

**Dispute Settlement Body
25 January 2022**

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 25 JANUARY 2022¹

Chairman: H.E. Mr Didier Chambovey (Switzerland)

Prior to the adoption of the Agenda: (i) the Chairman welcomed all delegations participating in the meeting of the DSB both in-person and remotely and said that he wished to recall a few technical instructions regarding the virtual participation of delegations. He said that if a Member was unable to take the floor during the meeting because of a technical issue, the delegation could inform the Chair or the Secretariat and that Agenda item would remain open until the delegation could take the floor. In the alternative, the item would remain open temporarily, the meeting would proceed to the next Agenda item, and the DSB would revert to the open item after the technical issue had been resolved. If a technical issue remained unresolved, the delegation had the option to send the statement to the Secretariat with the request that it be read out by the Secretariat on behalf of that delegation during the meeting so that the statement could be reflected in the minutes of the meeting; (ii) the Chairman made a short statement regarding item 4 of the proposed Agenda of the DSB meeting of 28 April 2021 pertaining to the DS574 dispute. He said that, as Members recalled, that matter had been removed from the proposed Agenda to allow time for the Chair's consultations with each interested party regarding that Agenda item. At the present meeting, he wished to inform delegations that he continued to consult with each interested party on this matter and that those consultations were ongoing; and (iii) the representative of Tunisia said that Tunisia wished to make a statement under "Other Business" on progress in the consultations with Morocco regarding the Panel Report in the dispute: "Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia" (DS578).

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

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¹ The proceedings of this meeting were held in a hybrid format.

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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.223)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.198)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.161)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.45)

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.37)

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.32 – WT/DS478/22/Add.32)

1.1. The Chairman noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. As Members recalled, Article 21.6 requires that: "Unless 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, the Chairman 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: "Representatives 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."

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.223)

1.2. The Chairman drew attention to document WT/DS184/15/Add.223, 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 13 January 2022, 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 of the DSB that had yet to be addressed, the US Administration would confer with the US Congress with respect to the appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that Japan thanked the United States for the latest status report and the statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB 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.198)

1.6. The Chairman drew attention to document WT/DS160/24/Add.198, 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 13 January 2022, in accordance with Article 21.6 of the DSU. The US Administration

would continue to confer with the European Union, and 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 the European Union thanked the United States for its status report and its statement made at the present meeting. The European Union referred to its previous statements made on this matter and said that it wished to resolve this case as soon as possible.

1.9. 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.161)

1.10. The Chairman drew attention to document WT/DS291/37/Add.161, 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.

1.11. The representative of the European Union said that the European Union and the United States had held another biotech dialogue the previous month. The European Union considered that dialogue to be a useful forum to exchange information on biotech-related issues. During that meeting, the European Union had provided detailed updates on several priority applications indicated by the United States. The updates showed that, on average, 85% of the time from validation of the application dossier to adoption of the scientific opinion was used by the applicants. The United States frequently referred to products that had successfully passed EFSA's risk assessment, but not yet received final approval through comitology. The European Union pointed out that there were administrative procedures between the publication of EFSA's favourable opinion and the comitology vote that had to be respected, including, among others, procedures related to transparency, such as a one-month public consultation period. The European Union failed to see how those procedures could be characterised as "undue delay". During the recent biotech dialogue, those procedures and the corresponding timelines had been explained to the United States. The European Union acted in line with its WTO obligations. The European Union recalled that the EU approval system was not covered by the DSB's recommendations and rulings. To update the WTO Membership concerning the progress of the applications throughout the authorisation process, the European Union noted the following. First, the written procedure on the vote on the draft decision authorising two genetically modified organisms (GMOs) – genetically modified oilseed rape 73496 and genetically modified cotton GHB811 – which had been presented at the online Standing Committee meeting of 17 December 2021 resulted in "no opinion". The draft decision would be referred to the Appeal Committee in February. Second, the Standing Committee meeting had been held online on 20 January 2022. The Commission presented a draft decision authorising genetically modified soybean GMB151. The vote on this draft decision was taking place by means of written procedures. Third, the Appeal Committee meeting had been held online on 20 January 2022. The Commission had referred a draft decision renewing genetically modified cotton GHB614.² The vote on that draft decision was taking place by means of written procedure.

1.12. The representative of the United States thanked the European Union for its status report and its statement at the present meeting. The United States continued to engage with the European Union in good faith on these issues, and had provided recommendations on several occasions as to how the European Union could address the undue delays in its approval procedures. The United States requested that the European Union move to issue final approvals for all products that had completed science-based risk assessments at EFSA, including those products that were with the Standing Committee and Appeals Committee.

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

² The draft decision was presented at the Standing Committee on 17 November 2021 and voted on afterwards by written procedure.

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.45)

1.14. The Chairman drew attention to document WT/DS464/17/Add.45, 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.

1.15. The representative of the United States said that the United States had provided a status report in this dispute on 13 January 2022, 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 recommendations concerning those anti-dumping and countervailing duty orders. The United States would consult with interested parties on options to address the recommendations of the DSB relating to other measures challenged in this dispute.

1.16. The representative of Korea said that Korea thanked the United States for its status report. Korea again urged the United States to take prompt and appropriate steps to implement the DSB recommendations for the "as such" measures at issue in this dispute.

1.17. The representative of Canada said that more than four years had passed since the expiry of the reasonable period of time for implementation of the DSB recommendations arising from the Appellate Body Report in "US – Washing Machines", according to which the "differential pricing methodology" (DPM) was "as such" inconsistent with the WTO Agreements. Despite this, the United States continued to apply the DPM "as such" in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters on the basis of this non-compliant methodology. Canada was deeply concerned about this violation and invited the United States to put an end to it as soon as possible.

1.18. 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.37)

1.19. The Chairman drew attention to document WT/DS471/17/Add.37, 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.

1.20. The representative of the United States said that the United States had provided a status report in this dispute on 13 January 2022, in accordance with Article 21.6 of the DSU. As explained in that report, the United States would consult with interested parties on options to address the recommendations of the DSB.

1.21. The representative of China said that China thanked the United States for its most recent status report. It was disappointing that more than three years after the expiry of the reasonable period of time, the United States had still failed to implement the adopted rulings and recommendations in this dispute. China urged the United States to honour its obligation by bringing its measures into conformity with the WTO obligations without any further delay.

1.22. 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.32 – WT/DS478/22/Add.32)

1.23. The Chairman drew attention to document WT/DS477/21/Add.32 – WT/DS478/22/Add.32, 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.

1.24. The representative of Indonesia said that Indonesia submitted its status report pursuant to Article 21.6 of the DSU. Indonesia reiterated its commitment to implementing the recommendations and rulings of the DSB in these disputes. On measure 18, as reported in previous DSB meetings, Indonesia had removed all Articles in the relevant Laws that were found to be inconsistent with the WTO rules, through the enactment of Law No. 11/2020 on Job Creation. With respect to measures 1-17, Indonesia reassured that significant adjustments in complying with the recommendations and rulings of the DSB had been carried out through amendments of the relevant Ministry of Agriculture and Ministry of Trade regulations. Those adjustments included the removal of disputed measures including, *inter alia*, harvest period restriction, import realization requirements, six-months harvest requirement, and reference price. Indonesia committed to engaging with New Zealand and the United States and reaffirmed its commitment to implementing the recommendations and rulings of the DSB in these disputes.

1.25. The representative of the United States said that the United States was continuing to review Indonesia's new laws and regulations in light of Indonesia's recent statements and status reports. The United States had learned that Indonesia's Constitutional Court had ruled that the Omnibus Law on Job Creation (No. 11/2020) was unconstitutional and ordered the government to revise the law. The United States questioned how that ruling affected Indonesia's implementation of the DSB's recommendation concerning measure 18. With respect to measures 1-17, the United States said that it would still appreciate further clarity on which regulations presently comprised Indonesia's import licensing regimes and on any forthcoming regulations that would affect the regimes. The United States remained willing to work with Indonesia to fully resolve this dispute.

1.26. The representative of New Zealand said that New Zealand thanked Indonesia for its status report, and acknowledged Indonesia's commitment to comply fully with the DSB's recommendations and rulings. Both compliance deadlines had long since expired, and a number of measures remained non-compliant. New Zealand continued to review recent legislative adjustments in order to assess what impact this would have on Indonesia's compliance, in particular in respect of Measure 18. New Zealand understood that Indonesia was in the process of implementing new regulations under Law No. 11/2020 on Job Creation, which would impact that assessment. This included the recently-released Ministry of Trade Regulation 20/2021. New Zealand sought clarity on how the implementation of this regulation would amend Indonesia's import licensing system. New Zealand remained interested in what impact, if any, the recent constitutional court ruling declaring the Job Creation Law unconstitutional would have on the legislation associated with the DSB's recommendations and rulings. New Zealand invited Indonesia to provide further details as soon as possible and looked forward to further bilateral engagement to that end.

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

2 UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN

A. Implementation of the recommendations of the DSB

2.1. The Chairman recalled that, in accordance with the DSU, the DSB was required to keep under surveillance the implementation of DSB recommendations and rulings in order to ensure effective resolution of disputes, for the benefit of all Members. In that respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB within 30 days of the date of adoption of the panel report of its intentions with respect to implementation of the DSB's recommendations and rulings. He recalled that at its meeting on 20 December 2021, the DSB had adopted the Panel Report in "United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain". The 30-day time-period in this dispute had expired on 19 January 2022 and on that date the United States had informed the DSB in writing of its intentions with respect to implementation of its recommendations and rulings. The relevant communication was contained in document WT/DS577/10. He then invited the representative of the United States to make a statement.

2.2. The representative of the United States said that on 20 December 2021, the DSB adopted the report of the Panel in the dispute: "United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain" (DS577). As provided in the first sentence of Article 21.3 of the DSU, the United States wished to state that it intended to implement the recommendations of the DSB in this dispute in a manner that respected US WTO obligations. On 19 January 2022, the United States informed the DSB by letter that it intended to implement the recommendations and rulings of the DSB and

had begun to evaluate its options for doing so. That letter had been circulated to the DSB (WT/DS577/10). The United States had notified the DSB of US intentions by letter in light of the fact that the 30-day period of time described in Article 21.3 of the DSU had expired before the next regularly scheduled DSB meeting and under circumstances that did not favour calling a special DSB meeting for that sole purpose. As the United States had noted in its letter, it would need a reasonable period of time in which to implement the DSB's recommendations and rulings, and it hoped to reach agreement with the European Union in accordance with Article 21.3(b) of the DSU.

2.3. The representative of the European Union said that the European Union welcomed the statement made by the United States indicating its intention to comply with its WTO obligations. The European Union was ready to discuss with the United States a reasonable period of time in which to implement the recommendations. The European Union recalled that the Panel Report had substantially upheld the European Union's claims and had largely confirmed that in the anti-subsidy duties imposed by the United States on ripe olives from Spain, the United States had acted inconsistently with the SCM Agreement. The Panel Report had found that the United States did not comply with its obligation in the determination of *de jure* specificity and in the calculation of the subsidy benefit for one specific EU company. The Panel Report had also found that Section 771B of the Tariff Act of 1930, which presumed that the entire benefit of a subsidy provided in respect of a raw agricultural product passed through to the downstream processed agricultural product, was "as such" inconsistent with the SCM Agreement and that the application of Section 771B in the ripe olive investigation was also inconsistent with the SCM Agreement.

2.4. The representative of Canada said that Canada welcomed the decision of the United States not to appeal the Panel Report in "US – Ripe Olives from Spain" and to implement the recommendations and rulings of the DSB with respect to this Panel Report. The Panel had made significant findings concerning the issue of the "pass-through" of a benefit. In particular, the Panel had found that Section 771B of the Tariff Act was "as such" inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement because these provisions required an investigating authority to establish the existence and amount of pass-through of a benefit, taking into account all relevant facts. Section 771B required the US Department of Commerce to presume, where certain conditions were met, that the entire benefit of a subsidy provided in respect of a raw agricultural input product passed through to the downstream processed agricultural product. Canada would be following the implementation of this aspect of the decision attentively.

2.5. The DSB took note of the statements.

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

A. Statement by the European Union

3.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union and he invited the representative of the European Union to speak.

3.2. The representative of the European Union said that the European Union wished to refer to all its previous statements made under this Agenda item. The European Union understood that the United States was prepared to provide a number of clarifications at the present meeting.

3.3. The representative of the United States said that as Members were aware from prior DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. The Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. Accordingly, the United States had fully implemented the DSB's recommendations in these disputes. Since enactment of the Deficit Reduction Act, the United States had continued to track the distribution of those duties on goods that had entered before 1 October 2007. As of October 2008 – shortly after repeal – roughly \$1 billion in estimated duties had been collected that could be eligible for possible disbursements. By October 2015, that figure had declined to an estimated \$40 million in estimated duties. As of 2021, the number had further declined to approximately \$6.5 million relating to 176 anti-dumping and countervailing duty orders. This amounted to less than 1% of the estimated duties eligible for possible disbursement when the Continued Dumping and Subsidy Offset Act of 2000 was repealed. In the case of goods entered from the European Union, the remaining amount was a small fraction of this. As of October 2021, less than \$500,000 in estimated duties were eligible for possible disbursement on pre-October 2007 entries of EU goods. These figures

reflected the steady distribution of all funds related to those pre-October 2007 entries under the Continued Dumping and Subsidy Offset Act of 2000. In limited cases, certain issues had arisen that at times had resulted in the delay of disbursements. These included instances in which there was some delay in the US Department of Commerce's issuance of the final liquidation instructions for certain entries. US Customs and Border Protection awaited final liquidation instructions from the US Department of Commerce as a ministerial matter prior to the distribution of any duties that were being held. In other instances, delays may have occurred where the liquidation of entries and disbursement of funds had been suspended pending ongoing litigation, or if the US government was required to initiate litigation to collect delinquent anti-dumping or countervailing duties. The United States continued to work towards finalizing any outstanding liquidation instructions and completing the distribution of those duties on goods that had entered before 1 October 2007. The United States had engaged with the European Union on this matter in the spirit of cooperation, and without prejudice to their respective positions on the submission of status reports. The United States looked forward to continued bilateral engagement with the European Union on this and other matters.

3.4. The representative of the European Union said that the European Union wished to thank the United States for its statement. He said that as well as providing the DSB at the present meeting with greater transparency, that statement complemented useful clarifications that the European Union had received from the United States in recent months regarding progress on disbursements. The European Union remained of the view that, as long as distributions continued in connection with the Continued Dumping and Subsidy Offset Act of 2000, full compliance had not yet been achieved and the matter was not yet resolved within the meaning of Article 21.6 of the DSU. However, the European Union was now satisfied that this should eventually be achieved on the basis of the measures currently in place. While it might still take some time for such distributions to come to an end, the total outstanding amount of those distributions had already fallen significantly and continued to fall. The European Union understood that – barring an unforeseen change in circumstances – it was destined to reduce towards zero. Therefore, in the current circumstances and in the light of the clarifications that the United States had provided to the DSB at the present meeting, unless there were to be a material change in circumstances, the European Union did not consider it necessary to continue to request that this matter be placed on the Agenda of DSB regular meetings in the future. This was without prejudice to the EU's positions in this dispute, including on the issue of submission of status reports, or on WTO dispute settlement more broadly, or to the EU's rights in any WTO dispute.

3.5. The DSB took note of the statements.

4 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

4.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the United States, and he invited the representative of the United States to speak.

4.2. The representative of the United States said that as Members were aware, on 15 June 2021, the United States and the European Union had reached an "Understanding on a cooperative framework for Large Civil Aircraft." That Understanding sought to forge a more cooperative future by suspending the tariffs related to this dispute for five years, agreeing to clear principles that any financing for the production or development of large civil aircraft would be on market terms, and committing to collaborate on addressing the challenge posed by non-market economies in this sector. Those efforts would help their companies and workers compete fairly, and the United States welcomed the collaboration with its European partners. As Members were aware, the United States had placed this item on the agenda of recent DSB meetings in order to highlight an issue regarding the submission of status reports. As part of the significant effort to enhance cooperation between the United States and the European Union, the United States intended to discuss any concerns relating to EU support measures with the European Union bilaterally and accordingly did not intend to place this item on the Agenda of future DSB meetings. This decision was without prejudice to the US position regarding status reports. The US looked forward to continued cooperation with the European Union on this and other matters.

4.3. The representative of the European Union said that the European Union wished to refer to its previous statements made under this Agenda item and thanked the United States for its statement

at the present meeting. It was a reflection of the positive dynamic established between the two sides by the previous June's "Understanding on a cooperative framework for Large Civil Aircraft". As well as allowing each side to suspend the application of its countermeasures for five years, that Understanding offered, among other things, a useful channel for the discussion and resolution of any concern raised by either side relating to the matters covered.

4.4. The DSB took note of the statements.

5 AUSTRALIA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. Request for the establishment of a panel by the China (WT/DS603/2)

5.1. The Chairman drew attention to the communication from China contained in document WT/DS603/2 and he invited the representative of China to speak.

5.2. The representative of China said that, at the present meeting, China was requesting the DSB to establish a panel with standard terms of reference to examine the dispute referred to in document WT/DS603/2. On 24 June 2021, China had requested consultations with Australia relating to anti-dumping measures imposed by Australia on Chinese imports of wind towers, stainless steel sinks, and railway wheels, as well as the countervailing measures imposed on stainless steel sinks. China had engaged in consultation procedures with Australia on 11 August 2021 in good faith and with a view to reaching a mutually satisfactory solution. Unfortunately, those consultations had failed to resolve the dispute. Therefore, on 13 January 2022 China had submitted its request for the establishment of a panel to examine this matter. As indicated in its panel request, China's claims under the Anti-Dumping Agreement highlighted the obvious inconsistency of Australian measures at issue with the well-established rules that required the use of the cost records of the exporters subject to an investigation in the determination of dumping, and that cost of production of products should be the cost in their country of origin. However, Australia used, variously, costs or cost indices from countries such as Korea and France, and from broad regions such as North America and Europe. This practice had been ruled to be inconsistent with WTO rules by previous panels and the Appellate Body on numerous occasions. In addition, China's request also highlighted inconsistencies in the use of foreign cost data by the Australian investigating authority, such as the failure to use actual data or actual amounts of profits in the determinations of dumping, and its distinct failures to make due allowances so as to ensure a fair comparison between the export price and the normal value. China's claims under the SCM Agreement reflected its strong view that Australia had failed to make proper determinations with respect to several key elements in the determination of a "countervailable subsidy". Practices similar to those of Australia had been ruled to be inconsistent with the SCM Agreement in previous disputes. China also challenged the decision to initiate the countervailing investigation, which was not based on sufficient evidence or a proper review of the evidence provided in the domestic industry's application. China was a staunch supporter of the multilateral trading system. It was important to bear in mind that misuse of anti-dumping and countervailing measures was a serious problem for the trading system. Such WTO-inconsistent measures not only negatively affected the rights of other Members but also undermined the predictability and certainty that the multilateral trading system sought to provide to all Members. China requested that the DSB establish a panel to examine the matter, as set out in its panel request.

5.3. The representative of Australia said that Australia was disappointed that China had requested that a WTO panel be established to consider this matter at this time. The ability to take remedial action against dumped and subsidized imports that were causing or threatening material injury to a domestic industry formed part of the critical balance of Members' rights and obligations under WTO rules. Consistent with Australia's WTO obligations, Australia's trade remedies system was independent, transparent, non-discriminatory, and evidence-based. This dispute concerned Australia's anti-dumping measures on railway wheels, deep drawn stainless steel sinks, and wind towers imported from China, and Australia's countervailing measures on deep drawn stainless steel sinks from China. Those measures were imposed after investigations by Australia's Anti-Dumping Commission determined that the products were being dumped and, in the case of sinks, were being subsidized. As the dumping and subsidization caused material injury to Australian industry, Australia had imposed duties on the products to remove the injury. In initiating and conducting the investigations, and in imposing the duties, Australia had complied with its WTO obligations under the Anti-Dumping Agreement and the SCM Agreement. Australia had, in good faith, engaged in consultations with China to seek to resolve China's concerns. Australia remained ready to resolve

this matter through further discussions. Accordingly, Australia did not support China's request to establish a panel.

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

6 STATEMENTS BY BRAZIL, AUSTRALIA AND GUATEMALA REGARDING THE PANEL REPORTS IN THE DISPUTES: "INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE" (DS579, DS580 AND DS581)

6.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Brazil, Australia and Guatemala, and he invited the respective representatives to speak.

6.2. The representative of Brazil said that Brazil wished to thank the Panel and the WTO Secretariat for their work in these three disputes. The Panel Report had substantially upheld all of Brazil's claims. It had found that India's domestic support to sugarcane producers was inconsistent with Article 7.2(b) of the Agreement on Agriculture, as it exceeded the applicable *de minimis* levels. It also found that India's mandatory sugar export requirements under the MIEQ and the MAEQ schemes were subsidies contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture and, therefore, were inconsistent with the provisions regarding agricultural export subsidies in Articles 3.3 and 8 of that same agreement. Beyond that, India's measures had distorted international market prices of sugar, leading to losses to producers worldwide, including in Brazil. Brazil was thus disappointed by India's decision to appeal "into the void" in these disputes, as this did not contribute to achieving a timely, fair solution to those distortions and losses. It also reflected a practice that was contrary to the purpose and the spirit of the dispute settlement mechanism and the WTO as a whole. Brazil recalled that, according to Article 3.3 of the DSU, the prompt settlement of disputes was "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". As such, Brazil could not but express its concern that appeals "into the void" such as this could serve as a means to evade a panel's findings and recommendations, in order to perpetuate the harm caused by WTO-inconsistent measures, without any prospects of a timely, fair settlement. Brazil had always been engaged in seeking a negotiated solution with India that could address the negative economic impact of India's measures. That effort led to several requests, together with Australia and Guatemala, to delay the circulation of the Panel Report. However, due to the impossibility of reaching a common understanding among all parties involved, the report had been circulated on 14 December 2021. Brazil reiterated that it was actively committed to achieving a non-litigious resolution to this dispute, if possible, and would continue to explore, with flexibility and earnest engagement, viable solutions that addressed the concrete impact on Brazilian sugar producers. Finally, Brazil emphasized the essential role played by the dispute settlement mechanism in safeguarding the WTO's credibility and the rules-based trading system as a whole. The present paralysis, especially if not addressed with a sense of urgency, could have severe consequences that would go well beyond the specific cases presently under consideration.

6.3. The representative of Australia said that Australia wished to thank the panelists for their rigorous and comprehensive examination of the evidence and arguments submitted by the parties in this dispute. Australia thanked the co-complainants, Brazil and Guatemala, for their cooperation throughout the proceedings, and the third parties for their engagement. Australia also thanked the WTO Secretariat for their hard work and dedication in the matter. Australia recognized that the COVID-19 pandemic imposed additional challenges on the Panel, the Secretariat, and the parties. Despite the delay, Australia noted with appreciation the Panel's efforts to advance the proceedings efficiently and in a manner consistent with the DSU, while not prejudicing the rights of the parties or third parties. Australia welcomed the Panel Report in DS580.

6.4. Australia noted the Panel's clear and comprehensive findings that: India's domestic support to sugarcane producers, during sugar seasons 2014-15 to 2018-19, constituted non-exempt product-specific domestic support in excess of India's permitted levels under the Agreement on Agriculture; certain subsidies pertaining to sugar or sugarcane were contingent on export performance and therefore inconsistent with India's schedule of commitments within the Agreement on Agriculture; and certain subsidies pertaining to sugar or sugarcane were contingent upon export performance and inconsistent with India's obligations under the Subsidies and Countervailing Measures Agreement. Australia also noted the Panel's recommendations that India bring its measures into conformity with its WTO obligations. This dispute considered important issues not previously considered within the dispute settlement system. In particular, Australia observed the

significance of the Panel's findings with respect to the meaning of "market price support" in the Agreement on Agriculture, and the obligation on Members to notify all domestic support measures and export subsidies.

6.5. Australia recognized that India was entitled to appeal errors of law in the Panel's findings and recommendations. However, Australia disagreed with India's assertion that the Panel had made errors of law. Australia would strongly defend the Panel's findings when the Appellate Body was able to consider this appeal. In the meantime, the absence of an appellate function would delay the binding resolution of this dispute and continue India's non-compliance with its WTO obligations. There were now 24 panel decisions awaiting final determination. Without the reforms required for a fully functional dispute settlement system, this number would only continue to grow. This had a tangible cost to the Membership, including to the right of all Members to a final and binding resolution to a dispute. Once again, Australia encouraged Members to move forward with renewed resolve to find the solutions required to deliver a fully functioning dispute settlement system.

6.6. The representative of Guatemala said that Guatemala wished to join Australia and Brazil in thanking the Panel and the WTO Secretariat for their assistance in these disputes. Guatemala also thanked the DSB for the opportunity to express and register its views with respect to the dispute DS581, and also expressed its appreciation to Australia and Brazil for their cooperation throughout the proceedings. Guatemala regretted that India had decided to appeal the Panel Report into the void, which meant that the appeal proceedings would be suspended for an undetermined period of time. At the outset, Guatemala noted the Panel's rigorous interpretation of the WTO Agreements and the sound legal reasoning included in its report. Contrary to what India alleged in its notice of appeal, the Panel did not commit any legal error in its decision. India's appeal was without merit. This dispute was a textbook example of violations of domestic support and export subsidies commitments under the Agreement on Agriculture and the SCM Agreement. Nothing less, nothing more. As a matter of fact, India did not dispute the existence of the measures at issue or their operation. Furthermore, India's obligations under those agreements were clear: India may not provide domestic support measures beyond the permitted *de minimis* level of 10% and India may not grant export subsidies because it had not reserved this right in its Schedule of Concessions. Guatemala's legal claims in this dispute concerned these two main aspects: (i) India's domestic support for sugarcane producers, which was provided in amounts greatly exceeding India's permitted *de minimis* level of 10%; and (ii) India's export subsidies for sugar, which India maintained even though it had no export subsidy entitlements inscribed in its Schedule of Concessions. At the heart of India's regime was the market price support provided by the Indian Government to sugarcane producers through the federal-level Fair and Remunerative Price ("FRP") and, in the case of certain Indian States, the State Advised Price ("SAP"). Both the FRP and SAP were government-mandated administered prices for sugarcane purchases. Additionally, India provided export subsidies by subsidizing sugar mills that complied with export quotas.

6.7. With respect to its domestic support measures, India did not dispute that it legally mandated sugar mills to purchase sugarcane at the administered prices. Instead, India's defence focused on disputing the legal characterization of the FRP and the SAP as "market price support". India's main argument was that market price support could only exist if the support consisted of budgetary outlays or revenue foregone, but not when the government set an applied administered price to be paid by private entities. India's arguments required reading the clause "shall include" in paragraph 2 of Annex 3 of the Agreement on Agriculture as "shall include only", thereby incorporating words into the treaty text that simply were not there. This approach, needless to say, was not permissible under either Article 3.2 of the DSU or Article 31 of the Vienna Convention on the Law of Treaties. Furthermore, India's interpretation would run contrary to the organic structure of the Agreement on Agriculture. For example, Article 6.1 and paragraphs 1 and 8 of Annex 3 of the Agreement on Agriculture confirmed that domestic support measures were not limited to budgetary outlays and revenue foregone. Moreover, nothing in paragraph 1 of Annex 3 – which set out the three different types of domestic support – limited domestic support measures to budgetary outlays and revenue foregone. In Guatemala's view, India's proposed interpretation of market price support sought to diminish the rights and obligations under the domestic support disciplines of the Agreement on Agriculture and, by so doing, make many provisions of that agreement redundant or inutile. The Panel had rejected India's interpretation. After a rigorous and sound legal interpretation of the Agreement on Agriculture, the Panel correctly found that India's domestic support measures to sugarcane producers constituted market price support and were inconsistent with Article 7.2(b) of the Agreement on Agriculture. On appeal, India faulted the Panel for not agreeing with its interpretation and raised the same arguments that were rejected by the Panel. Since India's

proposed interpretation required adding words to the treaty text that simply were not there, ignoring the organic structure of the Agreement on Agriculture, and diminishing the rights and obligations under the domestic support disciplines, India clearly erred, and its appeal was thus without merit.

6.8. He said that concerning Guatemala's claims on export subsidies, India had also challenged the legal characterization of the measures and proposed legal interpretations of the Agreement on Agriculture and the SCM Agreement that were not supported by their plain text. After a careful and complete assessment of the parties' arguments, the Panel had rejected all of India's arguments and correctly found that India's export subsidies pertaining to sugar or sugarcane were inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture and with Articles 3.1(a) and 3.2 of the SCM Agreement. Moreover, pursuant to Article 4.7 of the SCM Agreement, the Panel recommended that India withdraw its export subsidies within 120 days from the adoption of the Report. In its notice of appeal, India sought review of two alleged errors in respect of export subsidies. As in its appeal on domestic support, India framed as "legal error" and "lack of objectivity" the Panel's rejection of India's arguments that were not supported by the plain text of the SCM Agreement.

6.9. The first alleged "error" concerned the Panel's interpretation of Article 27.3(b) of the SCM Agreement that underlay the Panel's conclusion that Article 3.1(a) of the SCM Agreement applied to India. Before the Panel, India advanced the argument that the disciplines of Article 3 of the SCM Agreement did not apply to India because after its graduation from Annex VII of that Agreement, in 2017, India started to enjoy an additional transition period of eight years which allegedly would end in 2025. India's argument rested on the proposition that, after graduating from Annex VII, India was entitled to the eight-year transition period stated in Article 27.2(b) of the SCM Agreement. The problem with India's proposition was that the eight-year period under Article 27.2(b) expired in 2003 because, according to the plain text of that provision, the eight years started counting as "from the date of entry into force of the WTO Agreement" (i.e. 1995). Tellingly, India had acknowledged before the Panel that its interpretation was not based on the "ordinary meaning" of Article 27.2(b), but rather on the context and negotiating history of this provision. Having found that Article 27.2(b) of the SCM Agreement provided a "clear meaning", the Panel had found it unnecessary to examine India's arguments regarding supplementary means of interpretation, such as the negotiating history of Article 27 of the SCM Agreement. Clearly, the Panel did not err in interpreting the SCM Agreement in accordance with the rules of interpretation enshrined in the DSU and the Vienna Convention. Again, India's appeal was without merit.

6.10. He said that the second alleged error with respect to export subsidies concerned the Panel's decision to recommend that India withdraw its export subsidies within 120 days pursuant to Article 4.7 of the SCM Agreement. During the Panel proceedings, India had asked the Panel not to apply Article 4.7 of the SCM Agreement in this dispute, arguing that there was an alleged conflict between Article 21.3 of the DSU (to which Article 19 of the Agreement on Agriculture refers) and Article 4.7 of the SCM Agreement. India considered that this alleged conflict needed to be resolved "by means of Article 21.1 of the Agreement on Agriculture". However, India had failed to articulate the existence of a conflict between these provisions and the Panel had correctly found that the "relationship between Article 19 of the Agreement on Agriculture and Article 4.7 of the SCM Agreement does not amount to a conflict". The Panel had further explained that Article 19 of the Agreement on Agriculture "does not provide any carve out from the provisions of Article 4.7 of the SCM Agreement". In fact, as the Panel had explained, "by complying with the Panel's recommendation under Article 4.7 of the SCM Agreement, India would simultaneously bring its measures into compliance with the Agreement on Agriculture". On appeal, India failed again to identify any conflict between these provisions and resubmitted the same arguments that had been rejected by the Panel. As there was simply no conflict among the provisions of the SCM Agreement, the Agreement on Agriculture, and the DSU, once again, India's appeal was without merit.

6.11. Finally, Guatemala wished to make its last comments on the systemic consequences of this dispute and the lack of a fully functional dispute settlement mechanism. First, Members were witnessing at the present meeting yet another example of a dispute that would remain unresolved for an undetermined period of time, with dire consequences for sugarcane and sugar producers and exporters all over the world. This was so, because India's sugarcane and sugar regimes would continue to exert pressure on international prices, affecting big and small sugarcane and sugar producers alike. Second, by not reaching a solution to these disputes, all Members lost, including India. India's sugarcane and sugar regime functioned as a vicious circle, in which one trade-distorting policy engendered problems that had to be addressed through additional trade-distorting policies. India's regime was financially unsustainable in the long run for the Indian Government, as well as

for other sugar producing and exporting countries. The fact that these disputes were brought by Australia, Brazil and Guatemala did not mean that the measures at issue only affected the complaining parties. On the contrary, they affected all sugar producing and exporting countries. Third, it was simply not true that Members would be more inclined to cooperate towards negotiating mutually agreed solutions while the Appellate Body was not operational. With very limited exceptions, evidence showed that cooperation between disputing parties was rather the exception. The lack of binding decisions provided a different kind of incentives, particularly, to the responding parties. One only needed to look at the great majority of disputes that were appealed into the void. They appeared to remain unresolved. And this case was unfortunately not different. For the record, the complaining Parties had made every effort to agree with India on having either an *ad hoc* mechanism to review the alleged legal errors in the panel report or a mutually agreed solution to the dispute. Regrettably, India rejected the complainant's proposal for an *ad hoc* mechanism and never provided feedback to the complainants' written proposal for a negotiated solution. Finally, it was important to note that Guatemala, as a small developing country, fully depended on a well-functioning multilateral rules-based system to resolve its disputes with other WTO Members. Given its weight in the multilateral trading system, there were no other alternatives for Guatemala. Therefore, Guatemala would spare no effort in working with WTO Members with a view to finding a solution to the current situation of the dispute settlement mechanism. In the meantime, Guatemala remained open to have bilateral conversations with India with respect to this dispute, whenever India was ready to engage in those conversations in good faith.

6.12. The representative of India said that India wished to join Brazil, Australia and Guatemala in thanking the Panel and the Secretariat for their efforts with regard to the joint Panel Report in three disputes. India wished to express its views on the Panel Reports and also respond to certain issues raised by the complainants. At the outset, India reiterated that it was in full compliance with its obligations under the WTO Agreement on Agriculture and the SCM Agreement with respect to the issues raised by the complainants in these disputes. India believed that the Panel had not only committed serious errors of law, but had also failed to discharge its functions, as required under the DSU. These disputes were of great importance given that the challenged measures were designed to address the livelihood concerns of millions of low-income and resource-poor farmers and India did not accept the gross legal errors made by the Panel regarding such measures. Therefore, India, on 24 December 2021, well within its rights under the DSU, appealed certain erroneous legal interpretations developed by the Panel. In its appeal, India clarified that its choice not to appeal against any particular conclusion regarding a question of law in the Panel Reports could not be characterised as India's agreement on these issues.

6.13. India wished to highlight some of its concerns with the Panel Reports and the manner in which the Panel had approached some of the legal issues that were central to the dispute. First, India fundamentally disagreed with the Panel's interpretation of what constituted "market price support" under the Agreement on Agriculture. More importantly, India took serious issue with the manner in which the Panel had arrived at its erroneous conclusions. Contrary to its mandate, the Panel had adopted an evasive approach and had failed to address the legal issues raised by India in its submissions. For example, the Panel did not consider it appropriate to determine whether market price support was a "subsidy", a question that was central to the dispute. This was because, if market price support was indeed a subsidy (which it was), some of the challenged measures – i.e. the Fair and Remunerative Price ("FRP") and State Advised Price ("SAP") – did not qualify as market price support measures. This was one of the central questions that the disputes had raised, which the Panel chose to ignore. Accordingly, the Panel's findings that India provided domestic support over and above the limit prescribed under the Agreement on Agriculture was based on an interpretation that was grossly erroneous.

6.14. Second, the Panel had also erred in its interpretation of Article 27.2(b) of the SCM Agreement as its interpretation: (i) rendered express words of Annex VII(b) of the SCM Agreement ineffective and ran contrary to the object and purpose of the SCM Agreement; and (ii) denied the rights granted to developing country members by Annex VII(b) of the SCM Agreement. Similarly, the Panel had also committed grave errors in its understanding of what constituted a prohibited export subsidy. Specifically, the Panel's interpretation of paragraph (i) of Annex I to the SCM Agreement turned the concept of "export subsidies" on its head. Going by the Panel's reading of the relevant provisions, almost every tax remission scheme that was attached to imported inputs on a post-export basis would qualify as an export subsidy, regardless of whether or not there was an excess remission of taxes.

6.15. Finally, India said that the Panel had also acted outside its jurisdiction. For example, the Panel had issued findings and recommendations with respect to India's "Scheme for providing assistance to sugar mills for expenses on marketing costs including handling, upgrading and other processing costs and costs of international and internal transport and freight charges on the export of sugar" for the 2019–20 sugar season ("MAEQ Scheme") even though this measure came into existence after the establishment of the Panel. The Panel had also erred in holding that the MAEQ Scheme had the same essence as that of some of the other measures identified by the complainants in their requests for the establishment of a panel. In addition to the above, the Panel, in several instances, had failed to consider India's arguments let alone conduct any analysis thereof. In a few other instances, the Panel had simply chosen to announce its conclusions without engaging with the text of the agreement or offering any cogent reasons. Therefore, the Panel had failed to fulfil some of its key obligations under the DSU.

6.16. India said that Brazil and Guatemala had also raised a few other procedural issues. While this was not the forum to discuss those issues, since the complainants had raised these issues, India wished to respond. Guatemala had raised certain procedural issues such as non-filing of paper copies of India's Appellant's Submission and Notice of Appeal. On the basis of communications received from several panels, India understood that the filing of paper/hard copies had been suspended in view of the health risks posed by the COVID-19 pandemic situation in Geneva. Given the health risks posed by the rising cases of the Omicron variant, India had clarified that it would file paper copies of the appeal once it became feasible to do so (i.e. when the Appellate Body Registry or any other organ or desk within the WTO responsible for receiving the Notice of Appeal and the Appellant's Submission commenced accepting paper copies). That said, Guatemala's grievance with non-filing of paper copies was completely at odds with its repeated assertions to hold substantive meetings virtually during the Panel process, with no physical copies exchanged between the parties. India did not recall Guatemala raising any objections or articulating any concerns at the Panel stage regarding the parties not exchanging physical copies of their submissions. While India had validly filed an appeal in accordance with the Working Procedures, India noted that all three complainants had failed to submit their respective appellees' submissions in terms of Rule 22 read with Rule 31(2) and Annex I of the Working Procedures. To conclude, India could not accept the findings in the Panel Report for the grave errors committed by the Panel and expected that those errors would be set right by the Appellate Body in due course. India had always been ready to explore ways to find a mutually satisfactory solution to the issues raised by the complainants and again reiterated that should the complainants so wish, India remained available to engage meaningfully with the complainants and arrive at a mutually satisfactory solution.

6.17. The representative of Canada said that Canada thanked Brazil, Australia, and Guatemala for their statements. Canada also thanked the members of the Panels and the WTO Secretariat for their hard work. As a third party, Canada had read with great interest the findings and conclusions of the Panel. The preamble to the Agreement on Agriculture provided that Members' long-term objective was "to establish a fair and market-oriented agricultural trading system". Members considered that the disciplines related to domestic support and export subsidies in the Agreement were integral to achieving that objective. The Agreement included methodologies for accounting for non-exempt product specific support and required each Member to ensure that those amounts were consistent with their annual domestic support commitment. As noted by the Panel, paragraph 8 of Annex 3 of the Agreement provided a clear methodology on how a government-mandated minimum price for an agricultural product was to be calculated and then counted against the Member's annual domestic support commitment. Canada also noted that Members had to account for domestic support provided at national and sub-national levels in favour of agricultural producers. These amounts were to be included in the annual calculation of domestic support to producers of agricultural products, in this case sugarcane.

6.18. Regarding export subsidies, in 2015, at the Tenth WTO Ministerial Conference, Ministers agreed to the historic elimination of export subsidies. In this respect, Canada considered it important that measures that circumvented that historic outcome be effectively addressed and curtailed. In the review process in the Committee on Agriculture, Members had discussed the use of export subsidies that had been claimed under Article 9.4 of the Agreement. Canada appreciated the clarity provided by the Panel on the scope of the measures that fell under Article 9.4. Canada noted the importance of timely and complete notifications to the Committee on Agriculture. Those notifications improved transparency and were the vehicle through which the Committee on Agriculture monitored the implementation of Members' commitments under the Agreement. In this respect, Canada agreed with the Panel's conclusion that the obligation in the Agreement to notify all domestic support in

favour of agricultural producers was mandatory. There was room for improvement to transparency, and this and other topics were being actively discussed in the Committee on Agriculture in Special Session.

6.19. With regard to systemic considerations pertaining to India's appeal of these Panel Reports, Canada noted that since 11 December 2019, the Appellate Body had effectively been non-functioning. Article 3.10 of the DSU provided that, when a dispute arose, Members would engage in dispute settlement procedures in good faith and in an effort to resolve the dispute. The inability of the Appellate Body to carry out its appellate review responsibilities undermined the established process under the DSU for dispute settlement, but the obligation in Article 3.10 to make good faith efforts to resolve the dispute still stood. No Member should seek to take unfair advantage of the present impasse. In the context of specific disputes, options existed to break the present deadlock at the Appellate Body. In particular, parties to the dispute might agree to use procedures such as those set out in Annex 1 of the MPIA (JOB/DSB/1/Add.12) to supplement the appeal process. Canada believed that it was essential that all parties to the dispute fulfilled their good faith commitment under Article 3.10 of the DSU by making every effort to find an acceptable solution. If they failed to find such a solution, they might resort to self-help measures, which in turn would erode confidence in the rules-based system for governing international trade. No Member would benefit from that situation in the long run. A Member acting in good faith should find no comfort in an unfair – and short-term – advantage that had arisen because of the absence of a functioning Appellate Body. In addition, Canada reiterated its invitation to India to consider joining the MPIA in order to safeguard binding dispute settlement with access to appellate review in disputes with other participants.

6.20. The representative of the European Union said that this was yet another dispute that illustrated the grave consequences of the blockage of Appellate Body appointments since 2017. That blockage frustrated the essential rights of Members that had been agreed multilaterally in the DSU. In that regard, the European Union wished to refer to its previous statements on this matter, and in particular to its statements made under item 6 of the Agenda of the 28 September 2020 DSB meeting and under item 7 of the 27 September 2021 DSB meeting, where it had elaborated on those consequences and on the possibility of appeals being adjudicated upon an appeal arbitration pursuant to Article 25 of the DSU, consistently with the DSU principles. The European Union did not wish to repeat those points at the present meeting.

6.21. The representative of the Russian Federation said that the Russian Federation wished to refer to its previous statements regarding the practice of appealing into the "void". The Russian Federation reiterated its disappointment with the fact that WTO Members continued to file appeals, notwithstanding the Appellate Body's critical state, and therefore disputes remained unresolved. The Russian Federation wished to underline that, unfortunately, such actions threatened the continued effectiveness of the dispute settlement mechanism and inevitably undermined confidence in the WTO.

6.22. The representative of India said that it was not India's intention to take the floor for the second time, but after listening to the statements made, India had to clarify certain issues. He said that while India had thanked the Panel and Secretariat for their work, when India had used the phrase "gross legal errors", it actually reflected on the professional quality of the Panel. Those errors were made, in India's view due to something that happened before the composition of the Panel. The record would show what India was referring to. One of the complainants had promoted a candidate for an MPIA arbitrator post, and had ended up getting the same person on this Panel. In that context, never had a prior panel in WTO history bypassed the legal issues raised by a Member like this Panel had done. This Panel had remained silent, and had decided to pass judgment, without giving a speaking order, which was why India had used the phrase "gross legal error". India wished to alert Members that that the Panel's interpretation of domestic support had turned upside down what one "hears and reads" in the WTO. It might soothe or help them, but very soon it would come to hit them. To give one example, by the Panel's definition of domestic support, or subsidy, the entire concept of a statutory minimum wages, which the complainants employed in the agricultural, industrial, or services sectors, which was there to protect labourers from forced labour and provide social security, would come under the definition of domestic support, because minimum wages were prescribed by the government, forced on the private sector and paid by the private sector. Thus, if the Panel Report was not annulled by an Appellate Body, this would remain in the definition of domestic support. Finally, with respect to good faith discussions and joining the MPIA, this would be difficult to address if one worked with a lawyer's mindset. Unfortunately, it was in their interest to

prolong the process and get more income. Also, if one insisted on a final outcome before starting the negotiation process, the negotiation was bound to fail. When India engaged in good faith discussions before 14 December 2021, India's only request was not to place the final outcome as a pre-condition for negotiations – then there would be no meaningful negotiations. India's response, which had been given to the complainants, was still on the table and India was waiting for their response so that the parties were not bogged down by the lack of an appellate process.

6.23. The DSB took note of the statements.

7 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; BANGLADESH; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMBODIA; 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.20)

7.1. The Chairman said that this item was on the Agenda at the request of Mexico, on behalf of a number of delegations. He then drew attention to the proposal contained in document WT/DSB/W/609/Rev.20 and invited the representative of Mexico to speak.

7.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.20, said that the delegations in question had agreed to submit the joint proposal, dated 18 November 2021, to launch the selection processes for the vacancies of the Appellate Body members. On behalf of those 122 Members, Mexico wished to state the following. The extensive number of Members submitting the joint proposal reflected a common concern with the current situation in the Appellate Body that was seriously affecting the overall dispute settlement system, against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system, and the multilateral trading system. Thus, it was their duty to proceed, without further delay, with the launching of the selection processes for the Appellate Body members, as submitted to the DSB at the present meeting. The proposal sought to: (i) start seven selection processes (one process to replace Mr Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; a second process to fill the vacancy resulting from the resignation of Mr Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr Peter Van den Bossche, whose second term had expired on 11 December 2017; a fourth process to replace Mr Shree Baboo Chekitan Servansing, whose four-year term of office had expired on 30 September 2018; a fifth process to replace Mr Ujal Singh Bhatia, whose second term had expired on 10 December 2019; a sixth process to replace Mr Thomas Graham whose second term had expired on 10 December 2019; and a seventh selection process to replace Ms Hong Zhao, whose first four-year term of office had expired on 30 November 2020; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for 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 in the determination of the deadlines for the selection processes, but Members should consider the urgency of the situation. The proponents continued to urge all Members to support the AB proposal in the interest of the dispute settlement and multilateral trading systems.

7.3. The representative of the European Union said that the European Union wished to refer to its previous statements made on this matter. He said that since 11 December 2019, the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. A fully functioning WTO dispute settlement system was crucial for a rules-based multilateral trading system. This was why the most urgent area of WTO reform involved finding an agreed basis to restore such a system and proceeding to the appointment of the members of the Appellate Body.

This task should be addressed as a priority. As the European Union had consistently noted, WTO Members had a shared responsibility to resolve this issue as soon as possible, and to fill the outstanding vacancies, as required by Article 17.2 of the DSU. The European Union believed that a meaningful reform was needed in order to achieve that objective. The European Union, therefore, renewed its call on all WTO Members to engage in a constructive discussion as soon as possible in order to restore a fully functioning WTO dispute settlement system. The European Union thanked all Members that co-sponsored the proposal to launch the AB appointment processes.

7.4. The representative of Canada said that for more than two years the Appellate Body had no longer had a division to hear new appeals. Canada supported Mexico's statement and shared the concerns expressed by other Members at the present meeting. Canada invited those WTO Members who had not yet sponsored the proposal to consider joining the 122 Members requesting the launch of the AB selection processes. The critical mass of WTO Members supporting that proposal clearly reflected the importance that Members attached to a fully operational Appellate Body as an integral part of the dispute settlement system. The fact that the Appellate Body could not hear new appeals was of great concern. Canada reiterated its interest in contributing to discussions focused on finding solutions to the functioning of the Appellate Body. Canada's priority remained to find a multilateral and sustainable solution for all Members, including the United States. Meanwhile, Canada and 24 other WTO Members had approved the Multi-Party Interim Appeal Arbitration Arrangement, or MPIA, as an emergency measure. The purpose of this measure was to safeguard their rights to binding settlement of disputes, including the possibility to appeal in disputes among themselves. The MPIA was open to all WTO Members. Canada invited all WTO Members to consider joining the MPIA in order to safeguard their dispute settlement rights to the maximum extent possible until Members collectively found a permanent solution to the impasse in the Appellate Body. Canada stood ready to discuss the MPIA with any interested Member.

7.5. The representative of the United States said that the United States was not in a position to support the proposed decision. The United States continued to have systemic concerns with the Appellate Body. As Members knew, the United States had raised and explained its systemic concerns for more than 16 years and across multiple US Administrations. The United States believed that Members had to undertake fundamental reform if the system was to remain viable and credible. The dispute settlement system could and should support rather than undermine the WTO's negotiating and monitoring functions. The United States looked forward to further discussions with Members on these important issues.

7.6. The representative of Brazil said that Brazil thanked Mexico for presenting the proposal on behalf of 122 co-sponsors and wished to refer to its previous statements made under this Agenda item. This problem had been with Members for too long. Concrete prejudice to specific interests of Members and to the WTO as a whole was increasing. Towards the end of 2021, Brazil's perception was that there was positive momentum on this matter. In Brazil's view, Members should seize on that momentum and engage in objective, frank discussions with the aim of identifying possible concrete solutions to the current impasse. On its part, Brazil was ready to engage with Members on this matter.

7.7. The representative of China said that China supported the statement made by Mexico on behalf of 122 co-sponsors and called upon more Members to join the AB proposal. China wished to refer to its previous statements on this urgent matter and reiterated its firm commitment to an independent and impartial two-tier dispute settlement system. China stood ready to work with all Members in that regard.

7.8. The representative of the United Kingdom said that the United Kingdom continued to support the launch of the process for appointments to the Appellate Body, and referred to its previous statements made on this matter. This DSB meeting again demonstrated the clear nullification of the rights of Members and their ability to achieve prompt settlement of disputes that resulted from the failure to appoint members to the Appellate Body, to the detriment of the multilateral trading system as a whole. Members had to maintain momentum and proceed with discussions to ensure the full functioning of the dispute settlement system. This benefited all Members, ensuring that the rules Members had negotiated were enforceable. It served as a backstop against WTO-inconsistent trade practices and helped to create a more predictable and stable trading environment.

7.9. The representative of Norway said that Norway fully supported the joint proposal presented by Mexico, and co-sponsored by 122 Members, to launch the process for appointments to the Appellate Body. Norway wished to refer to its previous statements made on this matter. Norway stood ready

to engage in urgently needed discussions to address the current impasse. However, no discussion should prevent the Appellate Body from continuing to operate fully and Members should comply with their obligation under the DSU to fill the vacancies and thereby restore a fully functioning dispute settlement system. As demonstrated by the statements made under the previous Agenda item, the paralysis of the dispute settlement mechanism should not be allowed to continue. Norway was encouraged by the strong conviction expressed by Ministers participating in the informal Ministerial Meeting on 21 January 2022 to address the situation of the dispute settlement mechanism as a priority and without further delay.

7.10. The representative of New Zealand said that New Zealand reiterated its support for the co-sponsored proposal and referred to its previous statements. New Zealand continued to urge all Members to constructively engage on the issues with a view to addressing this situation as a priority, in order to restore a fully functioning dispute settlement system. New Zealand joined others in welcoming the progress made at the end of 2021 towards setting clear parameters and time-frames for advancing this important work. New Zealand was ready to continue this momentum and get to work.

7.11. The representative of Nigeria, speaking on behalf of the African Group, said that the African Group wished to refer to its previous statements and commended Mexico for its statement on this urgent matter. The fact that the Appellate Body could not hear new appeals remained a concern. Members had a shared responsibility to safeguard the multilateral trading system. Therefore, the Group urged the DSB to urgently fulfil its obligation under the DSU which was to fill vacancies as they arose, so as to maintain the two-tiered dispute settlement system. This would ensure predictability within the multilateral trading system. Finally, the African Group encouraged all Members to engage constructively with each other in addressing the specific concerns raised against the functioning of the Appellate Body with a view to finding a solution, and urged all Members who were yet to co-sponsor the proposal to do so as soon as possible.

7.12. The representative of the Philippines said that the Philippines thanked Mexico and other delegations for pursuing this long-standing proposal and noted document WT/DSB/W/609/Rev.20, which had been circulated on 18 November 2021. The recent co-sponsorship by Cambodia of the proposal had brought the number to 122 Members who supported the proposal to reactivate the Appellate Body appointment processes. The Philippines had always been supportive of Members' appeals relating to the revival of a fully functioning, two-tier dispute settlement system at the WTO and noted that a key component of the postponed MC12 Agenda was this very issue of the dispute settlement system, as part of the overall WTO reform process which Ministers, at various meetings, had repeatedly urged. The Philippines, therefore, wished to express, at the present meeting, its support for the joint proposal and said that the Philippines would communicate its support to the Mexican delegation on the importance of recommencing the appointment processes for the Appellate Body consistently and in line with the proposed WTO reform work programme. The Philippines remained ready to instructively engage in all fora and discussions that could achieve WTO reforms and the revival of a well-functioning dispute settlement system.

7.13. The representative of Indonesia said that Indonesia wished to refer to its previous statements made at previous DSB meetings with regard to this Agenda item. Indonesia again urged all Members to give their serious attention, willingness, and commitment to the immediate appointment of the Appellate Body members.

7.14. The representative of Australia said that the first DSB meeting in 2022 was an opportunity to set Members' shared direction and commitment for the year ahead. As Members sought to reconvene MC12, they had to begin discussing the reforms required for the dispute settlement system to meet the needs of the Membership as a whole. For Australia, there was no more important reform priority. Australia welcomed recent signals that this was the time to translate conversations into a concrete process for agreeing solutions. The present paralysis could not continue. As the number of disputes appealed into the void grew, so did the tangible cost to the Membership, including to the fundamental right of all Members to a final and binding resolution to a dispute. The credibility and effectiveness of the multilateral trading system relied on Members resolving that impasse. Australia asked all Members to join it in working actively and constructively to achieve that shared objective.

7.15. The representative of Korea said that Korea thanked Mexico for its statement, reiterated its support for the joint AB proposal, and referred to its previous statements made on this matter. The WTO dispute settlement system had been a central element in providing security and predictability to the multilateral trading system and Korea, as a firm supporter of the system, was ready to engage

constructively in relevant discussions to find a solution to enhance the functioning of the dispute settlement system, with a view to accommodating the needs of WTO Members. Korea also stood ready to work with other Members building on what they had achieved in preparation for the outcome document for MC12 on this issue.

7.16. The representative of Japan said that Japan wished to refer to its statements made at previous DSB meetings and supported the joint proposal. Japan shared a sense of urgency for reform of the dispute settlement system. Achieving an expeditious reform that would contribute to a long-lasting solution to the structural and functional problems of the dispute settlement system was the utmost priority for Japan. For such a reform, every WTO Member, as the owner of the system, had to take seriously the current situation where the Appellate Body had virtually ceased its operation a long time ago, while a number of cases had been appealed into the void. Furthermore, Japan considered it essential that every WTO Member restarted constructive discussions on reform of the dispute settlement system, including on how to address the concerns surrounding the Appellate Body. Japan spared no efforts to collaborate with all WTO Members to that end.

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

7.18. The representative of the Russian Federation said that the Russian Federation wished to refer to its previous statements made on this matter and thanked Mexico as well as the co-sponsors for their continuous and faithful commitment to the appointment processes of the Appellate Body members. Russia reiterated its strong support for launching the appointment processes immediately. At the same time, the Russian Federation called upon all Members to engage in urgent constructive discussions towards a fully functioning dispute settlement system as soon as possible.

7.19. The representative of Hong Kong, China said that Hong Kong, China wished to join the previous speakers who had expressed, yet again, their grave concerns over the Appellate Body impasse, as refer to by some Members under the previous Agenda item. Hong Kong, China stressed the importance of having constructive discussions to resolve the impasse as soon as possible. Hong Kong, China stood ready to participate in any such constructive discussions.

7.20. The representative of Singapore said that Singapore thanked Mexico for its statement which, Singapore strongly supported. The mounting number of appeals into the void highlighted the urgency of this Agenda item. Singapore reiterated its previous statements on this matter and urged all Members, including the United States, to commence constructive discussions urgently with a view to restoring a fully functioning dispute settlement system.

7.21. The representative of Switzerland said that Switzerland wished to refer to its statements made on this matter at previous DSB meetings. A fully functional dispute settlement system was in everyone's interest. As this new year began, it was essential that constructive discussions could take place quickly, in order to find concrete solutions to resolve the impasse that Members had been facing for too long. Switzerland remained ready to work towards that objective and called on all Members to do the same.

7.22. The representative of Thailand said that Thailand wished to join many previous speakers in thanking for and supporting the statement made by Mexico, on behalf of the co-sponsors. Thailand wished to refer to its previous statements made on this matter. Once again, the continued filing of appeals by Members clearly demonstrated the importance of a two-tier, binding dispute settlement system as an integral part of the core elements of the WTO. Thailand, therefore, renewed its call on all Members to continue and intensify their efforts in finding ways forward while remaining fully committed to solutions-oriented discussions.

7.23. The representative of Malaysia said that Malaysia thanked Mexico and reiterated its support for the joint AB proposal. Malaysia also referred to its statements made on this matter at previous DSB meetings. Malaysia expressed its strong support for restoring a fully functioning dispute settlement system, which was a central element in providing security and productivity to the multilateral trading system.

7.24. The representative of Mexico, speaking on behalf of the 122 co-sponsors, regretted that for the fiftieth occasion Members had still not been able to start the selection processes for the vacancies of the Appellate Body, and had thus continuously failed to fulfil their duty as Members of this Organization. The fact that a Member may have concerns about certain aspects of the functioning of the Appellate Body could not serve as a pretext to impair and disrupt the work of this body and dispute settlement in general. There was no legal justification for the current blocking of the selection processes, which was causing concrete nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated, "vacancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members shall comply with their obligation under the DSU to fill the vacancies. Mexico noted with deep concern that by failing 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.

7.25. The representative of Mexico said that, for more than two years, Members had been requesting that the AB proposal be adopted by the DSB so as to preserve their right of appeal, as set out in the DSU. Mexico wished to refer to its previous statements made on this matter and continued to express deep concern and a sense of urgency regarding the fact that the Appellate Body was not operational. As Members had seen at the present meeting and at previous DSB meetings, all ongoing disputes were being affected because the dispute settlement system was not fully operational. This was putting at risk prompt compliance with, and the adoption of, panel reports. This was also affecting Members' right to have a binding mechanism. Currently, more than ever, with 24 cases appealed into a void, it was important and a priority to work towards a real, multilateral solution. Mexico remained ready to work constructively and called on Members who had not done so to join the AB proposal.

7.26. The Chairman said that the matter raised under this Agenda item was very important and fundamental to the functioning of the multilateral trading system, as demonstrated by the discussion at the present meeting. He recalled that this matter had been considered in the context of the preparations for MC12, which was scheduled for December 2021 and then postponed due to the pandemic. In particular, this matter had been raised in the context of the discussions on the outcome document led by the GC Chair. As Members were aware, the GC Chair would make a report on the way forward on the outcome document at the informal General Council meeting, which would take place later in the afternoon.

7.27. The DSB took note of the statements.

8 STATEMENT BY TUNISIA REGARDING THE PANEL REPORT IN THE DISPUTE: "MOROCCO – DEFINITIVE ANTI DUMPING MEASURES ON SCHOOL EXERCISE BOOKS FROM TUNISIA" (DS578)

8.1. The representative of Tunisia, speaking under "Other Business", said that, for transparency purposes, Tunisia wished to make a brief statement on the latest developments regarding its consultations with Morocco with a view to reaching a compromise solution in the dispute "Morocco – Definitive Anti-Dumping Measures on School Exercise Books" (DS578). He recalled that those consultations had been initiated in September 2021. He said that at the request of Morocco, the second meeting to be chaired by the DSB Chair, which was initially scheduled to take place in the week of 10 January 2022, had been deferred. At the present meeting, Tunisia was pleased to inform delegations that on 12 January 2022 the Moroccan trade authorities had sent a proposal, through diplomatic channels via the Capitals, for revision of the dumping margins and review of the assessment of injury and causation, based on the Panel's recommendations. The proposal, which included a recalculation of anti-dumping margins imposed on Tunisian exporters of exercise books, had been received at the end of the previous week by the Tunisian Ministry of Trade and Export Development and was under consideration by its relevant departments. The Tunisian trade authorities wished to thank their Moroccan counterparts and considered this revision to be a constructive basis for the continuation of the consultations. He noted that the Moroccan authorities were continuing their analysis of compliance with the other Panel findings, in particular those relating to injury and causation. Therefore, Tunisia welcomed the intensified level of collaboration with its Moroccan colleagues, and wished to thank the Chair of the DSB, whose good offices and involvement continued to assist the parties to arrive at a mutually acceptable arrangement as quickly as possible.

8.2. The DSB took note of the statement.
