clear. The rules provided that where an Appellate Body member was the subject of an allegation, the Appellate Body shall take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard. Canada supported this approach. Canada looked forward to having the full Appellate Body address the question once it regained quorum. With respect to the Appellate Body Report before the DSB, it remained subject to the negative consensus rule for its adoption. Accordingly, the DSB had to adopt this Report in accordance with Article 17.14 of the DSU. With respect to the notion of suspending the adoption of this Appellate Body Report until the allegations were further investigated, Canada noted that Article 17.14 was clear that an Appellate Body Report shall be adopted by the DSB unless the DSB decided by consensus not to adopt the Appellate Body Report within 30 days following its circulation. The fact that the situation described in Article 17.14 existed was not disputed. That is: the Report of the Appellate Body in the dispute at issue had been circulated. In addition, Canada had specifically requested that the Panel and Appellate Body Reports in this dispute be added to the Agenda of the 28 February 2020 DSB meeting. A suspension of the DSB's consideration of the Appellate Body Report was not the appropriate mechanism to address the situation. The appropriate mechanism under the Rules of Conduct of the DSU was for the United States to refer these allegations to the Appellate Body. The task before the DSB was to consider the Reports for adoption according to the reverse consensus rule. Canada would have welcomed the adoption of the Panel Report in this dispute at the time that the report had been issued. It was the United States that had appealed the panel report. It would be utterly unfair if, by

seeking to delay the adoption of an Appellate Body Report regarding its own appeal, the United States prevented the adoption of recommendations by the DSB in this dispute.

7.10. The representative of China said that at the present meeting, the DSB was to adopt the Appellate Body Report in this dispute by negative consensus. China expressed surprise that, to reject the legal effect of this unfavourable report, the United States had chosen to question the independence of one Appellate Body member. China was stunned by such radical and irresponsible behaviour. China firmly opposed the groundless US accusations. First, Dr. Zhao's occupation with the Chinese Academy of International Trade and Economic Cooperation (CAITEC) did not jeopardize her independence as an Appellate Body member. CAITEC had been registered as an independent legal entity under Chinese law since 1997. Like hospitals, universities and many other research institutes in China, CAITEC was a Category II social institution which was partially funded by the government. However, its main revenue was derived from providing consultation services. China wished to note that there were universities, think tanks and research institutes partially or wholly funded by the government in many WTO Members and all over the world. The funding structure of an institution by itself did not necessarily compromise the independence of its staff.

7.11. Second, Dr. Zhao's appointment and her service within the Appellate Body were in full compliance with the relevant rules under the DSU. Dr. Zhao had never misrepresented or concealed her previous and current occupations. While participating in the selection process, she had fully disclosed her employment history in her curriculum vitae, which had been circulated to all WTO Members. Her biography was publicly available on the official website of the WTO from the very beginning. More importantly, Dr. Zhao had gone through the selection process having been scrutinized by the entire Membership and had been appointed unanimously as an Appellate Body member by the DSB in 2016. All Members, including the United States, had agreed. No Member had ever questioned her independence and impartiality, either in the selection process or during her service as an Appellate Body member. She had been and still was in full compliance with Article 17.3 of the DSU which required that Appellate Body members be unaffiliated with any government.

7.12. Third, the improper US accusation would cause irreparable damage to the WTO dispute settlement system and the multilateral trading system. It was worth noting that this dispute was not the only one in which Dr. Zhao had participated as a division member. In particular, she had also served as a member of the AB division in the "US – Tuna II (Mexico)" compliance dispute (DS381). In contrast to what the United States had stated at the present meeting, it had welcomed the Appellate Body's rulings in the "US – Tuna II (Mexico)" compliance dispute (DS381) and had not raised any concern regarding the independence of Dr. Zhao. While the independence of Dr. Zhao had remained unchanged, the interests of the United States in relation to these two appellate rulings differed. This double-standard clearly revealed the true intention of the United States, which was to further its own interests through whatever means at its disposal. The reckless behaviour of the United States was not guided by good faith and had caused damage. Moreover, it had undermined the independence and authority of the Appellate Body and had compromised the rules-based multilateral trading system.

7.13. China said that it was normal for Members to win and lose disputes at the WTO. Members were entitled to express their views on an Appellate Body Report in accordance with Article 17.14 of the DSU. Questioning the independence of an Appellate Body member was fundamentally different. The US accusation would have a destructive impact on the legitimacy and effectiveness of the dispute settlement system which was a cornerstone of the multilateral trading system. China strongly urged the United States to cease behaving dangerously. Members expected more positive contributions from the United States to safeguard and further strengthen the rules-based multilateral trading system. Finally, China wished to underline that the report before the DSB at the present meeting was an Appellate Body Report, and there was no consensus not to adopt this Report. Therefore, this Appellate Body Report and the Panel Report modified by it had to be adopted by negative consensus in accordance with Article 17.14 of the DSU. To suggest otherwise had no legal merit.

7.14. The representative of Japan said that his country did not take a position on the facts of this case and the propriety of the legal conclusions reached by the Panel and the Appellate Body in their respective Reports. Japan wished to offer brief observations on one particular issue raised in this dispute, i.e., the issue of "ongoing conduct". As a general matter, Japan agreed with the Appellate Body's finding that "a broad range of measures can be challenged in WTO dispute settlement" and that elements to demonstrate the existence of a challenged measure "depend[] on the particular characteristics or nature of the measure being challenged". As the Appellate Body had observed in

the past, "how [a specific measure at issue] is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged". However, it should be noted that "ongoing conduct" was an analytical concept, rather than a treaty term, to specifically describe the measure at issue on a case-by-case basis. To challenge a measure in WTO dispute settlement, the complaining party had to identify the precise content of the measure. In this regard, for example, the existence of a challenged measure could not be demonstrated only by selectively picking common elements or features in a series of regulatory actions, as the precise content of alleged "ongoing conduct". At a minimum, there had to be a certain analytical correlation between the level of "preciseness" of the identified content of the alleged "ongoing conduct" and the degree of scrutiny required to determine the WTO-consistency of such alleged ongoing conduct. Thus, the less precise the identified content would be, the more robust the scrutiny of WTO-consistency should be. Such scrutiny could require a close examination of how the alleged "ongoing conduct" actually operated and in what circumstances, and also of how the different elements of regulatory actions, which allegedly contained the "ongoing conduct" interacted with each other within a specific context. Finally, Japan took note of the statement made by the United States regarding Article 17.3 of the DSU. At this point in time, Japan was not in a position to make any judgement as to the issue raised by the United States. Japan would carefully review the statements by the United States and others. The United States had raised a systemic issue of an extremely serious nature, which could call into question the very integrity and impartiality of the dispute settlement system. As such, this issue warranted serious attention from WTO Members.

7.15. The representative of the European Union said that his delegation wished to underline that there was no doubt that the Report before the DSB at the present meeting was a Report of the Appellate Body and that it would be adopted in accordance with the rules applicable for the adoption of Appellate Body Reports under Article 17.14 of the DSU, i.e., by negative consensus, as had been the case for all other Appellate Body Reports. The European Union wished to recall that the rules and procedures of the DSU excluded the right of any particular WTO Member to block the adoption of Panel or Appellate Body Reports. This was a central feature of the DSU and a major difference with the dispute settlement mechanism operated under the GATT 1947. Article 17.14 of the DSU was clear: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report". The EU wished to emphasize that it would not be the case at the present meeting that "the DSB decides by consensus not to adopt" the Reports. Therefore, both the Panel and the Appellate Body Reports would be "adopted by the DSB" within the meaning of Articles 16.4 and 17.14 of the DSU. The EU recognized that these provisions were without prejudice to the right of Members to express their views on the Reports, and such views had been expressed at the present meeting. However, while there was a right to express a view, there was no right to veto. Any theory attempting to underpin such a right to veto was without merit. This included any issues raised under the Code of Conduct. The EU also wished to point out that the Rules of Conduct provided for a procedure to be followed by disputing parties if they had evidence of a material violation of the obligations of independence, impartiality or confidentiality or of the avoidance of direct or indirect conflicts of interest by covered persons which could impair the integrity, impartiality or confidentiality of the dispute settlement mechanism. If this occurred, the parties had to submit such evidence, at the earliest possible time and on a confidential basis, to the standing Appellate Body. Other Members who possessed or came into possession of such evidence, could provide such evidence to the disputing parties in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism. It was for the standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the disputing parties to be heard. The EU was not aware of whether such procedure had been followed in this instance. Therefore, under the applicable rules, the EU saw no reason to question the validity of the Appellate Body Report for the purposes of the adoption procedure under Article 16.4 and Article 17.14 of the DSU.

7.16. The representative of the United States said that the United States had listened to the statements made by other Members very closely. At the outset, the United States did not believe that the Code of Conduct was applicable to this situation. Article 17.3 of the DSU was very clear: Appellate Body members had to be unaffiliated with any government. Having listened to the statement from the representative of China, the representative of the United States stated that China did not appear to directly contest the substance of the US statement. China had not denied the following: Ms. Zhao serves as Vice President of MOFCOM-AITEC; Ms. Zhao receives or had received a salary for her position of Vice President; MOFCOM-AITEC is an "affiliated" entity

"subordinate" to MOFCOM; MOFCOM-AITEC's budget is part of MOFCOM's budget, such that the salary for Ms. Zhao's Vice President position at MOFCOM-AITEC was funded by the Government of the People's Republic of China. If China had considered these statements incorrect, the United States would have expected them to have stated so explicitly. The fact that they did not would seem to confirm that Ms. Zhao is affiliated with the Government of China. China claimed that MOFCOM-AITEC was an "independent legal entity". This assertion did not address – much less contest – evidence demonstrating that MOFCOM-AITEC was an "affiliated" public institution under Chinese law "subordinate" to MOFCOM. China explicitly identified MOFCOM-AITEC's status as a "public institution". Under Chinese law, a "public institution" referred to "public service organizations that are established by the state organs or other organizations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene". Further, the "Notice of the Ministry of Commerce on the Establishment of Institutions" set out that MOFCOM-AITEC was a "Public Institution[] *Directly under the Ministry of Commerce*". MOFCOM's website similarly listed MOFCOM-AITEC as a "public institution under the Ministry of Commerce". At the present meeting, China had confirmed that MOFCOM-AITEC was funded, at least in part, by the Chinese government. And, as discussed, official Chinese documents indicated that salaries for MOFCOM-AITEC personnel were part of MOFCOM's budget. China's attempt to analogize MOFCOM-AITEC to entities in other WTO Members was not compelling and, ultimately, irrelevant to the question of whether Ms. Zhao was affiliated with the Government of China. Moreover, had Ms. Zhao's affiliation with the Government of China been properly disclosed, it would have been for WTO Members to decide whether they considered the circumstances analogous to what they may exist in their domestic systems. The lack of transparency and disclosure had deprived WTO Members of this opportunity and of making an informed decision on whether to appoint Ms. Zhao to the Appellate Body.

7.17. The United States expressed regret that Canada had not agreed to suspend the consideration of this Agenda item. The United States had focused its statement on the document circulated as WT/DS505/AB/R because of the extraordinary situation that rendered that document invalid. The United States reiterated that it would not join a consensus to adopt that document. This Agenda item also concerned the report of the panel in this dispute. The duties at issue in this dispute had been terminated in July 2018. Therefore, the United States had not appealed the many legal findings of the panel with which the United States strenuously disagreed because reversal of those findings was not necessary to resolve the dispute. As the United States had appealed certain legal findings of the panel, and the appeal had not been completed with the issuance of a valid Appellate Body report, the panel report could not be considered for adoption by the DSB by negative consensus under Article 16.4 of the DSU. However, under the circumstances of this dispute, where the duties at issue had already been terminated in July 2018, the United States was willing to permit adoption by positive consensus of the legal findings of the panel that had not been appealed; specifically, paragraphs 8.1, 8.2, and 8.3 of the panel report. The United States was willing to take this step to permit adoption of unappealed panel findings in the spirit of compromise and because neither party should be prejudiced by the service on this appeal of an individual with no right to serve, and the issuance of a document on appeal with no validity.

7.18. The representative of China said that his country believed that the United States had had the wrong impression that China did not contest the substance of its accusation. However, China had rebutted each and every allegation made by the United States. China wished to emphasize again that CAITEC was an independent legal entity under Chinese law since 1997. There were many universities, think tanks and research institutes, partially or wholly funded by the government, in many WTO Members and all over the world. The funding structure of an institution by no means compromised the independence of its staff. Over more than three years, Dr. ZHAO, as an Appellate Body member, had diligently served in this important adjudicatory body in full compliance with the requirements of the DSU and its Rules of Conduct. In particular, Dr. ZHAO had fully disclosed her previous and current occupations outside the WTO and had taken due care in performing her duties in order to fulfil the expectations of WTO Members. Her independence, impartiality and professional ethics were widely recognized by Members and should be beyond questioning. Once again, China believed that this Report was an Appellate Body Report under Article 17.14 of the DSU and that it should be adopted in accordance with the negative consensus rule.

7.19. The representative of Canada said that his country agreed with the United States that these types of allegations were indeed very serious, but they required full and impartial consideration in a manner that provided due process for all parties. The discussion at the present meeting failed that test. There was a process for dealing with this as Canada had set out in its previous statement under

this Agenda item. In accordance with Article 2.1 of the DSU, it was the DSB's responsibility to administer the rules and procedures of the DSU, including the adoption of Appellate Body Reports as set out in Article 17.14 of the DSU.

7.20. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS505/AB/R and Add.1 and the Panel Report contained in WT/DS505/R and Add.1, as upheld by the Appellate Body Report.

7.21. The representative of the United States said that the United States had described serious procedural and substantive concerns with the document circulated as WT/DS505/AB/R. The United States had explained how the document could not be an Appellate Body report because of ex-Appellate Body members' continuation of service without authorization by the DSB, and the failure to adhere to the deadline in Article 17.5 of the DSU. Most importantly, the United States had explained in detail that an individual who had served on this appeal was not a valid member of the Appellate Body given that they were affiliated with a government in breach of Article 17.3 of the DSU. And even beyond that, the appeal had directly implicated the interests of that Government. Accordingly, the United States reiterated its view that the document before the DSB at the present meeting was not a valid Appellate Body report, objected to adoption of the document, and did not join a consensus to adopt it. Any assertion that the WTO had adopted an appellate report at the present meeting under these extraordinary and illegal circumstances would only damage the credibility of the WTO and its dispute settlement system. To reiterate, and in the spirit of compromise, the United States would only have joined a positive consensus to adopt those aspects of the panel report that had not been appealed.

7.22. The representative of the European Union said that irrespective of how Members assessed the content of the Reports or the procedures that had given rise to them, the WTO dispute settlement system was mandatory and binding. Pursuant to Article 17.14 of the DSU, Appellate Body Reports were adopted by the DSB and unconditionally accepted by the parties. The only circumstance in which this did not occur was if the DSB decided by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. The European Union and Canada had not joined such a consensus at the present meeting. Consequently, the Appellate Body Report (including the Panel Report as modified by the Appellate Body Report) had been adopted by the DSB and unconditionally accepted by the parties by "operation of law (*ipso jure*)" (Appellate Body Report, Continued Suspension, paras. 310, 355 and 367), or "automatically" (Appellate Body Report, US-LCA, paras. 524, 531, 532 and 549). Neither the defendant, nor any other WTO Member, nor the Chairman of the DSB, nor the WTO Secretariat had the legal authority to prevent this from happening by any means. Whatever they said or did and whatever was recorded in the minutes of the DSB was incapable as a matter of law of negating the observation that what was provided for in Article 17.14 of the DSU had occurred. Subsequent adjudicators in the same dispute, including compliance and arbitration panels, would therefore proceed on the basis that the Appellate Body Report had been adopted and unconditionally accepted by the parties and would address the question of compliance or quantify nullification or impairment accordingly. They would reject any attempt by a defendant to frustrate their work on the procedural grounds that, at the relevant DSB meeting, the defendant (or any other Member) had purported to "block" the adoption of the Appellate Body Report.

7.23. The DSB took note of the statements.

8 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; 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.17)

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 drew attention to the proposal contained in document WT/DSB/W/609/Rev.17 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.17, said that the delegations in question had agreed to submit the joint proposal, dated 17 February 2020, to launch the AB selection processes. Her delegation, on behalf of these 120 Members, plus Bangladesh who had expressed its intention of joining as a co-sponsor to this proposal, wished to make the following statement. The extensive number of Members submitting this joint proposal reflected a common concern with the current situation of the Appellate Body that was seriously affecting its workings and the overall dispute settlement system against the best interest of WTO Members. Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes without further delay as set out in the joint proposal, which sought to: (i) start six selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; a second process to fill the vacancy occurred with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term had expired on 11 December 2017; a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office had expired on 30 September 2018; a fifth process to replace Mr. Ujal Singh Bhatia, whose second term had expired on 10 December 2019; and a sixth process to replace Mr. Thomas R. Graham whose second term had expired on 10 December 2019; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendation within 60 days after the deadline for nominations of candidates. The proponents were flexible regarding the deadlines for the AB selection processes. However, they believed that Members should consider the urgency of the situation. They continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

8.3. The representative of the European Union said that his delegation wished to refer to statements made on this issue at previous DSB meetings starting in February 2017, and to its statements made in the General Council meetings, including at the 9 December 2019 GC meeting. From 11 December 2019 onward, 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 many times, WTO Members had a shared responsibility to resolve this matter as soon as possible, and to fill the outstanding vacancies as required by Article 17.2 of the DSU. The EU wished to thank all Members that had co-sponsored the proposal to launch the AB selection processes and invited all other Members to endorse this proposal.

8.4. The representative of Bangladesh said that his delegation wished to thank Mexico and other co-sponsors for the proposal to launch the AB selection processes contained in document WT/DSB/W/609/Rev.17. Bangladesh expressed its intention to join the co-sponsors of this proposal. Dispute settlement was one of the core pillars of the multilateral trading system and without the Appellate Body it was incomplete. Bangladesh sincerely hoped that with support from Members, the

DSB would be able to take a decision and establish a selection committee, as proposed by the co-sponsors, to carry out the AB selection processes. Bangladesh stood ready to engage constructively with Members on this matter.

8.5. The representative of El Salvador, speaking on behalf of the Group of Latin American and Caribbean countries (GRULAC) that were Members of the WTO, said that the countries in question wished to express their concerns over the current AB impasse. The Appellate Body was a fundamental pillar of the WTO and of the multilateral trading system. Since the moment when this matter was first raised, the majority of WTO Members, including GRULAC Members, had contributed in a constructive fashion to seeking a solution which would enable Members to launch the AB selection processes. However, the AB impasse persisted. Members of the GRULAC that were WTO Members would continue to work constructively and reiterated their full support to the DSB Chairman and his successor, as well as to the Director-General in the process that he had recently initiated. They hoped that a solution could soon be found. El Salvador supported the statement made by Mexico under this Agenda item.

8.6. The representative of Thailand said that his country wished to refer to its statement made at the 27 January 2020 DSB meeting. As a co-sponsor, Thailand supported the proposal to launch the AB selection processes. The two-tier, binding WTO dispute settlement system was one of the core elements of the WTO. The current inability of the Appellate Body to function affected the ability of Members to secure a positive solution to disputes. As one of the Members with both pending appeals and a pending panel proceeding, both as complainant and defendant, Thailand's rights under the DSU were at risk. Thailand had already felt the impacts that were being generated as a result of this impasse. The longer the impasse lasted, the greater would be the risks to the multilateral trading system and to the interests of Members such as Thailand. This uncertainty in dispute settlement undermined the security and predictability of the multilateral trading system. Thailand strongly encouraged all Members involved to increase their efforts towards finding a permanent solution to this impasse.

8.7. The representative of Singapore said that Singapore wished to refer to its statements made at previous DSB meetings and to reiterate its strong systemic interest in the maintenance of the two-tier, binding WTO dispute settlement mechanism that was underpinned by negative consensus. The unblocking of the AB selection processes had to remain the paramount priority for all Members. Singapore urged all Members, including the United States, to constructively engage in finding concrete solutions. Singapore also wished to welcome Bangladesh as a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.17.

8.8. The representative of Canada said that his country supported the statement made by Mexico and shared the concerns expressed by other Members under this Agenda item. Canada invited WTO Members that had not yet sponsored the proposal contained in document WT/DSB/W/609/Rev.17 to consider joining the 120 Members that called for the launch of the AB selection processes. The critical mass of WTO Members that supported this proposal was a clear testimony to the importance that Members accorded to a fully functioning Appellate Body as an integral part of the dispute settlement system. Therefore, Canada called on the United States to act in accordance with Article 17.2 of the DSU and unblock the AB selection processes. The fact that the Appellate Body could not hear new appeals was of great concern. Canada wished to reiterate that it was fully committed to discussions on matters related to the functioning of the Appellate Body. Canada's priority remained to find a lasting multilateral resolution to the impasse that covered all Members, including the United States. To that effect, Canada called on the United States to engage, constructively, in solution-based discussions. In the meantime, Canada would continue its work on a multi-party interim appeal-arbitration arrangement as a contingency measure.

8.9. The representative of Brazil said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Brazil wished to thank Mexico for its presentation of the proposal contained in document WT/DSB/W/609/Rev.17 on behalf of its co-sponsors. Brazil welcomed Bangladesh to the group of co-sponsors of this proposal. Agenda item 10 was a concrete example of how the current situation was affecting the proper balance between the rights and obligations of WTO Members. Similar instances could be expected to occur. Brazil was prepared to engage meaningfully with all Members in order to reach a multilateral long-term solution to this impasse.

8.10. The representative of Hong Kong, China said that his delegation wished to thank Mexico for its statement made on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.17. As stated at previous DSB meetings, Hong Kong, China was concerned that there was still no sign of progress toward resolving the AB impasse. An impartial appeal stage was an essential element of the dispute settlement system that safeguarded the multilateral trading system in the Members' fundamental interest. The Appellate Body should be restored as soon as possible to allow Members to avail themselves of an independent, two-stage adjudication. Hong Kong, China urged Members to continue with their efforts and constructive engagement until a solution was found.

8.11. The representative of Nigeria, speaking on behalf of the African Group, wished to thank Mexico for its statement made at the present meeting. The African Group expressed regret that to date, the DSB had failed to perform its function as stipulated under Article 17.2 of the DSU which clearly stated that: "[v]acancies shall be filled as they arise". The African Group recognized the fact that the WTO dispute settlement system was a central element in providing security and predictability to the multilateral trading system. Therefore, they underscored the importance of ensuring the effective functioning of the dispute settlement system. All Members recognized its importance, and this was evidenced by the undertaking under the DSU. She wished to reaffirm the African Group's proposals on DSU reform, which sought to address structural differences within the dispute settlement system with the aim of facilitating the participation by African countries in the dispute settlement system. Therefore, the African Group wished to underscore the need for any reform to incorporate the developmental needs of developing countries in line with the Doha Development Agenda in order to address the capacity and access challenges faced by the African countries. However, they emphasized that the African Group's priority was to resolve the impasse. The African Group urged the DSB to urgently adopt a Decision to commence the AB selection processes regarding the six vacant Appellate Body member positions. To sum up, the African Group urged the DSB to fulfil its obligation under the DSU which was to fill the AB vacancies as they arose so as to ensure that the Appellate Body and the dispute settlement system did not collapse. The African Group remained concerned that this impasse could result in undesirable consequences for all within the multilateral trading system.

8.12. The representative of New Zealand said that his country wished to reiterate its support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.17 and to refer to its statements made at previous DSB meetings under this Agenda item. New Zealand expressed deep disappointment that the Appellate Body remained unable to perform its important functions and continued to urge all Members to engage on this matter with a view to urgently addressing the situation.

8.13. The representative of Norway said that sadly, the situation remained the same. The Appellate Body had been intentionally demolished. However, the Membership's response had been remarkably constructive. Throughout Norway's statements made at previous DSB meetings under this Agenda item, as was the case with the statements made by many other delegations, the consistent message was Members' readiness to discuss and find solutions. Members had even drafted a General Council decision – facilitated by Ambassador Walker as Facilitator of an informal process of focused discussions on AB matters – based on their perceptions of US arguments. Norway wished to refer to its statements made at previous DSB meetings under this Agenda item. Norway hoped that reason and diplomatic discussions in good faith would ultimately prevail.

8.14. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings under this Agenda item. Australia stood ready to engage in constructive dialogue with Members to reach a shared understanding of the concerns that had been raised and to agree pragmatic solutions in the interests of all Members. Ensuring an effective, multilateral, dispute settlement system in the WTO remained a core priority for Australia. Australia urged all Members to work constructively and demonstrate flexibility in order to find a path forward.

8.15. The representative of the United Kingdom said that her country was a strong supporter of the WTO dispute settlement system as a central pillar of the rules-based multilateral trading system. An effective and binding dispute settlement system ensured that the rules that Members had negotiated were enforceable, preserving the rights and obligations of Members. The United Kingdom supported a system which was compulsory, binding, impartial, and with two-tier adjudication, as the best means of ensuring the fair resolution of disagreements and of preventing recourse to unilateral measures. This was to the benefit of the global economy. The United Kingdom was greatly concerned

that the WTO Membership still had not been able to launch the AB selection processes, with the result that the Appellate Body was unable to hear appeals. The United Kingdom therefore continued and confirmed its support for the proposal contained in document WT/DSB/W/609/Rev.17 to launch the AB selection processes. The United Kingdom also supported the statement made by Mexico on behalf of all co-sponsors. The United Kingdom was committed to finding an urgent resolution to the AB impasse, which carried the support of all WTO Members. The United Kingdom understood the long-standing concerns that had been raised and supported further urgent discussions to find common ground, including on possible reforms to the system. The United Kingdom recognized that in a consensus-based Organization like the WTO, any dispute resolution mechanism had to carry the trust of all Members. However, the United Kingdom also considered that finding a solution should not stand in the way of the continued functioning of the system and the launch of the AB selection processes. The United Kingdom, therefore, called on all Members to act urgently to restore the system to its full functioning, whilst Members prioritized discussions on a long-term solution to the concerns raised.

8.16. The representative of Korea said that his country wished to welcome Bangladesh as a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.17. Korea supported the statement made by Mexico. Korea urged all Members to engage constructively in the discussions to resolve this issue as soon as possible.

8.17. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. As Japan had repeatedly stated, its priority had always been and continued to be to find a long-lasting solution to the Appellate Body matter.

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 also wished to reiterate its serious concerns regarding the DSB's inability to commence the AB selection processes. Since 11 December 2019, the Appellate Body was no longer available to review Panel Reports. The two-stage dispute settlement system, which was the central element in providing security and predictability to the multilateral trading system, had become paralyzed. Members had clearly seen the consequences of such paralysis at the present meeting as well as on 28 February 2020. Therefore, India called on all Members to immediately start the AB selection processes as a priority.

8.19. The representative of Turkey said that his country also wished to refer to its statements made at previous DSB meetings. Turkey, as a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.17, once again underlined the urgency of launching the AB selection processes as required by Article 17.2 of the DSU. Like other Members, Turkey believed that as this impasse persisted, the security and predictability of the multilateral trading system would gradually diminish. Members had already started seeing certain ramifications of this impasse. As other Members had already raised, Members needed the dispute settlement system to continue producing binding adjudications. Members should develop means to this end. In this respect, Turkey continued to be confident that Members could find a multilateral solution. Turkey was willing to continue discussions on the basis of the draft GC Decision put forward by Ambassador Walker. Turkey stood ready to engage constructively to help overcome this impasse and invited all Members to engage in discussions with the Membership that went beyond registering their complaints.

8.20. The representative of Switzerland said that her country wished to refer to its statements made at previous DSB meetings on this matter. Switzerland remained ready to engage constructively with all Members with a view to finding concrete solutions and expressed hope that the situation could be resolved soon.

8.21. The representative of Chinese Taipei said that his delegation wished to thank Mexico for its statement under this Agenda item on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.17. Chinese Taipei wished to refer to its statements made at previous DSB meetings on this matter. Chinese Taipei wished to welcome Bangladesh as a new co-sponsor to this proposal and urged all Members to engage in constructive dialogues to identify common ground that would help overcome the current impasse.

8.22. The representative of the United States thanked the Chair for the continued work on these issues. As the United States had explained in prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had

identified remained unaddressed. The US view across multiple US Administrations had been clear and consistent: When the Appellate Body overreached and 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. On 11 February 2020, the Office of the US Trade Representative had published a Report on the Appellate Body of the World Trade Organization. The Report detailed the manner in which the Appellate Body had strayed far from the limited role that WTO Members had assigned to it. Through persistent overreaching, the Appellate Body had increased its own power, at the expense of the authority of WTO Members. The United States encouraged Members to review the Report. As the United States had explained repeatedly, the fundamental problem was that the Appellate Body had not respected the current, clear language of the DSU. Members could not find meaningful solutions to this problem without understanding how Members had arrived at this point. Without an accurate diagnosis, Members could not assess the likely effectiveness of any potential solution. The United States was determined to bring about real WTO reform, including to ensure that the WTO dispute settlement system reinforced the WTO's critical negotiating and monitoring functions, and did not undermine those functions by overreaching and gap-filling. As discussions among Members continued, the dispute settlement system continued to function. The central objective of that system remained unchanged: to assist the parties to find a solution to their dispute. As before, Members had many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third-party adjudication. Consistent with the aim of the WTO dispute settlement system, the parties should make efforts to find a positive solution to their dispute, and this remained the US preference. And the United States would continue to insist that WTO rules be followed by the WTO dispute settlement system. The United States would continue its efforts and its discussions with Members and with the Chair to seek a solution on these important issues.

8.23. The representative of China said that his country wished to echo the statement made by Mexico on behalf of the 120 co-sponsoring Members, plus Bangladesh who had expressed its intention of joining as a co-sponsor to the proposal contained in document WT/DSB/W/609/Rev.17. The paralysis of the Appellate Body was very worrying and needed to be addressed through collective efforts. In that regard, China strongly encouraged additional Members to join this proposal in order to demonstrate their firm support and strong commitment to a two-tier, independent and predictable dispute settlement system. China expressed deep regret that the AB selection processes, once again, had failed to be launched due to the illegal blockage of the United States. China noted that the current two-tier dispute settlement system was part of the single undertaking. Without consensus, no Member had the right to unilaterally change this negotiated outcome. More importantly, for Members of this rules-based Organization, ensuring the functioning of the Appellate Body was not an option but an obligation. Article 17.2 of the DSU made it very clear: Members had to bear the legal obligation of filling AB vacancies as they arose. No excuse could serve to disregard this obligation. Like many other international or domestic adjudication bodies, the Appellate Body was not perfect and could be further improved on various fronts. However, any potential improvement could be achieved only if there still was a viable Appellate Body. Over the past two years, Members had made tremendous efforts while searching for meaningful reform options. Twelve proposals and a draft General Council decision had been tabled and vigorously discussed in different configurations. However, the United States continued to fail to engage constructively in these discussions. This failure rendered Members' collective efforts futile. Ironically, the United States had not tabled a single concrete proposal to address the concerns it had raised. China noted that the USTR had recently issued a report that targeted the Appellate Body specifically. Regrettably, this 174-page report was filled with criticisms but proposed no solution. China believed that based on a comparison of the USTR report with the statement made by the United States back in 2017 when it had blocked the AB selection processes for the first time, the United States appeared to be continuously expanding its concerns and requests. The criticisms in the USTR report were simply *post hoc* justifications for the misguided behaviour of the United States. To break the deadlock, Members were certainly willing to discuss any issue raised by the United States. However, in light of an old German fairy tale titled *The Fisherman and His Wife*, the US requests should not be expanding ceaselessly. The discussion needed to be solution oriented. Otherwise Members might stumble into endless philosophical debates that would lead nowhere.

8.24. China renewed its commitment to the informal process on AB matters and firmly supported Ambassador Walker and the Director-General in their respective efforts aimed at furthering consultations on reform. However, China believed it was equally important to find a timely interim solution during the paralysis of the Appellate Body. In that regard, China and other like-minded

Members were currently structuring a multi-party appeal arbitration mechanism which could serve as a stopgap. China welcomed and encouraged additional Members to seriously consider subscribing to this interim solution. China also welcomed the adoption of the Appellate Body report in the "US – Supercalendered Paper" dispute (DS505) at the present meeting. Paralyzing the Appellate Body would not change the nature of the rules-based multilateral trading system, nor would it change the nature of the unilateral protectionist actions taken by the United States. The paralysis of the Appellate Body would by no means become a means of leverage for the so-called "reform" advocated by the United States. As China had emphasized at the 9 December 2019 GC meeting, institutional memory was extremely important to ensure the integrity of the rules-based multilateral trading system. China wished to thank the Appellate Body Secretariat for its outstanding performance and long-term contribution in this respect. China requested that the Appellate Body Secretariat remain stable during this period, and that its structure be maintained according to the Decision on the Establishment of the Appellate Body (WT/DSB/1). The staff of the Appellate Body Secretariat should also remain on standby so that, at any given time, it would be ready to return to work on new cases in a timely manner.

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.17, regretted that for the thirty-second 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 undermine and disrupt its work as well as the work of the dispute settlement system. There was no legal justification for the current blockage of the AB selection processes, which was causing concrete nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members had to comply with their obligation under the DSU to fill the AB vacancies. They 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 the joint proposal contained in document WT/DSB/W/609/Rev.17 demonstrated the Members' desire to comply with their obligation to fill AB vacancies as they arose, in accordance with Article 17.2 of the DSU. Mexico expressed deep regret that Members were in an unprecedented situation whereby the Appellate Body was incomplete and non-operational. All ongoing disputes were being affected by the lack of a fully functioning dispute settlement system. This undermined the right of all Members to engage in appellate proceedings. Mexico urged Members to join the list of co-sponsors of this proposal and not to become accustomed to this situation. Mexico reiterated its readiness to work toward a solution through concrete proposals aimed at reaching a concrete solution.

8.27. The Chairman thanked all delegations for their statements. He said that, as in the past, the DSB would take note of the statements expressing the respective positions, which would be reflected in the minutes of the present meeting. He recalled that, under the auspices of the General Council, he had agreed to assist the Chair of the General Council, as Facilitator, in an informal process of focused discussions on Appellate Body matters. Based on his consultations, on 9 December 2019, he had provided his fifth progress report to the General Council and, as part of that report, he had put forward, in his capacity as Facilitator, a draft General Council Decision on the functioning of the Appellate Body for Members' consideration. The text of this draft decision contained in document WT/GC/W/791 had been based on the proposals submitted by Members and the extensive discussions in the informal process as well as the feedback that he had received from delegations. Unfortunately, no consensus had been reached on the draft Decision at the General Council meeting. Thus, it remained up to Members to decide how this work would be taken forward in the future. He would continue to look to assist Members in these efforts going forward in order to find a workable and agreeable solution to improve the functioning of the Appellate Body. He noted that as a number of Members had observed at the present meeting, the business of the present meeting only served to illustrate the urgency of finding that solution.

8.28. The DSB took note of the statements.

9 AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER: STATEMENT BY AUSTRALIA

9.1. The representative of Australia, speaking under "Other Business", said that at its 27 January 2020 meeting, the DSB had adopted the Panel's recommendations and rulings in the dispute: "Australia – Anti-Dumping Measures on A4 Copy Paper from Indonesia" (DS529). On 26 February 2020, Australia had provided the DSB with written notification of its intention to implement, as required under Article 21.3 of the DSU. As outlined in that written notification, Australia intended to implement the DSB's recommendations and rulings in a manner that complied with its WTO obligations. Australia would also conduct a review of the measures at issue in this dispute. Australia would need a reasonable period of time to conduct this review and had had discussions with Indonesia on this matter, in accordance with Article 21.3(b) of the DSU. Australia and Indonesia had agreed on a reasonable period of time of eight months from 27 January 2020. An extension of the reasonable period of time would be notified to the DSB in the event of any unavoidable delay. Australia and Indonesia would provide written notification of this agreement to the DSB under Article 21.3(b) of the DSU.

9.2. The representative of Indonesia said that his country wished to thank Australia for its written communication, dated 26 February 2020, and its statement made at the present meeting regarding its intentions to implement the DSB's rulings and recommendations in this dispute. Indonesia wished to confirm that it had agreed with Australia on a reasonable period of time to implement the DSB's rulings and recommendations. The reasonable period of time would be of eight months, starting from the date of the adoption of the Panel Report on 27 January 2020. The reasonable period of time would expire on 27 September 2020. Indonesia stood ready to engage with Australia and looked forward to receiving further information on Australia's future steps aimed at implementing the DSB's rulings and recommendations.

9.3. The DSB took note of the statements.

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

A. Recourse to Article 22.2 of the DSU by the Philippines (WT/DS371/32)

10.1. The Chairman drew attention to the communication from the Philippines contained in document WT/DS371/32 and invited the representative of the Philippines to speak.

10.2. The representative of the Philippines said that his country wished to thank for the opportunity to present its request, under Article 22.2 of the DSU for authorization to suspend the application to Thailand of concessions or other obligations under the covered agreements, in the DS371 dispute. The Philippines regretted that the work of the DSB had been delayed and welcome the resumption of the meeting. The Philippines appreciated that the DSB was properly considering the Philippines' request under Article 22.2 of the DSU. The Philippines noted Thailand's concerns relating to the application of the Understanding on Sequencing and the current AB impasse in the WTO dispute settlement system, which had previously been discussed under Agenda item 8. As Thailand had stated, there were far reaching implications for the rules-based WTO system. This Agenda item served as an opportunity for Members to express their views on the conflict between rights, obligations and procedures under Articles 21.5 and 22 of the DSU, while also touching upon the viability and integrity of the WTO dispute settlement system as a whole. The Philippines took exception, however, to the characterization that the Philippines was attempting to act unilaterally. The very reason the Philippines was before the DSB at the present meeting was to seek proper multilateral authorization to suspend concessions pursuant to the clear provisions of Article 22 of the DSU. Thailand had agreed to two reasonable periods of time for the implementation of the DSB's adopted recommendations and rulings, which applied to distinct measures. The first period had expired on 15 May 2012, and the second one expired on 15 October 2012. On 1 June 2012, the Philippines and Thailand had concluded an Understanding on Sequencing which had been notified to the DSB on 7 June 2012 and circulated to Members in document WT/DS371/16. The Understanding on Sequencing expressly stated that it was without prejudice to the parties' respective rights and obligations under the DSU, including the Philippines' rights under Article 22. In the Understanding on Sequencing, Thailand had expressly committed not to object to the exercise by the Philippines of its rights under Article 22. Thailand had also expressly preserved its rights to arbitration under

Article 22.6 of the DSU. In good faith, the Philippines had pursued parallel compliance proceedings under Article 21.5 of the DSU. The first compliance Panel Report had been issued on 12 November 2018. A second compliance Panel Report had been issued on 12 July 2019. Both compliance Panels had confirmed that Thailand had failed to comply with the DSB's recommendations and rulings in this dispute. Under the Understanding on Sequencing, any appeal of compliance panel reports under Article 21.5 of the DSU had to be mandatorily resolved within 90 days from its initiation. The 90-day period for the first and second compliance appeals had expired in 2019. On 10 December 2019, the AB division in each appeal had informed the parties that it had indefinitely suspended its work. In the Understanding on Sequencing, the parties had agreed to cooperate to find a prompt solution to any procedural issue not addressed in the Understanding. The Understanding on Sequencing did not address the AB impasse, but its spirit required that the parties cooperate to find solutions. The Philippines was prepared to do so. Therefore, the Philippines was fully respecting the procedures of the Understanding on Sequencing and should not be prevented from asserting its valid and substantial rights under Article 22 of the DSU. At various times, the Philippines had expressed the need to adopt the compliance panel reports under Article 21.5 of the DSU and to obtain full compliance by Thailand with the DSB's duly adopted recommendations. The Philippines remained open to constructive and time-bound solutions to the current situation that would respect the spirit of the Understanding on Sequencing's mandatory 90-day period for the resolution of appeals.

10.3. Therefore, the Philippines called on Thailand and other Members, under the leadership of the Chairman, to guide the Philippines toward obtaining full compliance with the DSB's recommendations and rulings by Thailand or, in the alternative, to afford and respect the right of the Philippines to be compensated or to be authorized to suspend concessions. In the informal consultations this past week, the Chairman had mentioned the possibility of referring the resolution of the pending appeals regarding the proceedings under Article 21.5 of the DSU to alternative methods and rules, including but not limited to Article 25 of the DSU. The Philippines had expressed its openness to this suggestion, as well as to resorting to arbitration under Article 22.6 of the DSU, to any other hybrid alternative or to any other constructive suggestion. The Philippines' remained open and welcomed and solicited views of Members. From the Philippines' perspective, if Thailand did not accept some solution to finalize Thailand's appeals promptly under alternative procedures, including through resort to Article 25 of the DSU, this matter would inevitably return to the DSB for a decision under the mandatory decision-making rules contained in Article 22.6 of the DSU. The Philippines was prepared to be guided by the Chairman and the DSB on compromises and could formally communicate this to the Chairman and Thailand. However, the Philippines would not be in a position to indefinitely suspend the exercise of its rights under Article 22 of the DSU. The mandatory decision-making rules in Article 22.6 of the DSU were designed precisely to prevent a respondent from frustrating WTO dispute settlement in such a manner as to block consensus. In these circumstances, the Philippines formally presented its request to the DSB for authorization to suspend concessions or other obligations under the covered agreements. However, the Philippines was willing to suspend consideration of this matter pending further consultations among the parties as well as pending the expression of views by Members. This willingness was subject to the condition that the DSB would revert to and retain this Agenda item at the next and subsequent DSB meetings in order to preserve all rights and remedies of the Philippines. The Philippines reserved its right to make an additional statement after having heard the perspectives of other Members, and to update Members of any development at the next DSB meeting.

10.4. The representative of Thailand said that her country wished to present Members with the background to the Philippines' request. Thailand expressed regret that the Philippines had presented Members with a one-sided and inaccurate picture of the status of this dispute. The Philippines' timeline for this dispute attached to its statement made on 28 February 2020 was equally one-sided. That timeline did not take into account the effects of the Philippines' litigation strategies and its timing preferences, including, for example, the Philippines' requests to delay the issuance of the two compliance panel reports,²⁷ which had also affected the course of the dispute. Neither Thailand nor the DSB was responsible for the Philippines' own choices. As background to the Philippines' request, Thailand wished to explain that the present situation was very straightforward. Contrary to what the Philippines had suggested, it was not a complex legal matter. In order to situate the Philippines' request in the appropriate context, it was important to recall the history of this dispute. The reasonable period of time for complying with the DSB's recommendations in this dispute had expired

²⁷ Communications from the Panel, WT/DS371/25 and WT/DS371/29, dated 9 November 2018 and 12 July 2019 respectively.

on 15 May 2012. The Parties had concluded a sequencing agreement on 1 June 2012, following one of the standard models. This sequencing agreement contained two essential rules:²⁸ (i) the Philippines had agreed to request retaliation under Article 22.2 of the DSU only after completion of proceedings under Article 21.5 of the DSU, which included a ruling by the Appellate Body in the event of an appeal; and (ii) the sequencing agreement further stated that upon completion of the appeals, Thailand would not object to the Philippines' retaliation request as being outside the 30-day deadline set out in Article 22.6 of the DSU. As Members knew, absent a sequencing agreement, a retaliation request that was filed after completing compliance proceedings would normally be outside the 30-day period for doing so under Article 22.6 of the DSU. There was nothing unusual about this type of sequencing agreement. It simply clarified the parties' agreement on the sequence of procedures to be followed and confirmed that a retaliation request submitted after the completion of compliance proceedings would not be considered untimely. Based on the parties' understanding, the Philippines had initiated two compliance proceedings under Article 21.5 of the DSU. The compliance panel had issued its reports on 12 November 2018 and 12 July 2019, respectively. Thailand had appealed both compliance reports on 9 January 2019 and 9 September 2019, respectively. The appellate review in these compliance proceedings was, therefore, still pending.

10.5. Thailand believed that the Philippines' request was without any legal basis. During the past two years, at no point had the Philippines questioned the validity of the agreed sequence of steps. In its panel requests under Article 21.5 of the DSU, the Philippines had expressly stated that it was doing so "pursuant to paragraph 1 of the Sequencing Agreement".²⁹ Thus, at no point during the proceedings under Article 21.5 of the DSU had the Philippines questioned the validity of the agreed sequencing rules. This had changed on 12 February 2020, when the Philippines had submitted a request to suspend concessions against Thailand. The Philippines' request had been submitted while the appeals under Article 21.5 of the DSU were ongoing. By filing its request, the Philippines appeared to believe that it was no longer bound by the sequencing agreement and, therefore, that it could proceed to requesting the suspension of concessions even before the completion of the appeals in respect of the proceedings under Article 21.5 of the DSU. Thailand expressed disappointment that the Philippines had chosen to unilaterally disregard the previously accepted rules for the post-implementation stage of this dispute. Thailand expressed disappointment that the Philippines had chosen to depart from its own position in the "EC – Bananas" dispute that, when there was a disagreement as to whether the measure taken to comply achieved compliance, "Article 21.5 proceedings should be available to [the respondent] to resolve that disagreement".³⁰

10.6. Thailand wished to reiterate that the proceedings under Article 21.5 of the DSU were still pending in this dispute, and that there had been no adopted reports finding that Thailand had failed to comply. Thailand believed that the important question was what would be the rights and obligations of Thailand and the Philippines if, as the Philippines appeared to suggest, the sequencing agreement was no longer valid. Thailand believed that the answer was simple: it meant that the DSU had to be applied to the letter. Specifically, if one accepted that the sequencing agreement was no longer valid, the DSB had to enforce the deadline under Article 22.6 of the DSU regarding the authorization of a request to suspend concessions. Pursuant to Article 22.6, any retaliation request had to be authorized by the DSB within 30 days of the expiry of the reasonable period of time to comply. The reasonable period of time in this dispute had expired on 15 May 2012. This meant that the deadline for authorizing the suspension of concessions had expired on 15 June 2012, more than seven years ago. In these circumstances, there were only two possible ways of considering the Philippines' request: (i) either the sequencing agreement applied, in which case the Philippines could not request authorization to suspend before the appeals were completed; or (ii) the sequencing agreement did not apply, in which case the Philippines' request was untimely under Article 22.6 of the DSU, as the 30-day deadline for requesting retaliation had expired on 15 June 2012.

10.7. Thailand believed that the Philippines' request was without any legal basis and should not have been on the Agenda of the present meeting. This was not the usual debate on the relationship between Articles 21 and 22 of the DSU. This was not an abstract legal discussion. It was a straightforward issue which entailed determining whether or not the sequencing agreement applied. The Philippines had to be able to answer this simple and direct question. The DSB could not and

²⁸ Understanding between the Philippines and Thailand regarding procedures under articles 21 and 22 of the DSU, WT/DS371/16, 7 June 2012.

²⁹ WT/DS371/18 of 6 July 2016 (first 21.5), para. 4; and WT/DS371/22 of 16 March 2018 (second 21.5), third preamble paragraph.

³⁰ Minutes of the DSB meeting dated 19 April 1999, WT/DSB/M/59, p. 9.

should not accept the Philippines' insistence that some parts of the sequencing agreement were still valid while some other parts were no longer valid. The Philippines could not breach the sequencing agreement by requesting the suspension of concessions before the completion of the appeals contemplated in the sequencing agreement, while simultaneously asking Thailand to respect the provisions of the sequencing agreement that allowed the Philippines to request the suspension of concessions beyond the deadline under Article 22.6 of the DSU. The Philippines could not pick and choose which rules to respect and which rules to disregard. Thailand also found extraordinary the Philippines' argument that once appeals had been pending for more than 90 days, Thailand and other affected Members should lose their rights under the DSU to appellate review of panel reports. This argument had no basis in the DSU. It did, however, emphasize the need for Members to seek a prompt solution that would enable the dispute settlement system to move forward in a manner that respected the rights and obligations of all Members and all disputing parties.

10.8. Thailand believed that absent any adopted compliance report by the Panel or the Appellate Body, the Philippines' retaliation request would amount to a unilateral determination regarding Thailand's alleged failure to comply with the DSB's rulings and recommendations in the original dispute. Thailand wished to recall that these types of unilateral determinations were expressly prohibited by Article 23.2(a) of the DSU. Article 23 was meant to prevent a WTO Member from "tak[ing] the law into its own hands".³¹ Thailand was also concerned that the Philippines had provided some Members with an inaccurate picture of Thailand's approach to the resolution of this situation. Thailand believed that bilateral discussions should remain bilateral. Nevertheless, as Thailand had stated repeatedly, the real problem was the Appellate Body crisis. For the means of resolutions of disputes in the WTO to have credibility among Members and in their capitals, it had to have multilateral support or, at a minimum, broad-based support in favour of any temporary mechanism. Again, Thailand encouraged all Members, including the Philippines, to do their best to enable the system as a whole to move forward as soon as possible. For these reasons, Thailand wished to reiterate strongly that the DSB was not in a position to consider and grant the Philippines' request for suspension of concessions at the present meeting.

10.9. The Chairman said that, without prejudice to the rights of the Philippines and Thailand, he wished to propose that further consideration of this Agenda item be suspended at this point. In proposing to suspend, the Chairman said that he would continue to consult with Thailand and the Philippines on these matters.

10.10. The representative of China said that his country understood that both parties had negotiated and reached a sequencing agreement in good faith with a view to solving this dispute in a manner consistent with the DSU. China noted, however, that the AB paralysis was such an extraordinary circumstance that neither party could have envisaged it when the sequencing agreement had been agreed. This was simply another example of the devastating impact that the Appellate Body impasse could have for all Members. Nevertheless, these unexpected circumstances should in no way diminish the rights and obligations of the parties to this dispute under the covered agreements. Therefore, China encouraged both parties to consult with each other in good faith and make efforts to solve this matter as soon as possible.

10.11. The representative of the Philippines said that his country acknowledged and took note of Thailand's comments. The Philippines believed that Thailand's legal concerns would require some sort of adjudication. The Philippines wished that the Chair's consultations on this matter be as broad as possible.

10.12. The Chairman said that, without prejudice to the rights of the Philippines and Thailand, further consideration of this Agenda item would be suspended. He said that he would continue to consult with Thailand and the Philippines on these matters.

10.13. The DSB took note of the statements and, as proposed by the Chairman, further consideration of Agenda item 10 was suspended.

³¹ Decision by the Arbitrator, "Canada – Aircraft Credits and Guarantees" (Article 22.6 – Canada), para. 398.