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1 SECTION VIII: PROCEDURES CONCERNING POSSIBLE MATERIAL VIOLATIONS

1.1 Text of Section VIII

VIII. Procedures Concerning Subsequent Disclosure and Possible Material Violations

1. Any party to a dispute, conducted pursuant to the WTO Agreement, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the DSB, the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VIII:5 to VIII:17 below, in a written statement specifying the relevant facts and circumstances. Other Members who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.

2. When evidence as described in paragraph VIII:1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VIII:1.

4. Following the submission of such evidence to the Chair of the DSB, the Director-General of the WTO or the Standing Appellate Body, as specified below, the procedures outlined in paragraphs VIII:5 to VIII:17 below shall be completed within fifteen working days.

Panelists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panelist, an arbitrator or an expert, the party shall provide such evidence to the Chair of the DSB.

6. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2, the Chair of the DSB shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.

7. If, after having consulted with the person concerned, the matter is not resolved, the Chair of the DSB shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the

person concerned resigns, the Chair of the DSB shall inform the parties to the dispute and, as the case may be, the panelists, the arbitrator(s) or experts.

8. In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VIII:1 and VIII:2 above has occurred. Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.

9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.

10. The Chair of the DSB shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

Secretariat

11. If the covered person who is the subject of the evidence is a member of the Secretariat, the party shall only provide the evidence to the Director-General of the WTO, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute and the panel.

12. It shall be for the Director-General to take any appropriate action in accordance with the Staff Regulations.***

(footnote original) *** Pending adoption of the Staff Regulations, the Director-General would act in accordance with the following draft provision for the Staff Regulations: "If paragraph VIII:11 of the Rules of Conduct for the DSU governing the settlement of disputes is invoked, the Director-General shall consult with the person who is the subject of the evidence and the panel and shall, if necessary, take appropriate disciplinary action".

13. The Director-General shall inform the parties to the dispute, the panel and the Chair of the DSB of his decision, together with relevant supporting information.

Standing Appellate Body

14. If the covered person who is the subject of the evidence is a member of the Standing Appellate Body or of the Standing Appellate Body support staff, the party shall provide the evidence to the other party to the dispute and the evidence shall thereafter be provided to the Standing Appellate Body.

15. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2 above, the Standing Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter.

16. It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.

17. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information.

18. Following completion of the procedures in paragraphs VIII:5 to VIII:17, if the appointment of a covered person, other than a member of the Standing Appellate Body, is revoked or that person is excused or resigns, the procedures specified in the DSU for initial appointment shall be followed for appointment of a replacement, but the time-periods shall be half those specified in the DSU.**** The member of the Standing Appellate Body who, under that Body's rules, would next be selected through rotation to consider the dispute, would automatically be assigned to the appeal. The panel, members of the Standing Appellate Body hearing the appeal, or the arbitrator, as the case may be, may then decide after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.

(footnote original) **** Appropriate adjustments would be made in the case of appointments pursuant to the Agreement on Subsidies and Countervailing Measures.

19. All covered persons and Members concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in the DSU.

20. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

1.2 General

1.2.1 Panels

1. In *Guatemala – Cement II*, Guatemala alleged that the presence on the Panel of a panelist who served *Guatemala – Cement I* detracted from the "objectivity and independence" of the Panel. The Panel issued a preliminary ruling on the issue, in which it considered that it was not competent to rule on the issue, and noted that if Guatemala wished to persist with its concerns, it could avail itself of the procedure provided for in Section VIII of the Rules of Conduct. In the Panel's view, this was the "only proper way" for Guatemala to raise the issue:

"Prior to the first meeting of the Panel with the parties, we issued the following preliminary ruling on this issue through a communication addressed to the parties and third parties, dated 24 February 2000:

'In order to determine whether the substance of Guatemala's preliminary objection is an issue that is susceptible of a ruling by the Panel, we have carefully analysed the provisions of the DSU governing panel composition. It is clear that Article 8.6 of the DSU imposes primary responsibility for panel composition on the parties to the dispute. In cases where the parties are unable to agree on the composition of a panel, such as this one, Article 8.7 of the DSU imposes responsibility for panel composition on the Director General. According to Article 8 of the DSU, therefore, the composition of a panel is determined by the parties to the dispute and, in certain circumstances, by the Director General. Neither Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process. For this reason, we find that we are unable to rule on the substance of the issue raised by Guatemala.

Should Guatemala persist with its substantive concerns regarding the composition of the Panel, Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.'

We are not aware whether Guatemala has decided to avail itself of its right under Article VIII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes to submit evidence of a violation of the obligations of independence or impartiality by a panel member to the Chairman of the DSB. As we indicated in our preliminary ruling, we conclude that this would have been

the only proper way for Guatemala to raise the issue. In light of this ruling, we also requested the parties not to submit any further arguments on this issue in subsequent stages of the procedure."¹

1.2.2 Experts

2. In *US/Canada – Continued Suspension*, the Appellate Body stated that:

"Selected experts are also subject to certain self-disclosure and confidentiality obligations set out elsewhere in the *Rules of Conduct*, and procedures exist for the referral of a 'material violation' of these obligations to the Chairman of the DSB for appropriate action."²³

1.2.3 Appellate Body

3. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body adopted additional procedures to protect business confidential information. In the context of discussing these additional procedures, the Appellate Body stated that:

"We recall, in this regard, that Appellate Body Members and Appellate Body Secretariat staff are subject to the *Rules of Conduct*. Paragraph VII:1 of the *Rules of Conduct* provides that 'each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.' If participants were to have any concerns regarding the protection of confidentiality by Appellate Body Members and Appellate Body Secretariat staff, they may raise them under the *Rules of Conduct* and the Appellate Body will decide."⁴ We do not consider that more is required."⁵

4. In that case, the "Additional Procedures to Protect Sensitive Information" adopted by the Appellate Body provided, among other things, that:

"Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the *Rules of Conduct*. As provided for in the *Rules of Conduct*, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action."⁶

Current as of: December 2020

¹ Panel Report, *Guatemala – Cement II*, paras. 8.12-8.13.

² (*footnote original*) *Rules of Conduct*, Sections VI (Self-Disclosure Requirements by Covered Persons), VII (Confidentiality), and VIII (Procedures Concerning Possible Material Violations).

³ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 443.

⁴ (*footnote original*) See paragraph VIII:16 of the *Rules of Conduct*.

⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, para. 17.

⁶ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, para. 28, subpara. (v).