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**Dispute Settlement Body**
**29 October 2018**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 29 OCTOBER 2018

*Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)*

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1.1. The Chairperson noted that there were eight sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. She recalled that Article 21.6 required that: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time … and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, she invited delegations to provide up to date information about their compliance efforts. She also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record". She then turned to the first status report under this Agenda item.

### A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.188)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.188, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain 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 18 October 2018, in accordance with Article 21.6 of the DSU. The United States

had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that Japan wished to thank the United States for its most recent status report and the statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

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

### B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.163)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.163, 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 18 October 2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that the United States had submitted its 164th status report in this dispute, which was not materially different from the reports submitted by the United States ahead of previous DSB meetings, or from the first one submitted by the United States in November 2004. No further progress toward implementation was reported at the present meeting. This item had stayed in the DSB Agenda for more than 17 years and had become record-breaking in terms of persistent failure to honour the commitments under the covered agreements. China said that as a result of such persistent non-compliance, Section 110(5) of the US Copyright Act, which had long ago been found inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. He said that the United States continued to fail to accord to intellectual property right holders the minimum standard of protection required by the TRIPS Agreement. He said that as such, the United States remained the only Member that failed to implement the DSB's recommendations and rulings under the TRIPS Agreement long after the expiration of the reasonable period of time (RPT). Article II.2 of the Marrakesh Agreement Establishing the World Trade Organization provided that: "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 are … binding on all Members". China urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute. China again strongly suggested that the United States consider including in its next status report the specific reasons as to why there has been no implementation of the DSB's recommendations and rulings in this dispute.

1.10. The representative of the United States said that as the United States had noted at prior meetings of the DSB, by intervening under this item, China attempted to give the appearance of concern for intellectual property rights. China's intervention was ironic, given item 8, the request for establishment of a panel by the United States in the "China – Certain Measures Concerning the Protection of Intellectual Property Rights" dispute (DS542). The United States said that it would address China's purported interest in protecting intellectual property rights under that item.

1.11. The representative of China said that the US intervention tried to derail the discussion under this Agenda item by suggesting that its intellectual property protection was superior to that of China. China said that it would make a statement under item 8 of the present meeting. China wished to

emphasize again that the issue under this item was whether the United States had implemented the DSB's recommendations and rulings in this dispute. China said that the answer was negative. China, once again, urged the United States to faithfully and promptly honour its implementation obligation.

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

### C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.126)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.126, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.14. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. On 18 October 2018, one draft authorization on a cut flower[1] had been presented for a vote in the Member States Committee. As the vote had resulted in "no opinion", the draft measure would be submitted for a vote to the Appeal Committee in November 2018. On 22 October, two draft authorizations, one for a renewal of GM maize[2] and one new authorization for GM maize[3], had been voted in the Appeal Committee with a "no opinion" result. It was now for the Commission to decide on these authorizations. The EU continued to be committed to acting in line with its WTO obligations. More generally, the EU recalled that its approval system was not covered by the DSB's recommendations and rulings.

1.15. The representative of the United States said that the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States remained concerned with the EU's measures affecting the approval of biotech products. Delays persisted and affected dozens of applications that had been awaiting approval for months or years, or that had already received approval. Even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. As the United States had highlighted at several prior DSB meetings, the EU maintained legislation that permitted EU member States to "opt out" of certain approvals, even where the European Food Safety Authority (EFSA) had concluded that the product was safe. Of note, at least 17 member States, as well as certain regions within EU member States, had submitted requests to opt out of EU approvals. The United States again urged the EU to ensure that all its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific principles, and that decisions were taken without undue delay.

1.16. The representative of the European Union reiterated that no EU member State had imposed any ban thus far and that there was a miscommunication between the United States and the EU on this point. The United States said that EU member States had imposed bans while the EU believed that the truth was that no EU member State had imposed any ban thus far. Under the terms of the "opt-out Directive", as it was referred to by the United States, an EU member State could adopt measures prohibiting or restricting cultivation only if such measures: were in line with EU law; were reasoned, proportional and non-discriminatory; and were based on compelling grounds. The basic legislation to which the United States referred to as the opt-out Directive was in any event not covered by the DSB's recommendations and rulings.

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

### D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.10)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations

[1] Carnation Dianthus caryophyllus L. line FLO-40685-2.
[2] Maize NK603 x MON 810.
[3] Maize MON 87427 x MON 89034 x 1507 x MON 88017 x 59122.

in the case concerning anti-dumping and countervailing measures on large residential washers from Korea.

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

1.20. The representative of Korea said that Korea wished to thank the United States for its status report and the statement made at the present meeting. Korea wished to refer to its statements made at previous DSB meetings. Korea, once again, urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute.

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

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

### E. European Union – Anti-dumping measures on biodiesel from Indonesia: Status report by the European Union (WT/DS480/8/Add.2)

1.23. The Chairperson drew attention to document WT/DS480/8/Add.2, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on biodiesel from Indonesia.

1.24. The representative of the European Union informed the DSB that the EU had adopted the measure necessary to comply with the DSB's recommendations and rulings in this dispute before the expiry of the reasonable period of time (RPT) agreed with Indonesia. On 18 October 2018, the EU had adopted Commission Implementing Regulation (EU) 2018/1570 terminating the proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013. The Commission Regulation had been published in the Official Journal of the European Union on 19 October 2018 (OJ L 262, 19.10.2018, p. 40) and, according to Article 4 of the Regulation, had entered into force on 20 October 2018. Since its entry into force, no imports of biodiesel in the European Union from Indonesia and Argentina were subject to anti-dumping duties. The adoption of this Regulation ensured the full implementation of the DSB's recommendations and rulings and terminated this dispute.

1.25. The representative of Indonesia said that Indonesia wished to thank the EU for its status report, its statement made at the present meeting, and its publication of the Implementing Regulation, which Indonesia would study carefully.

1.26. The DSB took note of the statements.

### F. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.2)

1.27. The Chairperson drew attention to document WT/DS471/17/Add.2, 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.

1.28. The representative of the United States said that the United States had provided a status report in this dispute on 18 October 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.29. The representative of China said that China noted again, as indicated in the most recent US status report, that the United States had not yet initiated any substantive implementation process to address the DSB's recommendations and rulings in this dispute, other than "consulting with the interested parties". China was again very disappointed by and deeply concerned with the US failure to implement the DSB's recommendations and rulings. The WTO-inconsistent US measures had seriously infringed China's legitimate economic and trade interests, distorted the relevant international market as well as seriously damaged the rules-based multilateral trading system, which should alert all Members and the international community. China had requested authorization from the DSB to suspend concessions or other obligations and the matter had been referred to arbitration in line with the Article 22.6 of the DSU. Once again, China urged the United States to take concrete actions, respect the WTO rules, and faithfully implement the recommendations and rulings in this dispute in order to fully comply with its obligations under the covered agreements.

1.30. The representative of the United States said that the United States took note of China's statement and would convey it to capital. The United States was willing to discuss this matter with China on a bilateral basis. To be clear, however, it was incorrect to suggest that the United States had taken no action. As the United States had previously reported to the DSB, the United States continued to consult with interested parties on options to address the DSB's recommendations in this dispute. That internal process was ongoing.

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

### G. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18/Add.1)

1.32. The Chairperson drew attention to document WT/DS484/18/Add.1, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case on measures concerning the importation of chicken meat and chicken products.

1.33. The representative of Indonesia said that Indonesia submitted its status report in accordance with Article 21.6 of the DSU. He said that Indonesia had undertaken the necessary steps to adjust the relevant measures by amending its regulations, namely: (i) Ministry of Agriculture Regulation No. 23/2018, which entered into force on 24 May 2018; and (ii) Ministry of Trade Regulation No. 65/2018, which entered into force on 31 May 2018. Indonesia had notified these regulations to the Committee on Import Licensing on 13 August 2018 in documents G/LIC/N/2/IDN/39 and G/LIC/N/2/IDN/41. Regarding the DSB's recommendations and rulings in this dispute, Ministry of Agriculture Regulation No. 23/2018 stipulated that certification processes for veterinary and halal were conducted separately. Hence, halal certification was no longer a prerequisite for veterinary certification nor vice versa. In this regard, any application received by Indonesia's relevant veterinary and halal authorities would be processed once all requirements were fulfilled in a complete and correct manner. Indonesia stood ready to continue to consult and remained in constant communication with Brazil with respect to any matter relating thereto.

1.34. The representative of Brazil said that Brazil wished to thank Indonesia for its second status report in this dispute. Brazil had highlighted some concerns regarding Indonesia's implementation of the DSB's recommendations and rulings in this dispute at the previous DSB meeting. These concerns had not been addressed in Indonesia's latest status report. She said that Brazil would

appreciate if Indonesia could address the following issues at the present meeting or in its next status report: (i) the "positive list requirement"; (ii) the distribution plan requirement; and (iii) amendments to the terms of import licences. Regarding these issues, Brazil wished to note the following. Indonesia's positive list requirement had not ceased to exist. Indonesia had chosen to maintain the list and to include some of the HS codes of chicken meat and chicken products that had been the subject of Brazil's complaint. However, one HS code had yet to be included in Indonesia's positive list. Indonesia had further eliminated the requirement of distribution reports with information regarding use or place of sale of imported chicken meat and chicken products. However, the requirement of distribution plans continued to be in force by virtue of Article 22(1)(l) of Ministry of Agriculture Regulation 34/2016. Moreover, Indonesia had introduced the possibility of making changes to the terms of the import licenses. Notwithstanding this, amendments to import licenses were subject to several requirements and sanctions on importers in the event that these requirements were not strictly observed continued to apply. Brazil noted that any measure taken by Indonesia was to no avail if Indonesia failed to approve Brazil's veterinary health certificate for the importation of chicken meat and chicken products. Indonesia's delay prior to the approval of such certificate had already been considered undue by the Panel in this dispute. Recently, at Indonesia's request and as a gesture of good will, Brazil had sent responses to a new questionnaire on veterinary issues, even though Brazil wished to reiterate its understanding, as noted by the Panel, that there had never been outstanding information that had prevented Indonesia from moving forward with the approval procedure of Brazil's veterinary health certificate. Brazil, once again, asked Indonesia to include in its future status reports the status of the analysis and approval of this certificate. The Panel Report had been adopted, time was passing and full implementation had yet to be seen. Brazil remained ready to work with Indonesia with respect to any aspect of this dispute.

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

### H. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.1)

1.36. The Chairperson drew attention to document WT/DS488/12/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain oil country tubular goods from Korea.

1.37. The representative of the United States said that the United States had provided a status report in this dispute on 18 October 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.38. The representative of Korea said that Korea wished to thank the United States for its status report and for its statement made at the present meeting. Korea had been closely monitoring the status of US implementation of the DSB's recommendations and rulings in this dispute. Korea was concerned that no specific action to implement the rulings and recommendations of the DSB had been taken. Korea strongly requested that the United States resolve the uncertainty surrounding implementation without delay, and that it eventually bring its measures into conformity with the covered agreements within the reasonable period of time, which would expire on 12 January 2019.

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

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

### A. Statement by the European Union

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

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

2.3. The representative of Chile said that Chile was grateful to the EU for its statement made under this Agenda item.

2.4. The representative of Brazil said that as an original party to this dispute, Brazil wished to thank the EU, once again, for placing this item on the Agenda of the DSB. The main aspect of this item on the Agenda – beyond the discussion about the obligation or not for the concerned Member to continue to submit status reports – was that after more than 15 years of the DSB's recommendations and rulings in this dispute, and more than 12 years after the date of the Deficit Reduction Act that had repealed the Byrd Amendment, millions of dollars in anti-dumping and countervailing duties charged on Brazilian and other Members' exports were still being illegally disbursed to US domestic petitioners. Brazil called on the United States to fully comply with the DSB's recommendations and rulings in this dispute.

2.5. The representative of Canada said that Canada wished to thank the EU for having placed this item on the Agenda of the DSB. Canada expressed concern at the way in which the United States, at the 26 September 2018 DSB meeting, characterized Canada's statement made at the 27 August 2018 DSB meeting. Canada clarified that its statement's main purpose was to signal, in line with the EU's view, its disagreement with the US statement that it had fully implemented the DSB's recommendations in this dispute. Canada therefore supported the EU's decision to place this item on the Agenda of DSB meetings in order to keep this dispute under the surveillance of the DSB. Canada also clarified that its statement made at the 27 August 2018 DSB meeting had no bearing on whether a responding Member should provide status reports when it alleged having complied with the DSB's recommendations.

2.6. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States said that it recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 10 years ago. With respect to the EU's request for status reports in this matter, as the United States had explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. The practice of Members confirmed this widespread understanding of Article 21.6 of the DSU as no status report was submitted by any Member in any dispute this month, or for previous DSB meetings, where the responding Member had claimed compliance and the complaining Member disagreed. The EU had explained at the previous DSB meeting under this item that, in its view, the issue of compliance "remains unresolved for the purposes of Article 21.6". Under such a standard, the United States would expect the EU to provide status reports in any dispute where there was a disagreement between the parties on the EU's compliance, including the "EC – Large Civil Aircraft" dispute (DS316). The EU's attempt to draw a distinction where a compliance proceeding had been initiated under Article 21.5 of the DSU fell short, and had no basis in the text of Article 21.6 of the DSU. The EU had claimed compliance, and the United States disagreed. Based on the position that the EU had taken, the EU had to file a status report for the "EC – Large Civil Aircraft" dispute (DS316). Given the EU's failure to provide a status report in that dispute again this month, the United States failed to see how the EU's behaviour was consistent with the alleged systemic view it had been espousing under this Agenda item for more than ten years. As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to this dispute about the situation of compliance.

2.7. The representative of the European Union said that in relation to the US assertions regarding "EC – Large Civil Aircraft" dispute (DS316), the European Union noted that the United States had

placed an item related to this dispute on the Agenda of the present meeting. The EU would therefore respond under that Agenda item. In relation to the US assertion that the EU had failed to provide status reports and that no other Member had provided status reports recently, he said that the EU had provided status reports for all relevant disputes that involved it. For the present meeting of the DSB, the relevant disputes were the "EC – Approval and Marketing of Biotech Products" (DS291) dispute and the "EU – Biodiesel (Indonesia)" (DS480) dispute.

2.8. The DSB took note of the statements.

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

### A. Statement by the United States

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

3.2. The representative of the United States said that the United States noted that, once again, the EU had not provided Members with a status report concerning the "EC – Large Civil Aircraft" dispute (DS316). The United States had raised the same issue at recent past DSB meetings, where the EU similarly had chosen not to provide a status report. The United States said that as it had noted at the DSB meeting of 26 September 2018, the EU had argued that Article 21.6 of the DSU required that "the issue of implementation … shall remain on the DSB's agenda until the issue is resolved". The EU had argued that where the EU did not agree with another Member's "assertion that it has implemented the DSB recommendations and rulings", "the issue remains unresolved for the purposes of Article 21.6 DSU". This stated EU position simply contradicted the EU's actions in this dispute. The EU had admitted that there remained a disagreement as to whether the EU had complied in this dispute. Under the EU's own view, therefore, the EU should have been providing status reports. Yet it had failed to do so. The only difference that the United States could see was that, now that the EU was a *responding* party, the EU was choosing to contradict the reading of Article 21.6 of the DSU it had long promoted. The EU's purported rationale was that it need not provide a status report because it was pursuing a second compliance panel under Article 21.5 of the DSU. But as the United States had explained at past DSB meetings, there was nothing in Article 21.6 of the DSU to support this position. In short, the conduct of every Member when acting as a responding party, including the EU, showed that Members understood that a responding party had no obligation under Article 21.6 of the DSU to continue to supply status reports once that Member announced that it had implemented the DSB's recommendations. As the EU allegedly disagreed with this position, it should for future DSB meetings provide status reports. At the present meeting, the EU should welcome the opportunity that the United States was affording it to update the DSB for the first time with any detail on its alleged implementation efforts.

3.3. The representative of the European Union said that as the EU had indicated in previous DSB meetings, there was a difference between the "EC – Large Civil Aircraft" dispute (DS316) and the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes. In the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes, the disputes had been adjudicated and there were no further compliance proceedings pending. He said that under Article 21.6 of the DSU, the issue of implementation shall remain on the DSB's Agenda until the issue was resolved. In the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes, the EU could not agree with the US assertion that the United States had implemented the DSB's recommendations and rulings. Therefore, the issue remained unresolved for the purposes of Article 21.6 of the DSU. As to the "EC – Large Civil Aircraft" dispute (DS316), once the Appellate Body report on compliance had been issued, the EU had notified to the WTO a new set of measures in a compliance communication contained in document WT/DS316/34 and tabled at the DSB meeting of 28 May 2018. He said that with respect to the measures included in that communication, the United States had expressed the view that the EU had not yet fully complied with the recommendations of the DSB. In response to this US view, on 29 May 2018, the EU had requested consultations with the United States under Articles 4 and 21.5 of the DSU, and, after failure of the latter, had requested the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. He said that compliance proceedings in this dispute were therefore still ongoing. Whether or not the matter was resolved was the very subject matter of this ongoing litigation. The EU would be very concerned with

a reading of Article 21.6 of the DSU which would require the implementing Member to provide status reports regarding implementation while litigation on this issue was ongoing.

3.4. The DSB took note of the statements.

## 4 STATEMENT BY THE UNITED STATES CONCERNING THE ISSUANCE OF ADVISORY OPINIONS ON ISSUES NOT NECESSARY TO RESOLVE A DISPUTE

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

4.2. The representative of the United States said that the United States had requested this Agenda item to draw Members' attention to an important systemic issue with significant implications for the operation of the dispute settlement system: the issuance by WTO panels and the Appellate Body of findings not necessary to resolve a dispute, including statements or interpretations that were not necessary or even on issues not presented in a dispute. These were often referred to as "advisory opinions", which were commonly defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation".[4] The United States had long been concerned with the issuance by WTO adjudicators of such advisory opinions. Such advisory opinions often appeared to be an attempt by a panel or the Appellate Body to "make law" rather than resolve a particular dispute. They were contrary to core principles enshrined in the text of the WTO Agreement[5] and the Dispute Settlement Understanding[6], which set out distinct roles for WTO Members, on the one hand, and WTO adjudicators, on the other. Advisory opinions also ran directly counter to the specific mandate Members had agreed for WTO adjudicators, and therefore breached WTO rules. Through its statement made at the present meeting, the United States again attempted to facilitate a broader discussion among Members on whether Members understood and respected the rules that they had written and agreed to. To facilitate this discussion, in this statement the United States would highlight several aspects of this issue for Members. First, the United States would highlight the relevant text of the WTO Agreement and DSU that made clear that the purpose of the dispute settlement system was not to produce interpretations or to "make law" in the abstract, but rather to help Members resolve a specific dispute. Accordingly, the text of the DSU specifically empowered a WTO panel to make findings that would assist the DSB in making a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules – but not to make other findings, statements, or interpretations. Second, the United States would draw Members' attention to the dispute settlement rules and procedures of the GATT, from which the relevant provisions of the DSU had been drawn. The GATT dispute settlement language was substantially the same, and there was no question that the GATT did not provide for advisory opinions. Third, the United States would draw attention to the fact that Members had not given panels or the Appellate Body the power to give "advisory opinions," and this was significant in contrast with what parties had agreed for some other international tribunals. Fourth, the United States would draw Members' attention to troubling instances of advisory opinions issued by the Appellate Body and would note that some Members had recognized and criticized any such approach to this important issue. Fifth, the United States would conclude by explaining the serious consequences for the WTO dispute settlement system of the failure of panels and the Appellate Body to only make those findings necessary to resolve a dispute.

4.3. With regard to the view that the purpose of WTO dispute settlement was to resolve trade disputes, not make law, the United States said that Members had established the DSB to administer the WTO dispute settlement system in accordance with the DSU.[7] The dispute settlement system, which was but one component of the larger multilateral trading system, played an important, but focused role. The DSU defined the purpose of the dispute settlement system. In Article 3.7 of the DSU, Members had agreed that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Thus, the aim of the dispute settlement system was *not* to produce interpretations or "make law" in the abstract. And as the United States would discuss further, within this focused role, WTO panels were charged with a specific task – assisting the DSB in discharging its responsibilities under the DSU – and the Appellate Body was similarly charged with assisting the

[4] See, e.g., Oxford Dictionaries, "advisory opinion" (https://en.oxforddictionaries.com/definition/advisory_opinion).
[5] Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement").
[6] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").
[7] DSU Art. 2.1.

DSB (albeit in an even more limited, focused capacity). In contrast to the focused role of dispute settlement "to secure a positive solution to the dispute", WTO Members had created a mechanism to provide interpretations of the WTO agreements in the abstract. In Article IX:2 of the WTO Agreement, WTO Members had reserved for themselves acting in the Ministerial Conference or General Council "the exclusive authority to adopt interpretations" of the WTO agreements. In case this had not been clear enough, the DSU expressly provided that the dispute settlement mechanism was "without prejudice to the rights of Members to seek authoritative interpretation" of the WTO agreements through that process under the WTO Agreement.[8] To achieve the focused "aim of the dispute settlement mechanism … to secure a positive solution to a dispute"[9], Members had established in the DSU particular processes for resolving disputes promptly, including panels, and the Appellate Body where appropriate, assisting the DSB for this purpose.

4.4. The United States said that where a dispute between Members arose, the dispute settlement process typically began with a request for consultations submitted in accordance with Article 4 of the DSU. As Members were aware, the request for consultations had to include an "identification of the measures at issue and an indication of the legal basis for the complaint".[10] Even at this early stage, Members were required to identify the measures at issue, and not simply request consultations concerning an abstract interpretative legal issue. This was reinforced by Article 3.3 of the DSU, which made clear that WTO dispute settlement involved "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". If consultations failed to resolve a dispute, a Member could then submit a request to the DSB, in which the Member asked the DSB to establish a panel.[11] In that request, the Member was required to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[12] So here again, the DSU was not concerned with hypothetical measures or abstract legal questions. A complainant "shall … identify" with specificity the measures at issue and "shall … provide" the legal basis for the complaint. A panel request would not comply with the DSU if it merely requested the DSB to establish a panel to provide an interpretation of a covered agreement in the abstract or make a finding on a hypothetical measure.

4.5. The United States said that the DSU had established standard terms of reference for a panel in Article 7. The DSB had charged the panel with two tasks: to "examine … the matter referred to the DSB" in the panel request and "to make such findings as will assist the DSB in making the recommendations" provided for in the DSU.[13] And Article 19.1 of the DSU was, again, explicit in what that recommendation was: "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". Thus, a finding that a challenged measure was inconsistent with a WTO rule set out in a covered agreement necessarily led to a recommendation to bring the measure into compliance with that agreement. It was through such a finding of WTO-inconsistency and through such a recommendation "to bring the measure into conformity" that panels and the Appellate Body carried out the terms of reference "to make such findings as will assist the DSB in making the recommendations" provided for in the covered agreements.[14] Members had reinforced in Article 11 of the DSU that the "function of panels is to assist the DSB in discharging its responsibilities under [the DSU]".[15] Members had reinforced that a panel assisted the DSB through the tasks set out in the panel's terms of reference. In particular, Article 11 of the DSU stated that: "a panel should make an objective assessment of the matter ... and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for

[8] Article 3.9 of the DSU provided that "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement".

[9] See also, Article 3.3 of the DSU (which made clear that the prompt settlement of "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member" was essential to the effective functioning of the WTO.); Article 3.4 of the DSU (which provided that that the DSB's recommendations and rulings "shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements").

[10] DSU Art. 4.4.

[11] DSU Art. 6.

[12] DSU Art 6.2.

[13] DSU Art. 7.1.

[14] DSU Art. 7.1.

[15] DSU Art. 11.

in the covered agreements".[16] Thus, the text of the DSU had established that the DSB tasked a panel only with making those findings as would assist the DSB in making the recommendation provided for in the covered agreements – that was, to bring a measure found to be inconsistent with a WTO agreement into conformity with that agreement.

4.6. The United States said that the inverse was equally clear: it would *not* be within a panel's terms of reference under Article 7.1 of the DSU, nor would it be consistent with a panel's function under Article 11 of the DSU, to make findings that *could not* "assist the DSB in making [its] recommendations" to bring a WTO-inconsistent measure into conformity with WTO rules. Put more succinctly, a panel would act contrary to these articles by issuing advisory opinions, or findings on issues not necessary to resolve a dispute. The same applied to the Appellate Body. The Appellate Body's task under the DSU was limited to assisting the DSB in discharging its functions under the DSU. Under Article 17.6 of the DSU, an appeal was "limited to issues of law covered in the panel report and legal interpretations developed by the panel". Further, under Article 17.13 of the DSU, the Appellate Body was only authorized to "uphold, modify or reverse the legal findings and conclusions of the panel". Since a panel's function under Article 11 of the DSU was "to assist the DSB in discharging its responsibilities" under the DSU, the Appellate Body, in reviewing a panel's legal conclusion or interpretation, was thus also assisting the DSB in discharging its responsibilities to find whether the responding Member's measure was consistent with WTO rules.[17] And so just as a panel could not ignore its terms of reference as established by the DSB to make findings that could not "assist the DSB in making [its] recommendations", so too the Appellate Body was not authorized to go beyond the panel's terms of reference to issue findings on issues unnecessary to resolve a dispute.

4.7. The United States said that at this point, it was worth noting two provisions of the DSU that some had misunderstood as suggesting panels and the Appellate Body could render advisory opinions. The first was the reference to "clarify[ing] the existing provisions of the covered agreements" in Article 3.2 of the DSU. Article 3.2 of the DSU provided in relevant part: "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The "it" in the second sentence of Article 3.2 of the DSU referred to the subject of the first sentence, "the dispute settlement system of the WTO". In other words, Members had recognized that *the dispute settlement system of the WTO* – as set out in the DSU – served to preserve the rights and obligations of Members under the covered agreements, and *the dispute settlement system of the WTO* – as set out in the DSU – served to clarify the existing provisions of those agreements. As the United States had shown, the dispute settlement system – as set out in the DSU – charged panels and the Appellate Body with making such findings as would assist the DSB in making the recommendation set out in the DSU, and through that function it served to preserve Members' rights and obligations and to clarify existing provisions. Furthermore, this text of Article 3.2 of the DSU was neither a directive to panels or the Appellate Body nor an authorization for them. There was no "shall" or "may" in this text. Instead, it was a statement of what Members had agreed flowed from the system when it operated in accordance with the provisions agreed by Members.

4.8. The United States said that the second provision that was sometimes misread was Article 17.12 of the DSU, which provided that: "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding". The ordinary meaning of "address" is to "[t]hink about and begin to deal with (an issue or problem)".[18] In other words, to address an issue was not necessarily to resolve that issue. This term could also be contrasted with the immediate context of Article 17.13 of the DSU, which referred to a panel's "legal findings and conclusions". In other words, Article 17.12 of the DSU did not direct the Appellate Body to "make legal findings and conclusions" on each of the issues raised in the appeal. Similarly, it was useful to note that Article 7.2 of the DSU also stated that "panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". As Members well knew,

[16] DSU Art. 11.

[17] Where a panel or the Appellate Body concluded that a measure was inconsistent with a covered agreement, Article 19.1 of the DSU provided in mandatory terms that "*it shall* recommend that the Member concerned bring the measure into conformity with that agreement".

[18] Oxford Dictionaries, "address" (third definition) (https://en.oxforddictionaries.com/definition/address).

panels and the Appellate Body had often "addressed" an issue through the exercise of judicial economy. As the Appellate Body had stated more than 20 years ago in endorsing judicial economy: "[g]iven the explicit aim of dispute settlement that permeates the DSU [to settle disputes], we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[19] If a finding would not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement, the only proper way to "address" such an issue would be to refrain from issuing a finding. Thus, it would be incorrect to read the word "address" as permitting the Appellate Body or a panel to make findings on issues that would not assist the DSB in discharging its responsibilities. Neither Article 3.2 nor Article 17.12 of the DSU, then, provided any authority to give advisory opinions.

4.9. With regard to the view that advisory opinions were not permitted under the GATT dispute settlement rules and procedures, the United States noted that the lack of authority for panels and the Appellate Body to issue advisory opinions in WTO dispute settlement was consistent with the lack of such authority under the GATT dispute settlement rules and procedures. In fact, the text of several provisions of the DSU were carried over directly from the GATT procedures as reflected, for instance, in the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures (or "Montreal Rules"). There had been no question that GATT dispute settlement had not authorized advisory opinions. Provisions of the GATT dispute settlement rules and procedures – provisions nearly identical to analogous provisions of the DSU – confirmed that GATT panels functioned to assist the Contracting Parties in making the recommendations or in giving the rulings provided for in the GATT. For example, paragraph F(a) of the Montreal Rules had required panel requests to "indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly". Just like Article 6.2 of the DSU, this demonstrated that GATT dispute settlement had not been concerned with hypothetical measures or abstract legal questions. Paragraph F(b)(1) of the Montreal Rules had provided that GATT panels would have following standard terms of reference: "[t]o examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".

4.10. The United States said that just like Article 7.1 of the DSU, this text had made explicit that GATT panels had functioned to assist the Contracting Parties in making the recommendations to bring a measure found inconsistent with the GATT into conformity with those rules. The terms of reference of GATT panels, like WTO panels today, had not empowered them to make interpretations in the abstract. In addition, paragraph A1 of the Montreal Rules provided the following: "Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system". This was identical, in relevant part, to the language in Article 3.2 of the DSU on the WTO dispute settlement system preserving the rights and obligations of Members and serving to clarify the existing provisions of the covered agreements. The use of "clarify" in this text, like its use in Article 3.2 of the DSU, had not authorized GATT panels to provide interpretations in the abstract on issues not necessary to resolve the particular dispute. Rather, it had simply been a statement of what Contracting Parties had agreed flowed from the GATT dispute settlement system when it operated in accordance with the agreed provisions.

4.11. The United States said that the fact that much of the DSU text tracked the GATT dispute settlement rules and procedures was not surprising as the DSU, as reflected in the provisions that the United States had examined, had carried forward the understanding that the "aim of the CONTRACTING PARTIES [in dispute settlement] has always been to secure a positive solution to the dispute".[20] By choosing the same structure and words, the Contracting Parties had chosen to maintain an approach to dispute settlement under the GATT through the DSU. That approach under the GATT had never been understood as giving adjudicators the authority to make interpretations in the abstract that were not necessary to resolve a dispute. That same language when carried

[19] US – Wool Shirts and Blouses (AB), WT/DS33/AB/R, at 19.

[20] Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, L/4907, para. 4.

forward into the DSU also did not provide panels and the Appellate Body any authority to give advisory opinions.

4.12. With regard to the view that Members had not given panels or the Appellate Body the power to give "advisory" opinions, a power that some other international tribunals had, the United States said that the text of the DSU and WTO Agreement made clear that panels and the Appellate Body did not have the authority to issue advisory opinions. This stood in contrast to the authority explicitly provided to some other international tribunals in their respective legal texts. For example, the United Nations Charter explicitly provided that the International Court of Justice could be requested to provide "an advisory opinion on any legal question".[21] And the Statute of the International Court of Justice, which was annexed to and an integral part of the United Nations Charter[22], explicitly provided that the International Court of Justice could provide an advisory opinion: "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".[23] The Statute of the International Tribunal for the Law of the Sea set out in Articles 159[24] and 191[25], that the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea could give "an advisory opinion on the conformity with th[e] Convention of a proposal" or on other legal questions. The explicit authority to provide advisory opinions could also be found in the constitutive texts of certain other international adjudicative fora, including the European Court of Human Rights[26], the African Court on Human and Peoples' Rights[27], and the Inter-American Court of Human Rights.[28] Unlike the agreement governing these other tribunals, however, the DSU contained no provision authorizing a panel or the Appellate Body to provide an advisory opinion. To the contrary, as the United States had shown, the DSU set out specific terms of reference for the panel and Appellate Body, charging them to make such findings as will assist the DSB in making the recommendation to bring a WTO-inconsistent measure into conformity with a covered agreement. A WTO adjudicator's findings were therefore limited to those findings necessary to resolve a given dispute.

4.13. With regard to the Appellate Body's issuance of advisory opinions, the United States said that Members had agreed that the DSB would assign a specific function to a panel and the Appellate Body – to make such finding as will assist the DSB in making a recommendation to bring

[21] See UN Charter, Art.96(a) ("[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question") and Art. 96(b) ("[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities").

[22] UN Charter, Art. 92 ("[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter").

[23] Statute of the International Court of Justice, Art.65.

[24] Statute of the International Tribunal for the Law of the Sea, Art. 159(10) ("[u]pon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon").

[25] Statute of the International Tribunal for the Law of the Sea, Art. 191 ("[t]he Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities").

[26] European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 31 ("[t]he Grand Chamber shall … (c) consider requests for advisory opinions submitted under Article 47") and Art. 47 ("[t]he Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto").

[27] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 4(1) ("[a]t the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission").

[28] American Convention on Human Rights, Art. 64 ("1. [t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments"); Statute of the Inter-American Court, Art. 2 ("[t]he Court shall exercise adjudicatory and advisory jurisdiction: 1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and 2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention").

a WTO-inconsistent measure into conformity with a covered agreement. Early on, the Appellate Body had appeared to recognize this important but limited role for WTO adjudicators. In an early dispute, "US – Wool Shirts and Blouses", the Appellate Body had framed the work of the Appellate Body and panels in the following manner: "[g]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[29] We note, furthermore, that Article IX of the WTO Agreement provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements".[30]

4.14. The United States said that the Appellate Body had appropriately recognized the distinction between the role of Members – with the exclusive authority to adopt interpretations of WTO agreements – and the role of a panel and the Appellate Body to assist the DSB in resolving a particular dispute. Similarly, in "US – Customs Bonding", the Appellate Body had observed that "it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only WTO Members have the authority to amend the DSU or to adopt such interpretations".[31] Over time, however, the Appellate Body had departed from the limited role agreed to by Members. Beyond assisting in resolving the dispute before it, the Appellate Body had improperly stepped into the role of the Membership: increasingly, the Appellate Body first waded into issues not necessary to resolve the dispute, and then circulated interpretations of the WTO Agreements that it considered binding on Members. As Members knew, the United States had been raising concerns about advisory opinions by WTO adjudicators, and increasingly by the Appellate Body, for over 16 years.[32]

4.15. The United States said that despite the complexity that such advisory opinions could add to a report, and the need to understand a dispute in some detail in order to discern when an adjudicator had given an advisory opinion, the United States found numerous instances when Members had detected an advisory opinion by the Appellate Body and had spoken out against those efforts. The range of Members speaking out on this issue was informative. For example, in "Canada – Continued Suspension" and "United States – Continued Suspension", 10 WTO Members had spoken in the DSB to question the authority of the Appellate Body to "recommend" that the DSB request that certain Members initiate further dispute settlement proceedings. The so-called "recommendation" had served no purpose in assisting the DSB to resolve the dispute before it and had been directly contrary to Article 19.1 of the DSU. The United States and other Members had been critical of the Appellate Body's approach: For example, Canada had stated: "[s]ince no finding of inconsistency existed, the Appellate Body's recommendation … could not constitute a recommendation within the meaning of Article 19.1 of the DSU and was, therefore, without legal consequence".[33] Argentina had recalled that: "the authority to make recommendations in Article 19.1 was contingent on the prior conclusion that a measure was inconsistent with a covered agreement". That being the case, Argentina had asked: "[i]n the case at issue, there was no finding of inconsistency, so on what grounds could the Appellate Body recommend, let alone suggest, to the parties what action they should take with respect to their dispute?"[34] Chile had "regretted the inclusion of that recommendation, which in Chile's view did not help to settle this dispute".[35] Australia[36], Costa Rica[37], Ecuador[38], Korea[39], Japan[40] and Mexico[41] had all made similar statements questioning the authority of the Appellate Body to make a recommendation absent any finding of inconsistency with respect to the measures at issue in these disputes.

[29] US – Wool Shirts and Blouses (AB), page 19.
[30] US – Wool Shirts and Blouses (AB), pages 19-20.
[31] US – Customs Bonding (AB), para. 92.
[32] See 2018 President's Trade Policy Agenda, at 26-27.
[33] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 43.
[34] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 25.
[35] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 31.
[36] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 27.
[37] See Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 33.
[38] See Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 15.
[39] See Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 28.
[40] See Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), paras. 23-24.
[41] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 17.

4.16. The United States said that in these same disputes, the Appellate Body had also strayed from the issues necessary to resolve the dispute to opine on the application of the DSU in the post-suspension stage of a dispute. Even where some Members had agreed in principle with the Appellate Body's statements, the United States and other Members had criticized the Appellate Body's overreach. Chile, after recalling the ongoing work by Members on the very issue of post-retaliation in the context of negotiations to amend the DSU, had observed that "the Appellate Body was imposing its own authority over and above the work which was being carried out by Members, and which was solely their responsibility, and by determining which procedures should, in its opinion, be followed in such circumstances, the Appellate Body was creating new rights and obligations for all WTO Members. Furthermore, in setting out a new procedure, it had established new courses of action with practical application or implications that had not yet been evaluated, as was the case when each party initiated its own proceedings".[42] Argentina had agreed, stating that "the evaluation of the appropriateness of the different options offered by the DSU was not only the responsibility of Members, but required the type of analysis which, in particular circumstances, nobody could perform better than Members".[43]

4.17. The United States said that in another instance, "China – Publications and Audiovisual Products", the Appellate Body had made findings on the applicability of Article XX(a) of the GATT 1994 to a claim under China's Protocol of Accession. The Appellate Body had made this finding despite the fact that both parties had indicated during the appeal that it was not necessary to resolve this issue, and the panel had appropriately avoided resolving it. In its statement to the DSB, Japan had stressed that "there would be a risk that the complex issue of law, the novel one in particular, could be prematurely, and possibly improperly, decided by [an] adjudicative body of appellate jurisdiction in situations where the issue was not well presented by the parties and not fully explored or developed by lower tribunals". Japan had concluded that "the resolution of the availability of Article XX defense should have been saved for another day when the resolution of the issue was absolutely necessary and the issue would be more properly presented and fully explored".[44] A further example was the Appellate Body's report in "Argentina – Financial Services". This appeal had raised a number of issues under the GATS provisions on national treatment, most-favoured-nation treatment, and the prudential exception. The Appellate Body had resolved the appeal on the first, threshold issue of "likeness". The United States had addressed this report extensively in its statement to the DSB. Members might recall that, despite having resolved the appeal on the initial threshold issue, the Appellate Body had gone on to consider issues that the Appellate Body itself had considered not necessary to resolve the dispute. As the report stated: "[o]ur reversal of these findings [on likeness] means that the Panel's findings on 'treatment no less favourable' are moot because they were based on the Panel's findings that the relevant services and service suppliers are 'like'. Moreover, as a consequence of our reversal of the Panel's 'likeness' findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis … pursuant to Article XIV(c) of the GATS and … paragraph 2(a) of the GATS Annex on Financial Services".[45] However, after having clarified that all of the Panel's findings other than "likeness" had been rendered moot, the Appellate Body had stated one paragraph later that: "[s]everal of the issues raised in Panama's appeal have implications for the interpretation of provisions of the GATS. With these considerations in mind, we turn to address the issues raised in Panama's appeals".[46] The Appellate Body had then undertaken an analysis – 46 pages – that had been in the nature of obiter dicta. In other words, the Appellate Body had acknowledged that (i) it had already considered all issues necessary to help resolve the dispute, yet (ii) it would nevertheless address additional interpretive issues under the GATS. "Indonesia – Import Licensing Regimes", adopted last year, offered another example. The Appellate Body had made a threshold finding concerning Article XI:1 of the GATT 1994 that alone had resolved the dispute. Indeed, the United States had explained in its submission that the Appellate Body's analysis should have ended there if it had made this threshold finding. Several third parties had also suggested the Appellate Body should address only those issues necessary to resolve the dispute. Yet, the report had gone on to substantively address other claims, the outcome of which would have had no effect on the recommendations in the dispute, as the Appellate Body itself had acknowledged.[47] Most striking had been a GATT 1994 Article XX claim appealed by Indonesia, where the Appellate Body had expressly agreed with the United States

[42] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 30.
[43] Minutes of DSB Meeting, 14 November 2008 (WT/DSB/M/258), para. 26.
[44] Minutes of DSB Meeting, 19 January 2010 (WT/DSB/M/278), paras. 83-84.
[45] Argentina – Financial Services (AB), para. 6.83.
[46] Argentina – Financial Services (AB), para. 6.84.
[47] Indonesia – Import Licensing Regimes (AB), paras. 5.63, 5.102-103.

that addressing the claim was not necessary.[48] The Appellate Body report nonetheless discussed the legal standard under GATT 1994 Article XX at some length and then, without analysis or further explanation, declared the Panel's findings moot and of no legal effect.[49] The preceding discussion of GATT 1994 Article XX had therefore been unnecessary to resolve the dispute.

4.18. Lastly, the United States noted the appellate report in "EU – PET (Pakistan)". The EU had appealed the Panel's issuance of findings in this dispute. The EU had argued that: "WTO dispute settlement proceedings are intended to secure a positive solution to a dispute and should not serve as a vehicle to obtain 'advisory opinions' on legal matters".[50] The EU had observed that: "[t]here are other procedures that allow Members to obtain an authoritative interpretation of particular provisions of a covered agreement".[51] The EU had argued at length that it was not the role of the dispute settlement system to offer advisory opinions not necessary to resolve a dispute. Yet, the Appellate Body had done so anyway. The United States had agreed with the EU that the approach of the panel and the Appellate Body raised serious concerns. Pakistan had made clear that it did not seek a recommendation on the EU measure that had expired in the course of the panel proceedings. This fact alone confirmed that there had been no dispute between the parties. In that sense, Pakistan had been seeking an advisory opinion regarding the application of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in the future. As Pakistan had requested findings with respect to the interpretation and application of the SCM Agreement, but no recommendation on the challenged EU measure, the panel and the Appellate Body should have found Pakistan's request to be outside the terms of reference. There could be no finding that would have assisted the DSB in making the recommendation because Pakistan had requested no recommendation be made. As with the other reports discussed, the reports in the "EU – PET (Pakistan)" dispute had not been necessary to resolve a dispute, but rather – as the EU had rightly pointed out in its appeal – an exercise in making advisory opinions. These examples were just a few of the instances in which the Appellate Body had taken it upon itself to offer interpretations not necessary to the resolution of a dispute. Under the guise of providing clarifications to assist Members in future disputes, the Appellate Body's conduct contravened the limited role agreed to by Members: to review issues of law and legal interpretation covered in a panel report that would assist the DSB in finding whether the responding Member's measure was inconsistent with a covered agreement.

4.19. In conclusion, the United States said that the text of the DSU and WTO Agreement made clear that panels and the Appellate Body were only to issue those findings necessary to resolve a dispute, and specifically, findings that would assist the DSB in making a recommendation to bring a measure found to be inconsistent with a WTO agreement into conformity with that agreement. Members had reserved for themselves the exclusive authority to issue authoritative interpretations of the WTO agreements, and they agreed they would adopt such interpretations in the Ministerial Conference or the General Council, not the DSB. The United States had long expressed concerns with the issuance of advisory opinions by WTO adjudicators, and increasingly by the Appellate Body, and the United States had reviewed certain reports in which other Members recognized those concerns. This was another example of a failure by the Appellate Body to follow the rules agreed by Members in the WTO agreements. Several immediate consequences flowed from this problem. To list a few: as with other systemic problems identified by the United States, advisory opinions would add time to a proceeding and moved the system further away from the principle of prompt settlement reflected in Article 3 of the DSU; advisory opinions added to the complexity of a report and added to the burdens of Members in future disputes when considering past reports bearing on a legal issue; advisory opinions risked adding to or diminishing a Member's rights and obligations under the covered agreements, inconsistent with Articles 3.2 and 19.2 of the DSU; and by opining on issues that were not before it, and on which the parties might not have engaged fully, or for which relevant facts might not have been fully developed, an advisory opinion risked not taking into account all the facets of an issue. Ultimately, the failure of a WTO adjudicator to follow the rules set out in the DSU governing their role and function risked further eroding support for the dispute settlement system and the WTO as a whole. The United States looked forward to engaging with Members on this important issue.

4.20. The representative of the European Union said that the EU had listened carefully to the US statement. The EU did not wish to engage at the present meeting into a detailed discussion of

[48] Indonesia – Import Licensing Regimes (AB), paras. 5.102-103.
[49] Indonesia – Import Licensing Regimes (AB), paras. 5.91-101, 5.103.
[50] EU – PET (Pakistan) (AB), para. 5.31.
[51] EU – PET (Pakistan) (AB), para. 5.31.

each and every dispute mentioned by the US. The EU would limit itself to the following general observations. At the outset, the EU noted that the United States had referred to "advisory opinions" or "obiter dicta" being issued by the Appellate Body. The EU did not necessarily agree with this characterization of particular Appellate Body findings, but did not think it was useful to enter into a discussion of the correctness of such characterizations. What the EU understood to be the essence of the US position was that the Appellate Body had made findings unnecessary to resolve a dispute in a manner that was not consistent with its mandate under the DSU. On this point, the EU wished to recall that Article 17.6 of the DSU had delineated the scope of appeals as follows: "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel". Provided that an appeal concerned such issues of law, it was the duty of the Appellate Body to "address" these issues. This was explicitly provided for by Article 17.12 of the DSU which read as follows: "[t]he Appellate Body shall address each of the issues raised in accordance with [Article 17.6 of the DSU] during the appellate proceedings". The basic aim of dispute settlement in the WTO was to settle disputes.[52] Article 3.7 of the DSU explicitly stated that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Article 3.4 of the DSU stipulated that: "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements". Article 3.3 of the DSU explained that the aim of the WTO's dispute settlement system was the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". However, this did not mean that the panels or the Appellate Body could not interpret WTO provisions or clarify their meaning. Article 3.2 of the DSU explicitly stated that the Members "recognize" that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". As the Appellate Body had held repeatedly, given the explicit aim of dispute settlement that permeated the DSU, Article 3.2 of the DSU was not meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.[53] Regarding the Appellate Body's duty, enshrined in Article 17.12 of the DSU, the EU noted that there might be situations where it would not be necessary for the Appellate Body to examine each of the issues raised on appeal in order to contribute to the resolution of the dispute. This was why, taking into account the overall objectives of the DSU, in certain cases the Appellate Body had declined to make specific findings regarding an issue raised on appeal, and had "addressed" this issue only to the extent necessary to ascertain that – in the light of the other rulings under a different claim that resolved the dispute – there had been no need to rule on that particular additional issue in question. The EU wished to stress that, in the exercise of its adjudicative powers, the Appellate Body had a margin of discretion to decide on how to "address" each of the issues on appeal, and in particular whether or not to exercise judicial economy on certain issues.[54] Having made these general observations, the EU wished to reiterate its readiness to discuss possible improvements in the operation of the dispute settlement system.

4.21. The representative of Brazil said that Brazil wished to thank the United States for the inclusion of this item on the Agenda. Brazil considered that the DSB was the right forum for these discussions. Brazil would review the US statement carefully. This discussion could also take place in a more structured dedicated session, with previous distribution of documents. As Brazil had stated at the previous DSB meeting, the framing of ideas and opinions on the basis of solid rational discourse was fundamental for any fruitful collaboration among interested Members. Another possibility, already raised by Brazil in the past, was to introduce regular occasions of dialogue between Members and the Appellate Body, in an open and transparent way, which would be disconnected from the moment of adoption of reports. It bore reminding, however, that the discussion of this topic at the present meeting, as well as of topics brought by the United States at prior DSB meetings, could not serve as an argument to block the functioning of the system. No Member was entitled to make the system hostage of its own concerns, justified or not: the WTO framework provided other options for discussing and solving concrete problems.

4.22. With regard to the issue of so-called "advisory opinions", Brazil noted, at the outset, that, unlike previous issues like Rule 15 of the Working Procedures for Appellate Review or the 90-day

[52] "US – Wool Shirts and Blouses", Appellate Body Report, p. 19.

[53] "US – Wool Shirts and Blouses", Appellate Body Report, p.19; "US – Upland Cotton, para. 747; see also paras. 510-511.

[54] See separate opinion in DS456, para 5.160.

period, this topic required a great deal of prior delimitation of legal and jurisdictional concepts. According to Article 3.2 of the DSU, the function of the dispute settlement system was to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Within this mandate, WTO adjudicators had to interpret the terms and provisions of the covered agreements, and give them legal meaning. They also had to listen to and analyse competing interpretations brought by the parties about the same provisions, and to decide which interpretation best captured a provision's essence, according to the agreed rules of interpretation of the Vienna Convention on the Law of Treaties. These principles directed panels and the Appellate Body to look at the text, context, object and purpose of each provision. Legal interpretations developed and adopted in dispute settlement proceedings were immersed in a textual and contextual analysis. They might be concise or long, crystal-clear or sometimes seemed convoluted. The decisions applied to the case at hand, but due to the principle of fairness, according to which similar cases and situations had to be decided similarly, these decisions were also relevant for other cases and were treated as such by the parties who constantly brought them to the attention of the panelists and of the Appellate Body. The findings, and the legal reasonings that underpinned and led to them, were distinct from purely advisory exercises. As the Appellate Body itself had once explained: "[w]e observe that the concept of "advisory opinion" has a special meaning in the context of international adjudication. A number of international courts and tribunals, including the International Court of Justice and the European Court of Justice, provide in their statutes or rules for the provision of such opinions upon the request of States or of certain authorized bodies".[55] The idea that the Appellate Body engaged in advisory opinions was, conceptually, similar to the allegations made about obiter dicta. As obiter dicta were a feature characteristic of common law systems and were not in and of themselves typical of civil law systems – in which in general judges were either concise or wordy –, at least the expression advisory opinion was more neutral. Advisory opinions were thus not foreseen in the DSU. However, to qualify part of a report as an "advisory opinion", without further agreed common parameters, could also amount to effectively restricting unilaterally the jurisdiction of panels and the Appellate Body. It could unjustifiably restrict what would be the scope of the matter before them and could prevent them from exercising the functions assigned to them by the DSU. Without a prior, thorough debate about what the jurisdictional function in the WTO dispute settlement system meant, or should mean, the present debate risked simply revealing, at its core, divergent views about the nature of that system.

4.23. Brazil said that, on a more specific level, what the United States had repeatedly characterized as "advisory opinions" in its statement made at the present meeting while commenting on specific excerpts of Appellate Body reports could also be, depending on the case at hand and on the interpretation, simply a necessary element to decide a legal claim. Brazil referred to a concrete example. In the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes, "[t]he United States maintain(ed) that the Panel erred by rendering an advisory opinion on a measure that was not before it. Specifically, the United States appeal(ed) the Panel's statement that '[e]ven if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion … that offset payments may be made only in situations presenting the constituent elements of dumping.' The United States asserts that there was no measure before the Panel where payments were funded directly from the United States Treasury and, therefore, there was no basis for the Panel to opine on what its findings would be if such a measure were presented to it. The United States emphasizes that this finding should be reversed because the Panel has no authority to make findings on a matter that is not before it".[56] The Appellate Body had disagreed "with the United States that, in making this statement, the Panel was making a finding on a matter that was outside the Panel's terms of reference. In (its) view, the Panel was simply making an observation to make it abundantly clear that its finding was in no way based on the fact that offset payments are funded from collected anti-dumping duties. Therefore, we dismiss the United States' claim that the Panel issued an "advisory opinion" exceeding its terms of reference".[57] Several third parties had agreed with the Appellate Body. Australia had submitted that the Panel had not exceeded its terms of reference by clarifying the scope of its finding; Canada had taken the view that the Panel had not rendered an advisory opinion. Instead, it had made a statement in support of its overall argument concerning the operation of the CDSOA. According to Canada, the Panel had not arrived at a legal conclusion in respect of the payment of duties from the United States Treasury itself, and so could not have been in legal error. Nor had the Panel offered an "advisory opinion" on that issue. Japan and Chile had

[55] Appellate Body Report, "US — Offset Act (Byrd Amendment)" (DS217, DS234), footnote to para.214.
[56] Appellate Body Report, "US — Offset Act (Byrd Amendment)" (DS217, DS234), para.37.
[57] Appellate Body Report, "US — Offset Act (Byrd Amendment)" (DS217, DS234), para. 214.

submitted that the Panel's observations contained in paragraph 7.22 of the Panel Report were not, as the United States claimed, an "advisory opinion: "[t]hey point out that the Panel was merely clarifying the factual basis for its finding that the offset payments under the CDSOA can be made only in situations where the constituent elements of dumping are present".[58]

4.24. Brazil said that it recognized the relevance of the discussion introduced by the United States at the present meeting, and that it agreed that all Members would benefit from more streamlined, clear and concise decisions, as long as they contained the necessary legal density to underpin all findings. More to the point, Brazil also considered that the parameters set out in the DSU, especially in Article 3.2, that mandated the clarification of provisions while not adding to or diminishing rights and obligations of Members, as well as the whole of Article 17, which delimitated the scope of appellate review, were sufficient to guide Members through this debate. Brazil said that it had one final remark about the novel interpretation Members had just heard about the scope of Article IX:2 of the Marrakesh Agreement. For Brazil, interpretations under this provision served a different purpose. Once taken by all Members, such interpretations were, from that moment onward, binding for all Members, whereas adopted decisions taken by panels or the Appellate Body were binding only in the case at hand. In general, legal provisions generated regular effects until there was a dispute about the meaning of their wording. At that moment, parties argued conflicting or competing interpretations to panels and the Appellate body, which had to decide which one was the most adequate. Given the almost 600 hundred disputes brought at the WTO, it could not be assumed that Members would have to use Article IX:2 of the Marrakesh Agreement that many times for the purpose of rendering authoritative interpretations.

4.25. The representative of Japan said that Japan wished to thank the United States for its statement made at the present meeting. Japan considered that it was not the role of WTO adjudicators to make "advisory opinions" which were not necessary to resolve specific disputes. In addition to specific provisions of the DSU such as Articles 6, 7 11 and 17, Article 3 of the DSU (General Provisions) provides strong context. For example, Article 3.4 of the DSU stated that: "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements". Article 3.7 of the DSU also stated that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". WTO adjudicators had to follow and be guided by these principles when issuing their reports so as to enable the DSB to make recommendations and rulings properly. In short, the role of WTO adjudicators was no more than the one prescribed in the DSU. In this respect, Japan said that it shared the concern expressed by the United States. Members might disagree as to whether a WTO adjudicator's finding in a particular case was to be considered as an advisory opinion. This might be so because each Member had a different opinion on what constituted an "advisory opinion" depending on its position in a case or on other factors. Rather than engaging in such discussions, Members might want to have a more constructive dialogue that would lead to a positive solution of the issue raised here. In this respect, Japan saw merit in discussing possible solutions to address the issue at hand, such as clarifying the scope of review by WTO adjudicators in a more explicit manner, or by encouraging disputing parties to exercise self-restraint when selecting the issues to be appealed. Japan looked forward to engaging in a solution-oriented dialogue with other Members regarding this matter.

4.26. The representative of China said that China wished to thank the United States for placing this item on the Agenda of the present meeting. This issue was very important because it delineated the boundaries of the mandates of panels and the Appellate Body in relation to the scope of their rulings and recommendations. China was, therefore, willing to share some of its views on this matter. First, China viewed this issue as related to the compliance of panels and the Appellate Body with their respective mandates under the DSU. Article 7.2 of the DSU prescribed that "panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". Article 17.12 of the DSU clearly provided that "the Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding". Therefore, under the current DSU, and as had been required by the negotiators, the Appellate Body was under the obligation to address each of the legal issues raised by the parties in an appellate proceeding. There was no reason to criticize panels or the Appellate Body for so-called unnecessary rulings provided that they followed the requirements of Articles 7.2 and 17.12 of the DSU. The parties might have different views on whether a particular ruling was necessary or not to resolve a dispute. It seemed that the way that the United States read those provisions might render them futile. Of course, the Appellate

[58] Appellate Body Report, "US — Offset Act (Byrd Amendment)" (DS217, DS234), para. 111.

Body had to address only the issues appealed by the parties to the dispute, and should refrain from making findings on the issues that neither party had appealed. China noted that the United States had cited a number of cases to sustain its arguments. China might have had similar concerns in some cases. However, China still needed to further analyse the merits of its arguments, and was not in a position to discuss in detail the specific reports mentioned by the United States. To better address this issue, Members could provide more guidance to panels and the Appellate Body through appropriate instruments so that they were mandated to only review issues raised by parties that were necessary for the settlement of a given dispute. Nevertheless, any further guidance or clarification on this issue had to not adversely impact the independence of the Appellate Body. China was open to discussions on possible improvements to the operation of the dispute settlement system in the future. However, these discussions could not be used to block the launch of the AB selection processes. China welcomed the fact that the United States had placed this item on the Agenda of the present meeting and was ready to exchange views with other Members on possible solutions. At the same time, China also urged the United States to lift its illegal and unreasonable blockage of the AB selection processes which had to be launched immediately.

4.27. The representative of Canada said that Canada wished to thank the United States for its engagement on the topic of the issuance of opinions by WTO adjudicators on issues not necessary to resolve a dispute. Canada stood ready and willing to work with all Members to seek to achieve a common understanding on the spirit of the DSU in this regard. Canada wished to take this opportunity to comment on this important topic. Canada believed that WTO adjudicators were rightly tasked in the DSU with clarifying the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. The evolution of and increasing reliance on the WTO dispute settlement system meant that disputes were ever more complex. The outcome of a dispute often hinged on the interpretation of a provision that might have been drafted with a view to reaching agreement amongst Members during the Uruguay Round negotiations, rather than with a view to providing exact legal clarity. Therefore, in many instances, adjudicators were tasked with resolving disputes where the crux of the debate was an imprecise legal provision. This placed them in the difficult position of having to interpret such provisions while keeping in mind the strict requirement set out in the DSU to not add to or diminish the rights and obligations provided in the covered agreements. This was not an easy task. In this context, Canada believed that it would be appropriate to clarify that the primary objective of the dispute settlement system was the settlement of specific disputes, and that WTO adjudicators should only be permitted to make findings that were necessary to achieve this objective. Such an approach would provide useful focus for WTO adjudicators. Limiting the extent to which adjudicators made findings on peripheral issues in a specific case would also have the positive effect of facilitating their ability to meet DSU timelines for the issuance of panel and Appellate Body reports. Canada wished to reiterate its appreciation for US engagement on this issue. Canada wished to encourage all Members to join this discussion, and was committed to continue supporting a solution-oriented discussion on this and other DS issues.

4.28. The representative of New Zealand said that New Zealand agreed that the Appellate Body should focus on the issues necessary for resolution of the dispute immediately before it. This would assist in delivering prompt resolution of disputes in line with the 90-day period. New Zealand therefore saw an important linkage between this issue and addressing undue delays in the WTO dispute settlement system. For this reason, New Zealand supported Members exchanging views on this issue and making proposals for possible reform. New Zealand did, however, recognise that this was not a simple issue given the importance of clarity with respect to WTO rights and obligations. New Zealand noted also that the explicit right to make authoritative interpretations rested with the Membership pursuant to the Marrakesh Agreement. New Zealand was ready to continue to engage with other Members on the issues raised.

4.29. The representative of Chile said that Chile was sympathetic to the US position. Once more, the United States had substantiated in great detail certain aspects of the dispute settlement mechanism that were not functioning properly. Chile also wished to express gratitude for the very clear suggestions for solutions. Chile certainly supported such a solution-oriented approach. Concretely, Chile noted that there existed a possibility that the rights and obligations of Members could be affected if Articles 3.2 and 19.2 of the DSU were not applied properly. Rendering what is referred to as "advisory opinions", mainly on the part of the Appellate Body, could also impact the timelines that Members had agreed upon for the preparation of panel and Appellate Body reports.

4.30. The representative of India said that India wished to thank the United States for including this important issue on the Agenda of the present meeting. India had noted with interest the observations made by the United States, the EU, Brazil, China and other Members on this issue. India stood ready to engage in a constructive and solution-oriented dialogue on this important issue. However, India wished to reiterate that these discussions should not serve as a pretext to impair the work of the Appellate Body and should be de-linked from a quick resolution of the Appellate Body impasse.

4.31. The DSB took note of the statements.

## 5 PAKISTAN – ANTI-DUMPING MEASURES ON BIAXIALLY ORIENTED POLYPROPYLENE FILM FROM THE UNITED ARAB EMIRATES

### A. Request for the establishment of a panel by the United Arab Emirates (WT/DS538/2)

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 28 May 2018, and had agreed to revert to it. The Chairperson drew attention to the communication from the United Arab Emirates contained in document WT/DS538/2 and invited the representative of the United Arab Emirates to speak.

5.2. The representative of the United Arab Emirates (UAE) said that on 15 May 2018, the UAE had requested the establishment of a panel to examine the dispute concerning anti-dumping measures on biaxially oriented polypropylene film ("BOPP Film") from the UAE (DS538). Pakistan had not agreed to the establishment of a panel at the 28 May 2018 DSB meeting. Thereafter, bilateral discussions had continued between Pakistan and the UAE, but had failed to resolve this dispute. The UAE had therefore placed its request for the establishment of a panel on the Agenda of the DSB for the second time. For the reasons set out in its request for establishment of a panel, the UAE was concerned that the anti-dumping measures imposed and maintained by Pakistan on BOPP Film from the UAE were inconsistent with Pakistan's obligations under the GATT 1994 and the Anti-Dumping Agreement. Accordingly, the UAE respectfully requested, once again, that the DSB establish a panel to examine the matter set out in its request for establishment of a panel, with standard terms of reference.

5.3. The representative of Pakistan said that Pakistan regretted the UAE's decision to request for the second time the establishment of a panel at the present meeting. Pakistan believed that efforts to look into all possible alternatives to resolve this matter should continue and be fully explored. Pakistan wished to reiterate its openness to continue the discussions through consultations with the UAE to find mutually convenient solutions in this dispute. Nevertheless, Pakistan stood ready to defend its measures before the panel.

5.4. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU, with standard terms of reference.

5.5. The representatives of Afghanistan, China, the European Union, Japan, the Russian Federation, the Kingdom of Saudi Arabia and the United States reserved their third-party rights to participate in the Panel's proceedings.

## 6 KOREA – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON STAINLESS STEEL BARS

### A. Request for the establishment of a panel by Japan (WT/DS553/2)

6.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 26 September 2018 and had agreed to revert to it. The Chairperson drew attention to the communication from Japan contained in document WT/DS553/2 and invited the representative of Japan to speak.

6.2. The representative of Japan said that Japan would not repeat its position and claims in this dispute at the present meeting, as these were explained in detail in its panel request and in its statement made at the 26 September 2018 DSB meeting. Briefly put, this case concerned Korea's measures to continue the imposition of anti-dumping duties on imports of Stainless Steel Bars from Japan. Japan considered Korea's measures to be inconsistent with Korea's obligations under the

GATT 1994 and the Anti-Dumping Agreement. Japan's first request for establishment of a panel had appeared as an item on the Agenda of the previous DSB meeting. As Japan continued to see the inconsistency of Korea's measures, Japan, once again, requested, pursuant to Article 6 of the DSU, that a panel be established to examine the matter set out in its panel request, with standard terms of reference, in accordance with Article 7.1 of the DSU.

6.3. The representative of Korea said that Korea regretted that Japan had chosen at the present meeting to place its request for establishment of a panel on the Agenda of the DSB for a second time. As Korea had stated at the previous DSB meeting, Korea had determined, through an objective review of the matter, that it was highly likely that dumping and injury would recur if the duties were terminated, taking into account all the available evidence before it. Thus, based on this objective examination, Korea had reasonably concluded that it was necessary to maintain the anti-dumping measures on stainless steel bars from Japan. Korea had continuously expressed its willingness to engage constructively with Japan on this matter. Korea had participated in good faith in the consultations relating to this matter. Korea had also made itself available to provide any additional information that Japan would consider necessary. In addition, at the previous DSB meeting, Korea had already expressed its concern over certain procedural deficiencies contained in Japan's request for establishment of a panel. It was therefore regrettable that Japan had decided to place a request for establishment of a panel at the present meeting, which would lead to the establishment of a panel in accordance with Article 6.1 of the DSU. Korea would vigorously defend its WTO-consistent anti-dumping measures before the panel.

6.4. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU, with standard terms of reference.

6.5. The representatives of China, the European Union, India, Kazakhstan, the Russian Federation, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

## 7 RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION

### A. Recourse to Article 21.5 of the DSU by the European Union: Request for the establishment of a panel (WT/DS475/21)

7.1. The Chairperson drew attention to the communication from the European Union contained in document WT/DS475/21. She then invited the representative of the European Union to speak.

7.2. The representative of the European Union said that the EU had requested the establishment of a panel to assess the consistency with WTO rules of the measures taken by the Russian Federation to comply with the recommendations and rulings in this dispute. The EU regretted the repeated failure by the Russian Federation to open its market to pig products from the EU, despite a panel report, an Appellate Body report, a reasonable period of time to comply, and the EU's openness in recent months to resolve the matter through consultations leading up to this request. In the light of these considerations, the EU said that it would appreciate if Russia could join the consensus so that the DSB could decide to establish a compliance panel at the present meeting.

7.3. The representative of the Russian Federation said that Russia was disappointed by the EU's decision to request establishment of a panel under Article 21.5 of the DSU with respect to Russia's measures on the importation of live pigs, pork and other pig products from the EU. Russia would like to note that by virtue of the Russia's communication of 8 December 2017 (WT/DS475/16), Russia had informed the Membership and the DSB that all the DSB's rulings and recommendations in this dispute had been implemented by Russia in full and within the reasonable period of time agreed by the parties to this dispute. The Federal Service for Veterinary and Phytosanitary Surveillance had issued the Letter of 5 December 2017 No. FS-NV-7/26504 which had brought into conformity all measures found to be inconsistent with the WTO obligations of Russia in this dispute. Russia also noted that proceedings under Article 21.5 of the DSU were limited to measures taken to comply with the DSB's recommendations and rulings. However, the EU in its request for establishment of a panel referred to certain measures of Russia which had not been "taken to comply" with the DSB's recommendations and rulings. Russia thus believed that there was no legal

basis for the EU to request the establishment of the panel under Article 21.5 of the DSU. For these reasons, Russia was not in a position to agree to the establishment of a panel at the present meeting.

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

## 8 CHINA – CERTAIN MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

### A. Request for the establishment of a panel by the United States (WT/DS542/8)

8.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS542/8. She then invited the representative of the United States to speak.

8.2. The representative of the United States said that the United States recalled that all Members, including China, had committed through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to provide certain protections for intellectual property rights, a core element of a free and fair international trading system. Among those intellectual property rights were the commitments to protect exclusive rights of patent holders and to accord to the nationals of other Members treatment no less favourable than that the Member accords to its own nationals with regard to the protection of intellectual property. China had agreed to these commitments when it had acceded to the WTO. However, for the past several years, the United States had repeatedly raised concerns about China's policies relating to technology licensing that did not comport with China's WTO commitments. China's policies consistently sought to disadvantage foreign companies for the benefit of Chinese industry. The policies denied foreign patent holders, including US companies, basic patent rights to stop a Chinese entity from using the technology after a licensing contract ended. China also imposed mandatory adverse contract terms that discriminated against and were less favourable for imported foreign technology. These policies, reflected in Chinese legal instruments, were inconsistent with Articles 3 and 28 of the TRIPS Agreement because they failed to provide the intellectual property rights to which China had committed when it had acceded to the WTO. Prior to initiating this dispute, the United States had attempted to resolve these issues with China bilaterally. The United States and China had also held formal dispute settlement consultations in July 2018. However, these efforts had failed to resolve US concerns. Accordingly, the United States requested that the DSB establish a panel to examine the matter set out in its panel request, with standard terms of reference.

8.3. The representative of China said that China was disappointed that the United States had decided to request establishment of a panel to examine the subject matter of this dispute. The United States had filed its request for consultations with China on 23 March 2018. China had held consultations in good faith with the United States on 18 July 2018 and had positively responded to its relevant questions. The US accusations made at the present meeting were meritless. They were founded on a deliberate misrepresentation of Chinese laws and practices, as well as on allegations from unidentifiable sources. China was therefore not in a position to accept the establishment of a panel at the present meeting.

8.4. The representative of Japan said that Japan had been one of the major exporters of technology to China and had repeatedly raised its concerns with China's rules, regulations and other measures referred to in the US request for establishment of a panel. In particular, Japan believed that the Chinese regulation on the administration of import and export of technologies, one of the measures identified by the United States, seemed to impair the ability of foreign intellectual property right holders to protect their intellectual property rights because this measure mandated contractual terms in technology transfer agreements between foreign and Chinese partners in a manner adverse to the interests of foreign partners. Japan thus shared the concerns of the United States regarding discriminatory licensing practices as well as regarding the lack of sufficient protection of intellectual property rights in China. Japan wished to emphasize the importance of a stronger protection of intellectual property rights and their effective enforcement.

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

## 9 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by China (WT/DS544/8)

9.1. The Chairperson drew attention to the communication from China contained in document WT/DS544/8. She then invited the representative of China to speak.

9.2. The representative of China said that China had requested consultations with the United States in this dispute on 5 April 2018. Consultations had been held on 19 July 2018. These consultations had generated very limited clarifications to only a few issues between the parties, and had failed to resolve the dispute. China attached great importance to resolving this dispute promptly, and therefore requested establishment of a panel at the present meeting. On 23 March 2018, the United States had imposed 25 percent and 10 percent of additional import duties respectively on certain steel and aluminium products, from all countries except a few select Members, pursuant to Section 232 of the US Trade Expansion Act of 1962. Subsequently, the United States had made a series of revisions to the original measures which included adjusting the scope of the exemptions, introducing quotas on imports of steel products from select Members, and permitting exclusions of certain products. It appeared to China that the measures at issue, in their content and substance, had been taken because the imports of steel and aluminium products had been deemed to be in such increased quantities and under such conditions as to cause or threaten injury to domestic producers of these products. And the suspension of the obligations, or the withdrawal or modification of the concessions by the measures at issue was intended to relieve such injury or threat and to ensure that the relevant domestic industries were economically viable. Therefore, the measures at issue were in essence safeguard measures. The measures at issue, under the guise of "national security", were obviously and egregiously inconsistent with the relevant provisions of the Agreement on Safeguards and the GATT 1994, as China had explained in document WT/DS544/8. Notably, besides China, there were six other Members who had also requested the establishment of panels in respect of disputes regarding the same measures and based on similar legal considerations at the present meeting. China was of the view that there was a joint understanding among different Members that the measures at issue were inconsistent with the core principles of the covered agreements, including but not limited to MFN and schedules of concessions. China considered that the matter at issue had a significant systemic dimension for the WTO. Members had to faithfully fulfil their obligations and commitments under WTO agreements and had to use or invoke the national security exception on a *bona fide* basis. In addition, China believed that to safeguard the security and predictability of the multilateral trading system, the DSB should be explicitly entitled to establish a panel to examine the measures at issue. Pursuant to Article 9.1 of the DSU, China requested to establish a single panel to examine the complaints under Agenda items 9 to 14 and 19 which were related to the same matter.

9.3. The representative of the United States said that the United States was not surprised that China had submitted a panel request in this dispute. China's actions followed a pattern of using the WTO dispute settlement system as an instrument to promote its non-market economic policies. Those non-market policies and practices had been widely recognized by Members as leading to massive excess capacity and distortions of world markets. Those non-market policies and practices were damaging the interests of market-oriented economies, their businesses and workers. China's policies had created and maintained excess capacity in steel and aluminium and undermined the basic fairness of international trade. China's non-market policies had also led to global conditions in which core US industries, which were vital to US national security, were not able to survive and invest for the future on market-based terms. The President of the United States had determined that, under these conditions, imports of steel and aluminium threatened to impair US national security. The United States would not allow China's Party-State to fatally undermine the US steel and aluminium industries, on which the US military, and by extension global security, relied. The United States had given detailed explanations that the measures at issue were justified under Article XXI of the GATT 1994. In particular, the United States had explained that these measures were necessary to address the threatened impairment that these imports of steel and aluminium articles posed to US national security. Members were well aware that the steel and aluminium sectors had been suffering under conditions of massive excess capacity. China's non-market economic system, driven by its industrial policy, had created new plants and had maintained existing production contrary to market signals. In these circumstances, it was impossible for market economic actors in Members such as the United States, the European Union, Canada, Mexico, Norway, and others, to earn a sufficient return on the market to remain viable over the longer term. The United States was not the only Member with these concerns. A joint proposal from the European Union, Japan,

Mexico, and the United States warned that "overcapacity is a major cause of distortions to international trade. [I]t has societal consequences which are a contributing factor to negative sentiment regarding international trade".[59] China's non-market economic system and the policies it generated in the steel and aluminium sectors were recognized as a global problem. The September 2018 Global Steel Forum Ministerial Report had stated: "[e]xcess steelmaking capacity … depresses prices, undermines profitability, generates damaging trade distortions, jeopardizes the very existence of companies and branches across the world, creates regional imbalances, undermines the fight against environmental challenges and dangerously destabilizes world trading relations".[60] This year, the OECD Ministerial Council Meeting had reached a similar conclusion: "[s]evere excess capacity in key sectors such as steel and aluminium are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy. This is exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state-owned enterprises, forced technology transfer, and local content requirements and preferences".[61] The United States had reached out to China, year after year, in our bilateral dialogues and had asked China to address the problem of excess capacity in the steel and aluminium industries. The United States had discussed with China, year after year, the importance of completing the transition to a market economy and the commitments China had made to do so from the very first day that it had joined the World Trade Organization as a Member. Year after year, China had made promises it had not kept, and year after year, China had avoided taking actions that would have addressed the crisis affecting global steel and aluminium. The result was a staggering level of global overcapacity in steel and aluminium that was directly attributable to China. According to the OECD, between 2000 and 2016, China had added new steelmaking capacity equivalent to the combined steelmaking capacity of the rest of the world. And since 2008 alone, China had added more than 500 million metric tons in new capacity – that was more than the combined capacity of the United States, the European Union and Japan. The aluminium market had faced these same disturbing trends. In 2016, China had accounted for well over 50 percent of global aluminium capacity, and since 2008, China had added 30 million metric tons in new capacity – that was more than the current combined capacity of the nine largest producers after China. For all these reasons, the United States had had no choice but to take action to address these crises. The US measures were national security actions, taken pursuant to a national security statute. And the clear and unequivocal US position, maintained consistently for over 70 years, was that issues of national security were political in nature and were not matters appropriate for adjudication in the WTO dispute settlement system. Some Members had expressed concerns that invoking the national security exception would undermine the international trading system. This was erroneous, and completely backwards. Rather, what threatened the international trading system was that China was attempting to use the WTO dispute settlement system to prevent any action by any Member to address its unfair, trade-distorting policies. China's choice to pursue dispute settlement against Members defending their legitimate interests would make WTO rules an instrument for China to protect its non-market behaviour, rather than promoting fair, market-based competition that improved the welfare of all our citizens. As the United States had explained at the April 2018 DSB meeting, the WTO dispute settlement system should not be used as a defence for those Members that chose to adopt policies that could be shown to undermine the fairness and balance of the international trading system. If this were the case, then the WTO and the international trading system would lose all credibility and support among Members' citizens. For these reasons, the United States did not agree to establishment of a panel at the present meeting.

9.4. The representative of China said that China had noted the statement made by the United States at the present meeting, in particular regarding the so-called non-market economic policies and overcapacity. However, these arguments had not been included in the Reports of the US Department of the Commerce under Section 232 of the US Trade Expansion Act of 1962. It seemed, once again, that the United States had been shifting its arguments so that Section 232 could be used as a pretext for its protectionist measures. With respect to the non-market economy accusations, China wished to refer to its statements made in multiple fora including General Council meetings, DSB meetings, and recent SCM committee meetings. China had rebutted these accusations many times as being without merit and based on fabricated facts. It seemed that the United States was simply using these groundless arguments as a red herring for its notoriously protectionist measures. China therefore had no interest in repeating statements made at previous DSB meetings. China had made

[59] G/SCM/W/569.
[60] Global Steel Forum Ministerial Report, Sept. 20, 2018, p. 1.
[61] OECD 2018 Ministerial Council Meeting, Statement by the Chair of the Ministerial Council Meeting.

it very clear in its statement at the present meeting that it believed that the US Section 232 measures were essentially safeguard measures which were inconsistent with the GATT 1994 and the Agreement on Safeguards. These measures were adopted under the guise of national security. This was not merely China's opinion, but an opinion shared by many other Members. As the Agenda of the present meeting had shown, there were six other panel requests with respect to the Section 232 measures of the United States. China firmly believed that the prompt resolution of these disputes would enhance the rules-based multilateral trading system and benefit the WTO as a whole.

9.5. The representative of Brazil wished to make a statement with regard to items 9-14 and 19 of the Agenda of the present meeting. From a multilateral perspective, Brazil had, on many occasions, stressed its concerns about the systemic impacts of restrictive measures taken under Section 232 of the US Trade Expansion Act of 1962, and in particular the consequences of an extensible interpretation of the concept of national security interests. Brazil's concerns remained unchanged.

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

## 10 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by the European Union (WT/DS548/14)

10.1. The Chairperson drew attention to the communication from the European Union contained in document WT/DS548/14. She then invited the representative of the European Union to speak.

10.2. The representative of the European Union said that the EU would speak only under this Agenda item, and would not take the floor under items 9-14 and 19 that all concerned the same US measures. This was in order to avoid repetition, all the more at the present meeting which had a historically long Agenda for a DSB meeting. The statement that the EU would make under this item should be taken to also apply to those other items. The US measures taken under Section 232 of the US Trade Expansion Act of 1962 had prompted significant reactions over the last several months, both within the United States and world-wide, from the industry, independent experts and foreign governments. The sectors of the US economy that were directly favoured by these protectionist measures had understandably celebrated the redistribution of wealth to their benefit. All others, however, had been pointing out to what extent those benefits came at the expense of far greater losses for the rest of the US economy and for the rest of the world. As Members could see on the Agenda of the present meeting, seven Members had submitted panel requests related to these US measures. No similarly high number of panel requests had ever been submitted on the same day and against the same Member. This was just one sign among many suggesting what degree of objection the US measures were eliciting from the Membership. The large number of complainants demonstrated broad opposition to the US measures, a general view that these measures were WTO-inconsistent and that it was fully appropriate to bring them to the attention of WTO adjudicators, in line with the DSU. The EU had expected to hear at the present meeting from the United States that it considered these complaints under the dispute settlement system as misplaced. Hence, the EU would summarize in three short points why the United States in this respect was plainly wrong. First, the US additional duties were safeguard measures because they departed from US obligations under the GATT 1994 and were designed to protect, in an emergency action, domestic industries alleged to suffer injury at the hands of competing imports. Second, Article XXI of the GATT 1994, which was mentioned in the US response to the EU's consultations request, was an affirmative defence and therefore could be, like other exceptions, an integral part of the legal evaluation of a domestic measure under the WTO Agreement. GATT 1994 Article XXI was in no way a provision limiting the jurisdiction of WTO panels and the Appellate Body, or of the Dispute Settlement Body. Therefore, there was no legitimate scope for doubt as to whether the DSU applied to this dispute. GATT 1994 Article XXI was no magic wand whose mere invocation could suddenly have made the DSU inapplicable. On substance, the EU firmly believed that Article XXI of the GATT 1994 did not apply to measures such as the ones at hand. The EU believed that it was a very dangerous proposition without any basis in that Article to suggest that Members were allowed to invoke national security to protect the prosperity of a domestic industry. Third, if import restrictions such as the ones at issue here became the subject of a dispute under the DSU for resolution in accordance with those procedures, this was good rather than bad for the multilateral trading system. The fact that seven panel requests had been tabled at the present meeting in relation to the same US measures and based on virtually identical legal claims also meant procedurally that Article 9 of the DSU applied. Accordingly, the EU requested the establishment of a single panel pursuant to Article 9.1 of the DSU,

based on the seven panel requests submitted at the present meeting concerning the Section 232 US measures on steel and aluminium.

10.3. The representative of the United States said that the United States was deeply disappointed that the European Union had submitted a panel request in this dispute. This action was misdirected. It did not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminium sectors. In fact, rather than support the international trading system by taking action to resolve the underlying concerns, the European Union was undermining the trading system by asking the WTO to do what it had never been intended to do. It was simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests. The United States had explained that it considered the US measures taken under Section 232 of the US Trade Expansion Act of 1962 as necessary for the protection of its essential security interests, and that they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium products posed to US national security. In March 2018, the United States had provided information to the Council on Trade in Goods in relation to the proclamations issued by the President of the United States pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982.[62] In the US reply to the consultation requests challenging the 232 measures, the United States had clearly stated: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".[63] The United States therefore did not understand the purpose of this request for panel establishment, seeking WTO findings that the United States had breached certain WTO provisions. The WTO could not, consistent with GATT Article XXI, consider those claims or make the requested findings. The clear and unequivocal US position, for over 70 years, was that issues of national security were not matters appropriate for adjudication in the WTO dispute settlement system. No Member could be surprised by this view. For decades, the United States, as well as other Members, had consistently held the position that actions taken pursuant to GATT Article XXI were not subject to review in GATT or WTO dispute settlement. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[64] Not surprisingly, this had also been the view of the European Union and its member States. For instance, in 1949, with respect to a dispute with the then-Czechoslovakia, the view of the United States had been that the claim alleging a breach of GATT commitments could not be reviewed consistent with GATT Article XXI. The United Kingdom had agreed, explaining that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security".[65] Indeed, in 1982, when certain European actions were before the GATT Council, this was precisely the position that the European Economic Community had taken. The European Community had stated that Article XXI had been a reflection of a Member's "inherent rights". They stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement ... [since] every contracting party was – in the last resort – the judge of its exercise of these rights".[66] Lest anyone consider this had not been an official position, the European Community had then communicated the same views to the GATT Contracting Parties through a written communication.[67] At that same meeting, the United States had supported the European Community's position. The United States had stated that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise in the view of the United States, since no country could participate in GATT if in doing so it

[62] GATT Council, Decision Concerning Article XXI of the General Agreement – Decision of 30 November 1982, L/5426 (2 December 1982).

[63] See e.g., WT/DS548/13.

[64] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

[65] GATT/CP.3/SR.22, p. 3.

[66] C/M/157, p. 10.

[67] Communication to the Members of the GATT Council, L/5319/Rev.1 (noting "the European Community and its Member States, Australia and Canada, wish to state the following for the information of members of the Council … (b) they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection").

gave up the possibility of using any measures, other than military, to protect its security interests".[68] It was striking that the US position on GATT Article XXI at the present meeting was consistent with the US position in 1982, when European actions had been challenged, and was consistent with the US position in 1949, when US actions had been challenged. It was only the *European* position that had changed today. But *nothing* had changed in the text of GATT Article XXI. The United States therefore saw no principled basis for the EU position at the present meeting.

10.4. The United States said that it was not the WTO's function, nor was it within its authority, to second guess a sovereign's national security determination. Members had not abdicated their responsibilities to their citizens to protect their essential security interests when they had formed the WTO. Because the United States had invoked GATT Article XXI, there was no basis for a WTO panel to review the claims of breach raised by the European Union. Nor was there any basis for a WTO panel to review the invocation of GATT Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. The United States nonetheless would take a few moments to express how misguided this request was in terms of the EU's own economic interests. As noted under the previous Agenda item, Members were well aware that the steel and aluminium sectors had been suffering under conditions of massive excess capacity. Members had recognized that this situation was untenable, and had resulted in a crisis for the global economic system. It was striking that this view had been expressed particularly forcefully by the European Union itself. For example, in the 2017 Global Steel Forum report prepared for the G20, the European Union had described the situation in crisis terms: "[g]lobal overcapacity has reached a tipping point – it is so significant that it poses an *existential threat* that the EU *will not accept*. This requires *urgent solutions* addressing its structural causes".[69] The United States agreed with the European Union that overcapacity "poses an existential threat" and "requires urgent solutions". The United States wondered how the European Union understood the terms "existential threat" and "urgent solutions", however. Because the United States understood "existential" as "relating to *existence*" and "urgent" as "requiring *immediate* action," the United States viewed the EU diagnosis as, in fact, *supporting* the US actions on steel and aluminium. Together with the European Union, the United States had also participated in the Global Steel Forum on Excess Capacity for years, but, in all honesty, no effective solutions had been found. And so, this ongoing "existential threat" calling for "urgent solutions" that the EU "will not accept" had in fact been going on for years, draining public support for an international trading system that permitted devastating economic harms to occur – *for years* – without effective remedies. The United States would welcome effective solutions and coordinated actions to address these problems. Rather than working together with the United States to address the source of non-market economic conditions, however, some Members that shared long-standing security relationships with the United States were working to challenge a US national security determination. This was a blatant misuse of the WTO dispute settlement system. The United States found it troubling and regrettable that the European Union would risk such damage to the WTO – contrary to the longstanding European position on GATT Article XXI. The United States had invoked GATT Article XXI for its measures taken pursuant to Section 232. The United States had implemented these measures only after long and careful analysis, and after all trading partners had had the chance to address US concerns. While the United States had acted in accordance with its commitments to protect its legitimate security interests, other Members had not. Rather than work with the United States, they had retaliated with tariffs designed to punish US companies and workers. The United States would provide remarks on these unjustified and WTO-inconsistent retaliatory tariffs under separate items on the Agenda of the present meeting. The United States wished to be clear: if the WTO were to undertake to review an invocation of GATT Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. For these reasons, the United States did not agree to establishment of the panel requested by the European Union at the present meeting. The United States would encourage European countries to consider carefully their broader economic, political, and security interests.

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

[68] Idem.

[69] Global Forum on Steel Excess Capacity Report, November 30, 2017, prepared under the direction of the Chair of the G20, para. 126.

## 11 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by Canada (WT/DS550/11)

11.1. The Chairperson drew attention to the communication from Canada contained in document WT/DS550/11. She then invited the representative of Canada to speak.

11.2. The representative of Canada said that Canada was disappointed that this dispute had not been resolved. It was inconceivable that exports of steel and aluminium products from Canada would be found to threaten US national security. Canada was therefore extremely concerned that the United States had used the national security exemption to justify imposing tariffs on exports of these products. These tariffs, imposed under the pretext of national security, were unacceptable and counterproductive. More broadly, Canada was very concerned that such protectionist, unilateral actions undermined the integrity of the global trading system. As Canada had repeatedly indicated to the United States, Canada was prepared to resolve this dispute at any stage if the US removed these protectionist tariffs. Canada therefore continued to urge the United States to do so. In the meantime, Canada saw no other option but to pursue dispute settlement and therefore requested the establishment of a panel. Further, Canada's position was that a single panel should be established under Article 9.1 of the DSU for the "United States – Certain Measures on Steel and Aluminium Products" disputes with China (DS544), the EU (DS548), Canada (DS550), Mexico (DS551), Norway (DS552), the Russian Federation (DS554) and Turkey (DS564).

11.3. The representative of the United States said that the United States was deeply disappointed that Canada had requested establishment of a panel in this dispute. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium articles posed to US national security. As Canada knew, the position of the United States for over 70 years had been that actions taken pursuant to Article XXI of the GATT 1994 were not subject to review by the WTO. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[70] As Canada also knew, it had also been the position of Canada that the invocation of Article XXI was not reviewable in dispute settlement. In the same 1982 GATT Council discussion in which the European Community had expressed its view that the invocation of Article XXI was self-judging, Canada had made a similar and unequivocal statement: "Canada's sovereign action was to be seen as a political response to a political issue" and "the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised" under GATT Article XXI.[71] Because the United States had invoked GATT Article XXI, there was no basis for a WTO panel to review the claims of breach raised by Canada. Nor was there any basis for a WTO panel to review the invocation of GATT Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. For these reasons, the United States did not agree to establishment of the panel requested by Canada at the present meeting. The United States noted that Canadian and US authorities had been engaging in constructive discussions towards resolving concerns surrounding these matters. The United States was hopeful that these discussions might be concluded satisfactorily.

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

## 12 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by Mexico (WT/DS551/11)

12.1. The Chairperson drew attention to the communication from Mexico contained in document WT/DS551/11. She then invited the representative of Mexico to speak.

12.2. The representative of Mexico said that Mexico welcomed the opportunity to speak at the present meeting to address the concerns raised by the measures adopted by the United States on

[70] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

[71] C/M/157, p. 10.

certain steel and aluminium products. Mexico considered that these measures raised not only legal but also systemic concerns. First, the US measures raised legal concerns in relation to the nature of safeguard measures, regardless of how that Member characterized its own measures and of the domestic legal basis that was relied upon for their adoption. This necessarily had an impact on the applicability of the Agreement on Safeguards and, therefore, on the rights and obligations of Members under this Agreement. Second, Mexico's legal concerns related to the nature and scope of Article XXI of the GATT 1994. That Article could be invoked by Members as an exception; this raised issues to do with the type of measures that would fall within the scope of such exception and the way in which Members could justify such measures under that Article. The US measures also raised systemic concerns, which stemmed notably from the US understanding of the relationship between national security issues and WTO dispute settlement. According to the US understanding, "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".[72] Mexico considered that this view was not coherent with the dispute settlement objectives and commitments of Members. This view would defeat the purpose and impede the functioning of the DSB and, consequently, of panels and the Appellate Body. It would also have an impact on Members' rights under the covered agreements, and, ultimately, would cause a significant crisis in the multilateral trading system. These legal and systemic concerns were of great significance. Mexico therefore requested the establishment of a panel, with standard terms of reference. Given that there were seven requests for the establishment of a panel to address the same measures adopted by the United States, a single panel should be established under Article 9.1 of the DSU. This panel should examine the compatibility of the measures adopted by the United States and address the concerns raised.

12.3. The representative of the United States said that the United States was disappointed that Mexico had requested establishment of a panel in this dispute. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium products posed to US national security. As the United States had explained under previous Agenda items, the position of the United States for over 70 years had been that actions taken pursuant to Article XXI of the GATT 1994 were not subject to review by the WTO. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[73] Because the United States had invoked GATT Article XXI, there was no basis for a WTO panel to review the claims of breach raised by Mexico. Nor was there any basis for a WTO panel to review the invocation of GATT Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. For these reasons, the United States did not agree to establishment of the panel requested by Mexico at the present meeting. The United States noted that Mexican and US authorities had been engaging in constructive discussions towards resolving concerns surrounding these matters. The United States was hopeful that these discussions might be concluded satisfactorily.

12.4. The representative of Japan said that Japan wished to make a statement in relation to Agenda items 9 to 14 and 19. The United States had explained that tariffs on imports of steel and aluminium products imposed pursuant to Section 232 of the Trade Expansion Act of 1962 had been necessary to adjust the imports of steel and aluminium articles that threatened to impair the national security of the United States. Japan recalled the Ministerial Declaration of November 1982 that had been made in the context of an increasing number of inadequate and inward-looking trade measures and under continuing pressures for protective actions of governments. The Ministerial Declaration of November 1982 had been the result of efforts by GATT Contracting Parties to overcome such threats to the multilateral trading system. Members had undertaken individually and jointly to abstain from taking restrictive trade measures for reasons of a non-economic character not consistent with the GATT. Japan saw some resemblance between that situation and the current circumstances in which Members faced similar challenges to international trade and threats to the multilateral trading system. Japan called on Members to recall the commitment that was made to overcome such challenges. In line with this commitment, only with extreme caution could Members invoke the

[72] Communication from the United States, dated 15 June 2018, United States – Certain Measures on Steel and Aluminium Products, WT/DS551/10, 6 July 2018.

[73] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

security exceptions provision. Japan expressed serious concerns about the unilateral nature of the US additional tariff measures and their inconsistency with the WTO Agreement. Japan emphasized that any trade-restrictive measures inconsistent with the WTO Agreement undermined the rules-based multilateral trading system. In light of the far-reaching implications of the US measures, Japan wished to reiterate that all trade measures had to be consistent with the WTO Agreement. Japan also considered that once a panel was established, a claim based on national security, if invoked, was subject to review by the panel. Members who invoked GATT Article XXI had to explain how the requirements under GATT Article XXI were met. Based on their arguments and the facts presented by the parties, the panel could then examine and decide whether the measures at issue complied with that Article.

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

## 13 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by Norway (WT/DS552/10)

13.1. The Chairperson drew attention to the communication from Norway contained in document WT/DS552/10. She then invited the representative of Norway to speak.

13.2. The representative of Norway said that Norway had submitted its request for the establishment of a panel on 18 October 2018 in this dispute regarding US additional tariffs on certain steel and aluminium products of 25% and 10% respectively. In making this request, Norway joined six other co-complainants in seeking to bring US steel and aluminium tariffs before a WTO panel. This collective resort to dispute settlement reflected the serious concern of the Membership over the US measures. It also reflected trust and confidence in the WTO as a forum for resolving international trade disputes. The seven panel requests reflected a shared conviction among the co-complainants that the US steel and aluminium tariffs were inconsistent with US WTO obligations. In particular, the tariffs failed to respect US obligations under the Agreement on Safeguards. Norway appreciated that the United States did not characterize its steel and aluminium tariffs as "safeguard measures" as a matter of US municipal law. However, the question was not one of municipal law. Rather, the question was whether, as a matter of WTO law, the steel and aluminium tariffs constituted "safeguard measures" under the Agreement on Safeguards. It would fall to a WTO panel to decide which WTO obligations applied to the US steel and aluminium tariffs, based on an objective assessment of the "content and substance" of the measures, and on the applicability of the covered agreements. The US steel and aluminium tariffs also violated cornerstone principles of the GATT 1994. The United States imposed duties on imports at levels higher than those provided for in the US Schedule of Concessions. Moreover, the United States had granted select Members exemptions to its steel and aluminium tariffs. No such exemption had been extended to the seven co-complainants. The US measures, therefore, involved a material difference in the treatment of imports from different Members. The measures imposed by the United States had affected Norwegian exports of steel and aluminium since they had come into effect on 23 March 2018. Norway was deeply concerned about US action in this dispute, and the negative impact it would have on the WTO system, if left un-challenged. That is why Norway's reasons for bringing this dispute went beyond the actual impact of the US measures on Norway's exports of steel and aluminium. Norway's panel request was equally linked to its primary interest in maintaining, as a matter of principle, the rules-based multilateral trading system. Norway was worried that the United States would adopt measures so evidently inconsistent with obligations fundamental to the rules-based trading system while offering a purported justification that was so evidently divorced from real-world security concerns. Norway appreciated the sensitivity of the matters raised in this dispute. However, Norway was confident that a WTO panel would be well-equipped to assess the co-complainants' claims, using the rules and procedures set out in the DSU and the covered agreements. This was not, after all, the first sensitive dispute to come to the WTO. Indeed, Norway valued the WTO dispute settlement system precisely because of its tried and tested ability to handle sensitive disputes. Norway had requested formal dispute settlement consultations with the United States on this matter on 12 June 2018, and had held consultations with the United States on 19 July 2018. Unfortunately, such consultations had failed to resolve the dispute. Accordingly, Norway requested that a panel be established, with standard terms of reference. Like other co-complainants and with reference to Article 9.1 of the DSU, Norway requested the establishment of a single panel to examine all seven complaints brought at the present meeting in relation to the same US measures on imports of steel and aluminium, as all seven panel requests were related to the same matter.

13.3. The representative of the United States said that the United States was disappointed that Norway had submitted a panel request in this dispute. This action was misdirected. It did not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminium sectors. In fact, rather than support the international trading system by taking action to resolve the underlying concerns, Norway was undermining the trading system by asking the WTO to do what it had never been intended to do. It was simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium products posed to US national security. In the US reply to the consultation requests challenging the Section 232 measures, the United States had clearly stated: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".[74] The United States therefore did not understand the purpose of this request for panel establishment, seeking WTO findings that the United States had breached certain WTO provisions. The WTO could not, consistent with GATT Article XXI, consider those claims or make the requested findings. The clear and unequivocal US position, for over 70 years, was that issues of national security were not matters appropriate for adjudication in the WTO dispute settlement system. No WTO Member could be surprised by this view. For decades, the United States, as well as other WTO Members, had consistently held the position that actions taken pursuant to GATT Article XXI were not subject to review in GATT or WTO dispute settlement. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[75] As noted previously, in 1982, when certain European actions had been before the GATT Council, the European Economic Community and its member States stated that GATT Article XXI had been a reflection of a Member's "inherent rights". They had stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights".[76] In that same discussion, Norway had supported the EEC and its member States, Canada, and Australia, in their invocation of GATT Article XXI, stating that "in taking the measures … [they] did not act in contravention of the General Agreement".[77] As the United States had also noted, the United States in the same meeting had also supported the European position, stating that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis".[78] The position of the United States remained the same in 2018 as it was in 1982, 1949, and indeed during the negotiation of the GATT itself. Because the United States had invoked GATT Article XXI, there was no basis for a WTO panel to review the claims of breach raised by Norway. Nor was there any basis for a WTO panel to review the invocation of GATT Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. The United States wished to be clear: if the WTO were to undertake to review an invocation of GATT Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. For these reasons, the United States did not agree to establishment of the panel requested by Norway at the present meeting.

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

[74] See e.g., WT/DS548/13.

[75] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

[76] C/M/157, p. 10.

[77] C/M/157, p. 10.

[78] Idem.

## 14 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by the Russian Federation (WT/DS554/17)

14.1. The Chairperson drew attention to the communication from the Russian Federation contained in document WT/DS554/17. She then invited the representative of the Russian Federation to speak.

14.2. The representative of the Russian Federation said that Russia had requested consultations with the United States on 29 June 2018 concerning the measures that the United States had introduced to adjust imports of steel and aluminium into the United States. These measures included the imposition of additional *ad valorem* import duties on certain steel and aluminium products and the exemption of certain Members from these measures. The US measures in this dispute adversely affected exports of these products from Russia to the United States. Consultations had been held on 30 August 2018 with a view to reaching a satisfactory settlement of the matter. Unfortunately, these consultations had failed to resolve this dispute. Russia fully shared the view expressed by other Members who had submitted panel requests regarding the same US measures that the unprecedented number of complainants was a sign towards a shared understanding of inconsistency of the US measures with the cited agreements. Therefore, Russia requested, pursuant to Article 6 of the DSU, that the DSB establish a panel to examine this dispute, with standard terms of reference as set forth in Article 7.1 of the DSU. Taking into account the fact that there were seven analogous requests for the establishment of a panel against the US measures on steel and aluminium, Russia requested the establishment of a single panel under Article 9.1 of the DSU.

14.3. The representative of the United States said that the United States referred to the statement made under the previous Agenda item. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium articles posed to US national security. In the US reply to the consultation requests challenging the 232 measures, the United States had clearly stated: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".[79] The United States therefore did not understand the purpose of this request for panel establishment, seeking WTO findings that the United States had breached certain WTO provisions. The WTO could not, consistent with GATT Article XXI, consider those claims or make the requested findings. The United States had noted that, for decades, the US position had been that actions taken pursuant to GATT Article XXI were not subject to review in GATT or WTO dispute settlement. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[80] The position of the United States remained the same in 2018 as it was in 1982, 1949, and indeed during the negotiation of the GATT itself. In requesting this panel, however, Russia did not even act consistently with the view it had expressed in 2017, *less than one year ago*. In another dispute, the United States had agreed with Russia's understanding of GATT Article XXI that a determination that an action was necessary for the protection of a Member's essential security interests, and a determination of what were those essential security interests, was at the sole discretion of that Member.[81] The text of GATT Article XXI had not changed in the past year – only Russia's interests had. That was not a sound basis for understanding WTO rules, nor for preserving the legitimacy of the WTO's dispute settlement system. For these reasons, the United States did not agree to establishment of the panel requested by Russia at the present meeting.

14.4. The representative of the Russian Federation said that Russia wished to note that the references made at the present meeting by the United States to Russia's position related to another dispute. That other dispute had nothing to do with the present dispute. The concrete situation caused by the US measures had no relevance to any circumstances, measures or other factors considered in any other dispute to which Russia was a party. At the present meeting, the United States made a

[79] See e.g., WT/DS548/13.

[80] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

[81] See, e.g., US Third-Party Submission Regarding GATT Article XXI (Nov. 7, 2017) (available at https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-35).

statement in respect of China's request for the establishment of a panel on the same matter. In its statement, the United States had blamed China for its economic policies. This reinforced Russia's view that the US measures on steel and aluminium were a reaction to purely economic factors. Russia's understanding was that the United States itself recognized that the problems it had been trying to solve with its measures were about steel and aluminium markets and economic factors that had been affecting them. Russia believed that the US additional duties on steel and aluminium were in essence safeguard measures. They were aimed at revitalizing the US steel and aluminium industries by means of squeezing out competitive imports. The nature of the US measures and circumstances under which they were taken left no doubt that they were in fact safeguards. It was obvious to everyone, irrespective of the way in which the United States characterized its own measures.

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

## 15 CANADA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

### A. Request for the establishment of a panel by the United States (WT/DS557/2)

15.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS557/2. She then invited the representative of the United States to speak.

15.2. The representative of the United States said that under previous Agenda items, certain Members had claimed that the United States was breaching WTO rules. That view was erroneous as the United States had explained that US actions taken pursuant to Section 232 of the 1962 Trade Expansion Act were fully justified under Article XXI of the GATT 1994 as national security actions. At the same time, several of those same Members were unilaterally retaliating against the United States. They pretended that the US actions under Section 232 were so-called "safeguards," and further pretended that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Safeguards Agreement. This was hypocritical. Just as those Members appeared to be ready to undermine the dispute settlement system by throwing out the plain meaning of GATT Article XXI and 70 years of practice, so too were they ready to undermine the WTO by suggesting they were following WTO rules while taking measures blatantly against those rules. And Members knew from their own actions that many of these Members did not seriously believe that the US actions under Section 232 were safeguard measures. Canada had not even notified the Council for Trade in Goods of its suspension of concessions and other obligations, as it would have been required to do under Article 12.5 of the WTO Agreement on Safeguards if its duties had been in response to a US safeguard action. Thus, even had its action been permissible under the Safeguards Agreement, which it was not, Canada had not even followed the WTO rules that would have applied to that action. To be clear: Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking GATT Article XIX as a basis for its Section 232 actions. Thus, GATT Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232, and the United States had not utilized its domestic law on safeguards to take action under Section 232. Because the United States was not invoking GATT Article XIX, there was no basis for another Member to contend that GATT Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of Canada's WTO commitments and were applied only to the United States, contrary to Canada's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter, with standard terms of reference.

15.3. The representative of Canada said that Canada's countermeasures responded directly to the unwarranted and unprecedented unilateral trade restrictions imposed by the United States against Canadian steel and aluminium exports. By taking this action, Canada had imposed trade measures on US imports equal to the value of Canadian exports affected by US steel and aluminium tariffs. The US tariffs, ostensibly taken on the basis of national security, negatively affected Canadian and US workers and businesses and threatened to undermine the integrity of the global trading system. Canada regretted having to take countermeasures to respond to these US tariffs. However, Canada was confident that its countermeasures were fully consistent with Canada's international trade

obligations. For these reasons, Canada could not accept that a panel be established at the present meeting in this dispute.

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

## 16 CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

### A. Request for the establishment of a panel by the United States (WT/DS558/2)

16.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS558/2. She then invited the representative of the United States to speak.

16.2. The representative of the United States said that under previous Agenda items, certain Members had claimed that the United States was breaching WTO rules. That view was erroneous as the United States had explained that US actions taken pursuant to Section 232 of the 1962 Trade Expansion Act were fully justified under Article XXI of the GATT 1994 as national security actions. At the same time, some of those very same Members were unilaterally retaliating against the United States, based on the pretence that the actions taken by the United States were so-called "safeguards". Those Members engaged in the further pretence that their unilateral, retaliatory duties constituted a suspension of substantially equivalent concessions pursuant to the WTO Safeguards Agreement. This was hypocritical. Just as those Members eagerly sought to undermine the dispute settlement system by throwing out the plain meaning of Article XXI and 70 years of practice, so too were they prepared to undermine the WTO by taking measures blatantly against WTO rules, all the while pretending they were following the rules. China was a prime example. China pretended that it was entitled to withdraw substantially equivalent concessions pursuant to the Safeguards Agreement, but China had not complied with the most basic elements of the Safeguards Agreement that would be necessary for such action. Suspension of concessions and other obligations under the Safeguards Agreement required a multi-step process that had to take place within 90 days from the application of a safeguard measure. That process entailed certain procedures and considerations that China had not satisfied to put its suspension of concessions into effect. If China had truly considered the US actions under Section 232 to be safeguards, it would certainly have respected an obligation to allow 30 days for consultations and to wait 30 days to implement its suspension of concessions. But China had not complied with either of these obligations. Moreover, China had not even attempted to address whether its action was in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there had been an absolute increase in imports, the right to suspend substantially equivalent concessions under the Safeguards Agreement could not be exercised for the first three years of the safeguard measure. China's blatant disregard for these provisions of the Safeguards Agreement proved that China was not serious about its contention that the US actions under Section 232 were safeguard measures or that China was exercising a right under the Safeguards Agreement. To be clear: Article XIX of the GATT 1994 was not applicable to the US actions under Section 232. GATT Article XIX could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking GATT Article XIX as a basis for its Section 232 actions. Thus, GATT Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232, and the United States had not utilized its domestic law on safeguards to take the actions under Section 232. Because the United States was not invoking GATT Article XIX, there was no basis for China to pretend that GATT Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. China's additional, retaliatory duties were nothing other than duties in excess of China's WTO commitment and were applied only to the United States, contrary to its most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter, with standard terms of reference.

16.3. The representative of China said that China wished to express its strong disappointment with the US decision to request the establishment of a panel to examine the subject matter of this dispute. The United States had filed its request for consultations with China on 16 July 2018. China had held sincere consultations with the United States on 29 August 2018 and had positively responded to the relevant questions. China had reiterated its steadfast stance on respecting WTO rules and abiding by its commitments related to its accession to the WTO. It was well known that, on 23 March 2018, the United States had imposed 25 percent and 10 percent of additional import duties respectively on certain steel and aluminium products from China. In its statement previously made under Agenda

item 9, China had reiterated that US measures for certain steel and aluminium products were in essence safeguard measures. Since the United States had refused to hold consultations with China for trade compensation under the Agreement on Safeguards and the GATT 1994, China had had little other choice but to introduce rebalancing measures under the relevant provisions thereof. At the present meeting, the United States had repeatedly used non-market economy and overcapacity labels to further cover its safeguard measures already disguised as national security measures. China did not know in how many layers the United States was trying to dress its additional duties. China did know, however, that the DSB was mandated to strip any disguise away from protectionist measures and to recommend bringing such measures into conformity with WTO rules. As China had stated, China's tariff measures were taken pursuant to the Safeguards Agreement to offset US safeguard measures disguised as national security measures. Therefore, China did not agree to the establishment of a panel in this dispute.

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

## 17 EUROPEAN UNION – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

### A. Request for the establishment of a panel by the United States (WT/DS559/2)

17.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS559/2. She then invited the representative of the United States to speak.

17.2. The representative of the United States said that under previous Agenda items, certain Members had claimed that the United States was breaching WTO rules. That view was erroneous as the United States had explained that US actions taken pursuant to Section 232 of the 1962 Trade Expansion Act were fully justified under Article XXI of the GATT 1994 as national security actions. At the same time, some of those very same Members were unilaterally retaliating against the United States, based on the pretence that the actions taken by the United States were so-called "safeguards". Those Members engaged in the further pretence that their unilateral, retaliatory duties constituted a suspension of substantially equivalent concessions pursuant to the WTO Safeguards Agreement. This was hypocritical. Just as those Members eagerly sought to undermine the dispute settlement system by throwing out the plain meaning of Article XXI and 70 years of practice, so too were they prepared to undermine the WTO by taking measures blatantly against WTO rules, all the while pretending they were following the rules. The European Union's willingness to disregard WTO rules was apparent in its characterization of the US actions under Section 232 as safeguard measures. This fiction required the European Union to ignore the facts that contradicted its narrative. The US actions on steel and aluminium had been taken under Section 232, a national security statute that expressly related to imports that threatened to impair the national security of the United States. The President of the United States had made his determinations on the basis of lengthy and detailed reports by the responsible government department. The US actions had not been taken pursuant to Section 201 of the Trade Act of 1974 that authorized the imposition of a safeguard measure under US domestic law. To be clear: Article XIX of the GATT 1994 on safeguards could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking GATT Article XIX as a basis for its Section 232 actions. Thus, GATT Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking GATT Article XIX, another Member could not simply act as if GATT Article XIX had been invoked and use that sham pretence to apply safeguards rules that were simply inapplicable. The European Union's additional, retaliatory duties were nothing other than duties in excess of the EU's WTO commitments and were applied only to the United States, contrary to its most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter, with standard terms of reference.

17.3. The representative of the European Union said that the EU would speak only under this Agenda item, and did not and would not take the floor under the two preceding and the subsequent Agenda items that all concerned panel requests filed by the United States against measures by various Members in response to the same US steel and aluminium measures. This was, again, in order to avoid repetition at the present and already sufficiently long DSB meeting. The spirit of the statement which the EU would make also applied to the other previously mentioned and related Agenda items. The United States was of course entitled to bring this matter to dispute settlement in

the WTO. However, the EU firmly believed that the EU measures were fully justified. At the present meeting, Members already had had the opportunity to discuss the import restrictions on steel and aluminium which the United States had adopted on 8 March 2018. The EU could reassure all Members that it had not escaped its attention that the United States had relied on Section 232 of the 1962 Trade Expansion Act for these measures. Respect for international law, however, was not and could not be constrained by domestic law. Hence, the qualification of these US measures had to take place based on objective criteria. Rather than displaying any element that could qualify under the GATT's security exceptions, the US measures served to protect the allegedly struggling domestic steel and aluminium industries against competing imports. The United States had taken these measures in an emergency action that had implied the suspension notably of its tariff concessions which had stood in the way of the measures adopted. These were all essential elements of what the WTO Agreement considered a safeguard measure. Or, put differently, he said that "one has to acknowledge that if something looks like a safeguard, works like a safeguard and quacks like a safeguard, then it probably also is a safeguard". Safeguard measures gave rise to suspension rights under Article 8 of the WTO Agreement on Safeguards. The fact that the United States had called its measures differently and had respected none of the procedures and requirements prescribed for the legal imposition of safeguard measures could not possibly put the United States in the advantageous position of escaping the permitted response to a safeguard. For these reasons, the EU was confident that it would prevail in this dispute, and that its actions would be declared a permitted and proportionate response to the type of US trade policy action Members had seen in this dispute. The EU therefore did not accept the establishment of a panel at the present meeting in this dispute.

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

## 18 MEXICO – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

### A. Request for the establishment of a panel by the United States (WT/DS560/2)

18.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS560/2. She then invited the representative of the United States to speak.

18.2. The representative of the United States said that under previous Agenda items, certain Members had claimed that the United States was breaching WTO rules. That view was erroneous as the United States had explained that US actions taken pursuant to Section 232 of the 1962 Trade Expansion Act were fully justified under Article XXI of the GATT 1994 as national security actions. At the same time, several of those same Members were unilaterally retaliating against the United States, based on the pretence that the US actions under Section 232 were so-called "safeguards". Those Members engaged in the further pretence that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Safeguards Agreement. This was hypocritical. Just as those Members appeared to be ready to undermine the dispute settlement system by throwing out the plain meaning of GATT Article XXI and 70 years of practice, so too were they prepared to undermine the WTO by taking measures blatantly against WTO rules while pretending they were following the rules. And Members knew from their own actions that many of these Members did not seriously believe that the US actions under Section 232 were safeguard measures. Mexico had not even notified the Council for Trade in Goods of its suspension of concessions and other obligations, as it would have been required to do under Article 12.5 of the WTO Agreement on Safeguards if its duties had been in response to a US safeguard action. Thus, even had its action been permissible under the Safeguards Agreement, which it was not, Mexico had not even followed the WTO rules that would have applied to that action. To be clear: Article XIX of the GATT 1994 was not applicable to US actions under Section 232. Article XIX could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking GATT Article XIX as a basis for its Section 232 actions. Thus, GATT Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232, and the United States had not utilized its domestic law on safeguards to take action under Section 232. Because the United States was not invoking GATT Article XIX, there was no basis for Mexico to pretend that GATT Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The increased, retaliatory duties were nothing other than duties applied only to the United States, contrary to Mexico's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter, with standard terms of reference.

18.3. The representative of Mexico said that with regard to the request for the establishment of a panel by the United States in this dispute, Mexico considered that this dispute should not have been filed in the WTO, as it was based on a measure that had been adopted in exercise of a right expressly conferred by the North American Free Trade Agreement (NAFTA). In this regard, any concern arising from the application of the measures at issue should be settled within the relevant dispute settlement system and on the basis of the applicable agreement. The current situation was regrettable. On the one hand, the United States had adopted measures on the alleged grounds of "national security" and had indicated that these measures were not subject to dispute settlement. On the other hand, the United States challenged the measures at issue adopted by Mexico. Mexico was prepared to defend the consistency of its measures with the WTO rules. However, for the reasons stated above, Mexico was not in a position to agree to the establishment of the panel requested by the United States.

18.4. The representative of Japan said that Japan wished to make a statement in relation to Agenda items 15 to 18. The measures at issue in these disputes seemed to be counteractions to the US measures addressed under Agenda items 9 to 14. Although the United States had not notified its Section 232 measures on steel and aluminium pursuant to the Agreement on Safeguards, these measures appeared to have the characteristics of the measures to which Article XIX of GATT 1994 and the Agreement on Safeguards were applicable. In this respect, Japan noted that on 18 May and 20 June 2018, Japan had notified the Council for Trade in Goods of the proposed suspension of concessions and other obligations referred to in paragraph 2 of Article 8 of the Agreement on Safeguards, in respect of which Japan reserved its rights.

18.5. The representative of Brazil said that Brazil wished to make a statement which applied to Agenda items 15-18. Brazil considered that regardless of the justification, unilateral measures taken by Members undermined the proper procedures set out in the covered agreements to deal with trade disputes, as well as the rules-based system as a whole. In that sense, Brazil wished to recall that Article 23 of the DSU provided that Members wishing to seek the redress of a violation or other nullification or impairment of benefits "shall have recourse to, and abide by, the rules and procedures of this Understanding". In the present disputes, however, it was important to keep in mind that the measures that gave rise to the measures at issue in these disputes were devoid of any legal justification and reflected a clear protectionist intent. The reaction to those illegal underlying measures had to be seen in a different light than in regular situations. At the same time, Brazil welcomed the fact that the United States, with these panel requests, showed renewed confidence in the dispute settlement system. These disputes were a good example of the need for predictability, harmonious decisions and interpretations of legal provisions.

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

## 19 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

### A. Request for the establishment of a panel by Turkey (WT/DS564/15)

19.1. The Chairperson drew attention to the communication from Turkey contained in document WT/DS564/15. She then invited the representative of Turkey to speak.

19.2. The representative of Turkey said that Turkey regretted being obliged to initiate this dispute. However, the United States had left Turkey with no choice but to do so. Turkey had sought to avoid bringing this dispute before the WTO and had engaged in good-faith discussions with the United States. Unfortunately, this had been to no avail. It was deeply regrettable that the United States had decided to resort to unilateral measures on steel and aluminium, without a legal basis, for obviously protectionist purposes. The United States had effectively taken a safeguard measure, but without observing the requirements of Article XIX of the GATT 1994 and of the Agreement on Safeguards. As others had also underlined, Members were not bound by the US characterization of the measures, since the US measures were driven by economic purposes and exhibited all constitutive elements of a safeguard measure. The US measures also violated other fundamental principles of the WTO, including Articles I, II and XI of the GATT. The invalid national security concerns proffered by the United States could not be accepted. If these arguments were accepted, the entire edifice of international trade law, carefully built over decades, would crumble under the weight of discretionary, arbitrary measures that would remove all security and predictability from the system. In addition, Turkey was particularly concerned about these measures because Turkey

had been singled out for much higher tariffs than other Members, in yet another violation of the MFN principle. For no obvious reason – and without any meaningful explanation by the United States – Turkey was subject to steel duties that were double those imposed on other Members. If the purpose of these duties was to protect the US steel and aluminium industry, then why was Turkey being singled out for extra-high duties? Was there something special about Turkish steel that harmed the US industry more than steel from any other country? This was just another entirely arbitrary element of the US measures. It was yet another reason why these duties could not stand. Turkey also firmly rejected the US contention stated under a previous Agenda item at the present meeting that a WTO panel did not have jurisdiction over the matter because the dispute involved national security measures. The US measures at issue were patently trade-related. Tariffs and quantitative restrictions were part of the most basic elements of a government's trade policy. Trade measures such as these therefore had to be challengeable at the WTO and had to be subject to the jurisdiction of WTO panels. These measures could not be removed entirely from the ambit of WTO dispute settlement, simply because the responding Member had invoked GATT Article XXI. Turkey regretted having to initiate this dispute. However, Turkey had to act to preserve its rights under the covered agreements, rights that the United States had chosen to disregard. Turkey therefore requested the establishment of a panel pursuant to Article 6 of the DSU. Like the other Members who had made similar panel requests related to the same US measures, Turkey requested the establishment of a single panel pursuant to Article 9.1 of the DSU.

19.3. The representative of the United States said that the United States referred to the statements made under Agenda items 13 and 14. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium articles posed to US national security. In the US reply to the consultation requests challenging the 232 measures, the United States had clearly stated: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".[82] The United States therefore did not understand the purpose of this request for panel establishment, seeking WTO findings that the United States had breached certain WTO provisions. The WTO could not, consistent with GATT Article XXI, consider those claims or make the requested findings. The United States would welcome effective solutions and coordinated actions to address the problems created by non-market economic policies and practices creating massive excess capacity in the steel and aluminium sectors. Rather than working together with the United States to address the source of non-market economic conditions, however, some Members that shared long-standing security relationships with the United States were working to challenge a US national security determination. This was a blatant misuse of the WTO dispute settlement system. While the United States had acted in accord with its commitments to protect its legitimate security interests, other WTO Members had not. Rather than work with the United States, they had retaliated with tariffs designed to punish US companies and workers. The United States had recently requested supplemental WTO consultations with Turkey on its unjustified amended retaliatory tariffs. The United States wished to be clear: if the WTO were to undertake to review an invocation of GATT Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. For these reasons, the United States did not agree to establishment of the panel requested by Turkey at the present meeting.

19.4. The representative of the Bolivarian Republic of Venezuela said that Venezuela wished to express its concerns regarding Agenda items 9 to 14 and 19 concerning the protectionist and unilateral measures that underpinned these Agenda items. These measures violated the multilateral trade rules, including the MFN obligation which Turkey had alluded to in its statement made at the present meeting, and which affected developing countries in particular.

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

[82] See e.g., WT/DS548/13.

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

20.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. She drew attention to the proposal contained in document WT/DSB/W/609/Rev.5 and then invited the representative of Mexico to speak.

20.2. The representative of Mexico said that the delegations referred to in document WT/DSB/W/609/Rev.5 had agreed to submit the joint proposal dated 13 September 2018 to launch the selection processes for the vacancies in the Appellate Body. Mexico, on behalf of these 68 Members, wished to make a joint statement. The considerable number of Members that had submitted this joint proposal reflected a common concern with the current situation in the Appellate Body, which was seriously affecting its functioning and the overall dispute settlement system against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body and the dispute settlement and multilateral trading systems. It was therefore Members' obligation to proceed with the launching of the selection processes to appoint new Appellate Body members, as submitted at the present meeting. As stated in document WT/DSB/W/609/Rev.5, this proposal sought to: "(i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy that resulted from the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates". The proponents were flexible in the determination of the deadlines for the selection processes, but Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading and the dispute settlement systems.

20.3. The representative of Costa Rica, speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC), wished to reiterate the position of the GRULAC regarding the delicate situation that resulted from the deadlock in the AB selection processes. Costa Rica stressed the GRULAC's serious concern about this situation which affected the smooth functioning of one of the central bodies of the WTO. The delay in launching the AB selection processes meant failing to comply with an existing mandate, and implied a blatant breach of a legal obligation set out in a covered agreement. Costa Rica was aware that concerns that had been raised with respect to the functioning of the dispute settlement system and to some specific issues regarding a decision-making process, and that these concerns were preventing the start of the AB selection processes. However, the search for a solution to these concerns should not prevent the system from continuing to function. A proper interpretation of Article 17 of the DSU, read together with Article 2 of the DSU, would not suggest the need for positive consensus in order to launch the selection process aimed at filling the vacancies in the Appellate Body. Costa Rica requested the Chairperson to continue to seek a solution to this matter while making use of all the WTO's resources.

20.4. The representative of China said that China echoed the statement made by Mexico on behalf of the 68 co-sponsoring Members. China was disappointed that the efforts to launch the AB selection processes had, once again, been frustrated by one Member's persistent and concern-driven blockage. He said that the situation was worsening as the United States had blocked the reappointment of Mr. Shree Servansing. He said that the Appellate Body was the irreplaceable component of the WTO dispute settlement mechanism. It greatly contributed to the effective resolution of disputes and to the stability and predictability of the multilateral trading system. Ensuring the integrity and well-functioning of the Appellate Body served the common interests of all Members. Article 17.2 of the DSU clearly stated that: "vacancies shall be filled as they arise". The prompt initiation of the AB selection processes was the responsibility and obligation that had to be

undertaken by all Members. China believed that when Members had different views on any specific concern, discussions and negotiations was the only way forward. It was unjustified for any Member to attach any precondition to the launch of the AB selection processes. At present, the Appellate Body was in crisis. Currently, there were only three Appellate Body members left. If Members went along this path, they would face an unprecedented situation. One thing was clear: delaying the AB selection processes would adversely impact the operation of the WTO appellate review mechanism and the functioning of the multilateral trading system. Given that the aftermath would be borne by every Member, Members needed to launch the AB selection processes as soon as possible so that the operation of the Appellate Body could be ensured. It was regretful that the United States continuously refused to engage in meaningful discussions after having raised its concerns with respect to the functioning of the Appellate Body. Once more, China urged the United States to meet its commitments under the WTO Agreements and to interpret all WTO rules in good faith.

20.5. The representative of the United States said that the United States wished to thank the Chairperson for her continued work on these issues. As the United States had explained in prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at the DSB meeting on 27 August 2018, for more than 15 years, across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's disregard for the rules set by Members. Through persistent overreaching, the WTO Appellate Body had been adding obligations that were never agreed by the United States and other Members. The 2018 US Trade Policy Agenda had outlined several longstanding US concerns.[83] The United States had raised repeated concerns that appellate reports had gone far beyond the text setting out WTO rules in varied areas, such as subsidies, anti-dumping duties, anti-subsidy duties, standards and technical barriers to trade and safeguards, thereby restricting the ability of the United States to regulate in the public interest or protect US workers and businesses against unfair trading practices. And as the United States had explained under an earlier Agenda item, the Appellate Body had issued advisory opinions on issues not necessary to resolve a dispute. Furthermore, the United States had explained that the Appellate Body had reviewed panel fact-finding despite appeals having been limited to legal issues. And the Appellate Body had asserted that panels had to follow its reports although Members had not agreed to a system of precedent in the WTO. And the Appellate Body had continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules. And for more than a year, the United States had been calling for Members to correct the situation where the Appellate Body acted as if it had the power to permit ex-Appellate Body members to continue to decide appeals even after their terms of office – as set by Members – had expired. This so-called "Rule 15" of the Working Procedures for Appellate Review was, on its face, another example of the Appellate Body's disregard for the WTO's rules. US concerns had not been addressed. When the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all Members who cared about having the agreements respected as they had been negotiated and agreed. The United States would continue to insist that WTO rules had to be followed by the WTO dispute settlement system, and would continue its efforts and discussions with Members and with the Chairperson to seek a solution on these important issues.

20.6. The representative of Canada said that Canada deeply regretted that the DSB had been unable to fulfil its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the four current vacancies, taking into account the recent departure of Mr. Servansing. Canada noted that the serious effect of these vacancies on the ability of the Appellate Body to function could not be overstated. Canada was pleased to join the proposal contained in document WT/DSB/W/609/Rev.5 and urged the DSB to adopt it without further delay. The failure to launch the AB selection processes would only prolong the delays that necessitated recourse to Rule 15 of the Working Procedures for Appellate Review, about which the United States had expressed concerns. Like other Members, Canada was disappointed that the United States had linked the start of the AB selection processes to the resolution of certain procedural concerns it had shared with the Membership. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that the United States had raised. Canada remained committed to working with other interested Members –

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

including the United States – with a view to finding a way to address those concerns in order to allow the AB selection processes to start and be completed as soon as possible.

20.7. The representative of Pakistan said that Pakistan wished to register, once again, its concern over the challenging situation faced by the WTO dispute settlement system. Pakistan wished to reiterate the sense of urgency in the face of the current situation. Pakistan believed that the time had come for all Members to start working out a solution that would allow for the smooth functioning of the WTO dispute settlement mechanism. Pakistan, being a co-sponsor of the Mexican proposal contained in document WT/DSB/W/609/Rev.5, fully supported that proposal and called on Members to agree to it.

20.8. The representative of Thailand said that Thailand wished to thank Mexico and those Members who had co-sponsored the proposal. Thailand supported the launching of the AB selection processes as soon as possible. Thailand wished to reiterate its serious systemic concern over the AB impasse, which had threatened to undo the WTO's rules-based multilateral trading system. Thailand remained committed to working constructively with all Members to resolve this matter as a priority.

20.9. The representative of the European Union said that the EU wished to refer to its statements on this issue made at previous DSB meetings, starting in February 2017. With each passing month, the gravity and urgency of the situation increased. Members had a shared responsibility to resolve this issue as soon as possible. The EU wished to thank all Members who co-sponsored the proposal. The EU invited all other Members to endorse this proposal, so that the AB appointments could be made as soon as possible.

20.10. The representative of Singapore said that Singapore wished to refer to its statements made at previous DSB meetings. Singapore wished to reiterate its serious systemic concerns on the failure to launch the AB selection processes. With the expiry of the term of an Appellate Body member on 30 September 2018, the Appellate Body was now down to three members, which was the bare minimum to hear and decide on appeals. Given the strain that the Appellate Body was under, Singapore called on Members to bear this in mind when considering the filing of appeals. Systemic issues which had been raised could be discussed in a separate process. In this regard, Singapore appreciated and welcomed the efforts of Members who had put forth proposals and ideas in order to unblock the impasse. Singapore stood ready to engage constructively and collaboratively with other Members, as well as the Chairperson, to help resolve this impasse.

20.11. The representative of Japan said that Japan supported the proposal contained in document WT/DSB/W/609/Rev.5, and wished to refer to its statements made at previous DSB meetings on this matter.

20.12. The representative of Chinese Taipei said that Chinese Taipei wished to refer to its statements made at previous DSB meetings on this matter. Chinese Taipei supported the initiation of the AB selection processes as soon as possible.

20.13. The representative of Australia said that Australia wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its serious concerns regarding the DSB's inability to commence the AB selection processes. Australia remained committed to resolving this impasse as a priority, and was ready and willing to work with other Members on pragmatic solutions.

20.14. The representative of Norway said that Norway regretted, once again, that the United States could not join the consensus and support the proposal to launch the AB selection processes. Norway wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its willingness to engage in discussions in order to find solutions to the procedural issues raised by the United States. However, Norway still could not agree to these issues being linked to the AB selection processes. It was now high time that Members surpassed this deadlock.

20.15. The representative of Switzerland said that Switzerland wished to refer to its statements made at previous DSB meetings on this matter. Switzerland deeply regretted that the DSB continued to be unable to launch the AB selection processes. Once again, Switzerland wished to reiterate its serious systemic concerns about this ongoing deadlock. Switzerland stood ready, and repeated its call on all Members, to engage constructively in order to find a way forward and overcome this stalemate without further delay.

20.16. The representative of Korea said that Korea supported the statement made by Mexico at the present meeting with regard to the joint proposal contained in document WT/DSB/W/609/Rev.5, which was co-sponsored by Korea.

20.17. The representative of Brazil said that it had now been almost two years since Members had first started discussions on the AB selection processes. Unfortunately, no progress had been made. The need to overcome this impasse had become even more urgent with the expiration of Mr. Shree Servansing's term of office. Since 30 September 2018, the Appellate Body had been operating with only three members. Pursuant to the DSU, the Appellate Body was established as a body composed of seven persons. The proposal contained in document WT/DSB/W/609/Rev.5 and introduced again at the present meeting by 68 Members called for the establishment of a selection committee to appoint new Appellate Body members and followed a pre-existing practice of how to submit the matter to the DSB. That practice had been followed as a matter of routine in order to help the DSB discharge its obligations under Article 17 of the DSU. It could also be seen as a call, an opportunity, for the United States to recognize its legal obligations toward the DSU and the Appellate Body. The United States asserted that it would not be in a position to agree to the launching of the AB selection processes while its systemic concerns about the WTO dispute settlement system remained unaddressed. There were certainly issues that could be improved in the WTO in general and in its dispute settlement system in particular. Brazil was ready to engage with interested Members in order to discuss how best to address those concerns. Notwithstanding Brazil's willingness to discuss unaddressed systemic concerns, Brazil wished to stress once more, however, that these concerns simply did not qualify as legal justifications for blocking the AB selection processes and the appointment of Appellate Body members. Above all, they did not qualify as legal justifications for exempting the DSB from its collective responsibility to comply with the mandatory rules of the DSU. In this regard, Brazil invited Members to adopt a different approach. Brazil invited Members to focus on the text of the DSU. The provisions of Article 17 of the DSU were very clear. They did not require that the DSB take a decision on whether it would appoint persons to serve on the Appellate Body. The provisions of Article 17 of the DSU required only that the DSB take a decision who to appoint. The DSB was not required to take action in order to launch a selection process. This was confirmed by the recommendations approved by the Preparatory Committee (WTO/DSB/1). There was thus no legal basis in the DSU for blocking a selection process that aimed at providing the DSB with a recommendation that would help it fulfil its duties to appoint persons to serve on the Appellate Body. Arguably, the only DSU provision regarding the composition of the Appellate Body that called for a decision of the DSB was Article 17.2 of the DSU which read: "the DSB shall appoint persons to serve on the Appellate Body for a four-year term". Although Article 17.2 of the DSU did not use the term "decision", as foreseen in Article 2.4 of the DSU and as it used in other provisions of the DSU, it seemed that the DSB had to decide on whom to appoint as Appellate Body member, by consensus. Article 17.3 of the DSU set mandatory guidelines for the decision-making process on the appointment of Appellate Body members: "the Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO". The requirements that would legally justify an objection to a consensus on appointing an Appellate Body member thus related to the qualifications of a candidate. Therefore, unaddressed systemic concerns did not qualify as legal justifications for blocking a consensus decision to appoint Appellate Body members.

20.18. Brazil said that in no case should the actions of one Member prevent all Members from complying with three specific mandatory commands under Article 17 of the DSU. The verb "shall" had indeed been chosen by the drafters to prescribe that: (i) "a standing Appellate Body shall be established by the DSB" in Article 17.1 of the DSU; (ii) "the Appellate Body shall be composed of seven persons" also in Article 17.1 of the DSU; and (iii) "vacancies shall be filled as they arise" in Article 17.2 of the DSU. None of those three DSU mandatory provisions regarding the establishment and composition of the Appellate Body provided for the DSB to take a decision. The decision about the creation of a double degree of jurisdiction in the format of an Appellate Body composed of seven persons – no vacancies allowed – had already been taken by the positive consensus reached under the Marrakesh Agreement. Those three provisions imposed inescapable obligations on the DSB itself, which meant that not even the DSB, through positive consensus, could dismantle or "disestablish" the Appellate Body, for example by emptying the Appellate Body of its essential features. The DSB was not entitled to decide on the existence of the Appellate Body, but only to guarantee that it functioned uninterruptedly according to DSU provisions. The Appellate Body had been reduced to three members, a condition not envisaged and not allowed by the text of the DSU. Impaired by this assault on its integrity, it was already in a situation that made it unable to hear appeals in disputes

that might create direct or indirect conflicts of interest with one of the remaining AB members. And composed of only three members, contrary to the mandatory "shall" of the DSU, it was already in breach of the expected geographical representativeness and variety of legal traditions. In other words, what Members currently faced was the imminence of the dismantling or "disestablishment" of the Appellate Body by a deadlock that amounted to a breach of the DSU. This was in direct contradiction to the mandate contained in Article 17.1 of the DSU, which stated that "a standing Appellate Body shall be established by the DSB". Only by renegotiating the Marrakesh Agreement, only by consensus of all Members could the Appellate Body be disestablished or transformed into something else. By no means could this be achieved through unilateral action. If the DSB allowed the current impasse to extend in time, all Members would have a shared responsibility for having breached the DSU.

20.19. Brazil said that another aspect of the current situation should not be underestimated. The scope and breadth of consequences caused by the current impasse went far beyond the breach of provisions regarding the establishment and functioning of the Appellate Body. They affected the concrete trade and systemic interests of all Members that wished to invoke their rights to solve disputes through the dispute settlement system. For Brazil, this meant the nullification and impairment of benefits under the WTO Agreement. According to statistics, around 50 of current disputes, at consultations and panel phases, could potentially be prevented from benefitting from an appeal or from being adopted, absent agreement between the parties. Members affected by this abnormal state of affairs included Brazil, the EU, China, Canada, Japan, India, Vietnam, Korea, Mexico, Turkey, Ukraine, the United Arab Emirates and others, in addition to the United States. In light of this, Brazil was compelled to ask a very direct question that required a response: what was the legal justification for a single Member to cause such a disruption in the legal rights of other Members? And would this Member be held accountable – legally, financially, politically, economically – for its illegal conduct? Brazil was deeply concerned with the current impasse and its effects on the proper functioning of the WTO dispute settlement system and, more fundamentally, on the multilateral trading system. In light of the foregoing, and absent of any legal justification to block the AB selection processes, Brazil wished to urge the DSB to follow the text of the DSU, to launch the AB selection processes and to appoint new members to the Appellate Body. Brazil also wished to invite all Members, including the United States, to embrace the Members' collective responsibility to comply with the obligations under Article 17 of the DSU.

20.20. The representative of India said that India wished to refer to its statements made at previous DSB meetings on this matter. India also wished to reiterate its serious concerns about the current impasse in filling vacancies in the Appellate Body and its effect on the credibility of the WTO. India had repeatedly stated that it was willing to engage constructively with other WTO Members in addressing the existing inefficiencies in the WTO dispute settlement system, while strengthening its main features and principles. However, this exercise could not serve as a pretext to impair and disrupt the work of the Appellate Body. India wished to reiterate the importance of filling the vacancies in the Appellate Body as a matter of priority.

20.21. The representative of Mexico said that as had been stated on several occasions, the Appellate Body was a key part of the WTO dispute settlement system. This was why it should be a priority for all Members to ensure its proper functioning. It was fundamental for the Appellate Body to have a full contingent. According to the DSU, the WTO dispute settlement system was "a central element in providing security and predictability to the multilateral trading system", and it had benefitted all Members. However, despite many attempts made by various delegations, the Appellate Body consisted of only three out of the seven members that it should comprise. Mexico still had grave concerns, which were becoming increasingly pressing. Mexico, once again, called for Members to address, in a responsible manner, the current situation whereby, for over a year and a half, Members had been unable to launch the AB selection processes. In failing to do this, Members were clearly disregarding the obligation, established in Article 17.2 of the DSU, to fill such vacancies as soon as they arose. This situation was unacceptable and would have a serious systemic impact on the Organization. At the time of the present meeting, there were 11 ongoing appeals and various disputes at the panel stage which could reach the Appellate Body. If the situation did not change, there would be a major delay in the issuance of reports. Members had to stop the practice of raising concerns without proposing solutions and bring an end to this deadlock for which there was no legal basis, especially given the current crisis faced by the WTO dispute settlement system. Mexico wished to reiterate its call for Members to ensure that the AB selection processes were initiated as a matter of urgency, and for the Member that had raised concerns to take into consideration the willingness demonstrated by the other Members to engage in discussions and seek a solution to these concerns.

Nevertheless, Mexico wished to emphasize that such a solution could not prevent compliance with the legal obligations of Members, and therefore, there should be no link between the AB selection processes and other systemic concerns.

20.22. Mexico, speaking on behalf of the 68 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.5, said that it regretted that, once again (17 times), Members had still not been able to launch the AB selection processes and had thus continuously failed to fulfil their duties as Members of this Organization. The fact that Members might 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 the Appellate Body. There was no legal justification for the current blocking of the AB 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". By failing to act at the present meeting, Members would maintain the current situation which was seriously affecting the functioning of the Appellate Body against the best interest of all of its Members.

20.23. The representative of New Zealand said that New Zealand wished to reiterate its support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.5 and emphasized the importance of launching the AB selection processes. New Zealand wished to refer to its statements made at previous DSB meetings on the importance of the multilateral dispute settlement system. New Zealand considered that it was important to discuss issues and to find solutions among Members.

20.24. The representative of the Russian Federation said that Russia wished to express its grave concerns with how the United States had managed to create chaos in multilateral trade rules under the pretence of securing these rules. One Member had blocked the AB selection processes for over a year, even though there had been no legal grounds for such action. In that respect, Russia supported Brazil's statement made at the present meeting. Russia urged the United States to clarify its concerns and to define the proposals which could address them. Otherwise, in the absence of such proposals Russia believed that these concerns might not exist, in which case the AB selection processes should be launched.

20.25. The representative of the Bolivarian Republic of Venezuela said that Venezuela wished to associate itself with the statements made by Mexico and Costa Rica on behalf of the GRULAC at the present meeting. Venezuela wished to underline the gravity of the current situation and called for a prompt resolution.

20.26. The representative of Chile said that Chile was one of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.5. Chile regretted that so much time had passed without finding a solution. Chile said that this discussion was not about one Member in particular. It was about the smooth functioning of this Organization.

20.27. The representative of Hong Kong, China said that Hong Kong, China wished to refer to its statements made at previous DSB meetings on this matter. Hong Kong, China remained deeply concerned about the prolonged impasse over the AB selection processes and its impact on the multilateral trading system. Hong Kong, China urged for the launch of the AB selection processes without any delay and stated its commitment to engaging in a constructive discussion to address systemic concerns.

20.28. The representative of the United States said that contrary to what some Members had indicated, it was clear that there needed to be a DSB decision to launch the AB selection process for these vacancies. The decision to appoint an Appellate Body member was a decision of the DSB. Furthermore, in looking at what was entailed in establishing AB selection processes, there were a number of issues that needed to be decided, and such decisions were for the DSB to take. This was why the very first AB selection process was one established by a decision of the DSB.[84] For example, what was the deadline for nominations? Would there be a selection committee? If so, who would comprise the selection committee? What was the expectation for when recommendations would be made? So, again, it was clear that there needed to be a DSB decision to launch AB selection processes.

[84] See WT/DSB/1.

20.29. The Chairperson thanked all delegations for their statements. She said that as all Members were aware, this matter required political engagement on the part of all Members. She reiterated that her door was open to any delegation wishing to share ideas or views on this matter. In this regard, she noted that some delegations had met with her during the previous week to share their views on this matter. She thanked those delegations for their initiative to do so.

20.30. The DSB took note of the statements.

## 21 FOSTERING A DISCUSSION ON THE FUNCTIONING OF THE APPELLATE BODY (JOB/DSB/2): STATEMENT BY HONDURAS

21.1. The Chairperson said that this item was on the Agenda of today's meeting at the request of Honduras. She then drew attention to document JOB/DSB/2 and invited the representative of Honduras to speak.

21.2. The representative of Honduras said that as expressed at previous DSB meetings, Honduras conferred great importance to the Appellate Body and the WTO dispute settlement system. Regarding Honduras's non-paper, Honduras had been consulting with Members individually and the WTO Secretariat to explore the best way to proceed in this matter. Honduras was fully aware that there were several issues that had to be resolved and that Members had to respect the principle that "nothing is agreed until everything is agreed". Honduras was also fully aware that Members were prepared to present other proposals. Therefore, Honduras decided not to call for an open-ended meeting that it had announced at the 26 September 2018 DSB meeting. Honduras supported all work and efforts aimed at resolving this critical situation. Honduras welcomed all proposals that would be presented for Members' consideration in the near future. Honduras stood ready to engage with other Members to seek the best way possible to move forward. Honduras remained available to delegations for their questions and comments.

21.3. The representative of the United States said that the United States thanked Honduras for its non-paper contained in document JOB/DSB/2 and for placing this item on the Agenda of the present meeting. The United States looked forward to hearing other Members' views on options for addressing the concerns that the United States had been raising for over a year. The United States appreciated that the non-paper provided some of the possible options and that it recognized that there might be other possible approaches. The United States remained interested in hearing of other approaches that Members were considering. The United States wished to reiterate its views on one of the questions presented in Honduras's non-paper: *who* decides how to respond to the situation where the term of an Appellate Body member appointed to a division expired before the report in that appeal is signed? The United States had reiterated that this was the responsibility of WTO Members. In this regard, the United States recalled that it was the DSB, not the Appellate Body, that had the authority to appoint Appellate Body members and to decide when their term in office had expired under Articles 17.1 and 17.2 of the DSU. Accordingly, it was up to the DSB, not the Appellate Body, to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal. The United States noted that one of the options listed in the non-paper would be for the Appellate Body to continue to apply Rule 15 of the Working Procedures for Appellate Review. This would not address the issues that the United States had been raising for over a year. A solution to the Appellate Body's abuse of its authority under the DSU would require Members to exercise their responsibility for the system. Continuing to ignore such abuses – or perhaps worse, accommodating or ratifying them – was not tenable. The United States looked forward to continuing to discuss these issues with other Members.

21.4. The representative of the European Union said that the EU wished to refer to its statements made at previous DSB meetings on the issue of Rule 15 of the Working Procedures for Appellate Review. The EU considered that such a transitional rule was useful, since it allowed for an orderly transition in the case of appeals for which an outgoing Appellate Body member had begun their work and for which they would otherwise need to be replaced. This rule was therefore consistent with an orderly and prompt resolution of disputes and preserved the rights of the parties who participated in such proceedings. As the EU had stated at previous DSB meetings, the EU saw no link between the issue of Rule 15 of the Working Procedures for Appellate Review and the issue of appointments of new Appellate Body members. The discussion on Rule 15 could very well take place without delaying the decision on appointments any further. A fortiori, we see no rationale in blocking the launch of the mere AB selection processes. The EU was open to discussions that aimed at resolving the current crisis.

21.5. The representative of China said that, once again, China wished to thank Honduras for placing this item on the Agenda of the present meeting, and for Honduras's efforts to promote further discussion on this issue in order to unblock the launch of the AB selection processes. In its non-paper contained in document JOB/DSB/2, Honduras proposed to set up objective and reasonable criteria to determine when an outgoing Appellate Body member should continue to serve on an appeal. In general, China believed that these criteria were reasonable and agreed with them in general. Regarding the issue of who decided if Appellate Body members should serve after their four-year term expired, it was still unclear to China how the proposed approaches operated in practice together with the proposed objective criteria. China preferred to establish objective criteria. China believed that once objective criteria were established, these should apply equally to all outgoing Appellate Body members. It seemed unnecessary to determine who decided. China would continue to consider Honduras's non-paper. As Honduras had mentioned, the only solution to the current situation was constructive dialogue and real engagement from all Members. China would continue to engage in such discussion. China also believed that the AB selection processes had to be launched as soon as possible in order to ensure the normal operation of the WTO dispute settlement system and to safeguard the multilateral trading mechanism.

21.6. The representative of the Dominican Republic said that the Dominican Republic wished to thank Honduras for presenting its non-paper contained in document JOB/DSB/2. This non-paper was very useful to address and unblock the current impasse within the Appellate Body. This non-paper provided a good basis since it described various options that Members could discuss. The Dominican Republic was willing to participate in these discussions and insisted that it was important to launch the AB selection processes independently from these discussions.

21.7. The representative of Ecuador said that Ecuador wished to thank Honduras for its non-paper contained in document JOB/DSB/2. Ecuador supported the possibility of a constructive discussion on the functioning of the Appellate Body. Discussions regarding Rule 15 of the Working Procedures for Appellate Review could yield new elements that could be further examined in relation with the functioning of the Appellate Body. The two topics covered by Honduras in its non-paper essentially referred to the parameters that governed the Appellate Body, namely: until when an Appellate Body member could continue to serve in that capacity; and who would decide on this. Ecuador believed that these topics were a decisive stepping stone in order to unblock the AB selection processes.

21.8. The representative of Thailand said that Thailand wished to thank Honduras for its contribution and hard work. Thailand wished to refer to its previous statement under this Agenda item made at the 26 September 2018 DSB meeting, which included its preliminary comments on Rule 15 of the Working Procedures for Appellate Review. Thailand shared Honduras's view that action was urgently needed in order for Members to resolve the current impasse. In this regard, Thailand wished to reiterate, once again, its willingness to engage in technical discussions on transitional arrangements for outgoing Appellate Body members, as well as other areas of concern relating to the Appellate Body, with a view to improving the WTO dispute settlement system. Thailand believed that a constructive discussion with all interested Members was crucial for the success of achieving any lasting solutions. Thailand stood ready to work with Members in order to find a positive way forward.

21.9. The representative of Australia said that Australia wished to thank Honduras for its continued contribution to solution-orientated discussions aimed at resolving concerns raised regarding the functioning of the Appellate Body. In Australia's view, Members had to continue to prioritize finding solutions to resolve the impasse in the DSB on the selection and appointment of new Appellate Body members. As such, Australia stood ready and willing to engage in discussions which focused on finding concrete solutions. This included matters addressed in Honduras's non-paper contained in document JOB/DSB/2 regarding the transitional arrangements for outgoing Appellate Body members. At the DSB meeting of 26 September 2018, Australia had outlined a series of issues which Australia believed should be considered in the context of addressing such matters. Members' views on the range of issues Australia had identified could point to a number of possible pathways to addressing the concerns that had been raised. Greater clarity, particularly from the Member that had initiated discussion of this concern, as to what principles it would like to see applied to a solution was a critical step to working towards concrete, positive and lasting solutions. For Australia's part, some of the principles which Australia would like to see reflected in a solution included: that appropriate transitional arrangements could be an effective and practical means to ensure continuity and efficiency in dispute settlement proceedings; that solutions should respect the exclusive authority of the DSB under Article 17.2 of the DSU to appoint Appellate Body members; that solutions should clarify the application of the collegiality principle in the event of the application of

transitional rules; that objective criteria could be a useful tool to provide consistency and clarity to the application of transitional rules; that solutions should be prospective and of general application; and that the adoption of Appellate Body reports in accordance with Article 17.14 of the DSU should not be compromised. Australia remained open to different forms of solutions, including a DSB Decision, amendments to the Working Procedures for Appellate Review and/or amendments to the DSU. Australia was ready to engage in future work on this issue with other Members.

21.10. The representative of Peru said that Peru viewed positively and appreciated the efforts made by Honduras. Peru welcomed the discussion that had taken place in the DSB on Rule 15 of the Working Procedures for Appellate Review. On a preliminary basis, Peru considered favourably the possibility that: (i) the Appellate Body members assigned to a division would be retained, if a hearing had already been held as part of the appeal procedure; or (ii) that no new appeals were assigned to an Appellate Body member whose term would expire within 60 days. Peru was still considering other elements of Honduras's non-paper contained in document JOB/DSB/2. Peru noted the positions of Members and hoped that this dialogue and other initiatives would soon lead to the full restoration and improvement of the WTO dispute settlement mechanism.

21.11. The representative of Japan said that Japan wished to thank Honduras for its statement and non-paper contained in document JOB/DSB/2. Honduras had proposed certain decision-making rules for the DSB. Japan appreciated the concern of Honduras about the potential for any Member to intervene in the work of the Appellate Body. However, Japan was not sure how the DSB could apply such proposed rules consistent with the DSU. Honduras had also proposed certain objective criteria for allowing an outgoing Appellate Body member to continue serving on an appeal after the expiry of their term. Objective criteria would be useful not just for maintaining the promptness and continuity of ongoing appellate proceedings but also for ensuring the proper use of transitional arrangements. In this respect, Members could also wish to consider the possibility of a DSB decision of a general and prospective nature, as Australia had suggested. Japan looked forward to engaging in further discussions to find a meaningful and lasting solution.

21.12. The representative of Canada said that Canada wished to thank Honduras for its initiative and the additional information it had shared at the present meeting on its objectives for this discussion. Given Canada's shared interest and urgency in ensuring the effective functioning of the Appellate Body, Canada encouraged all Members to take this opportunity to address the concerns that had been raised. Canada would be pleased to further discuss this issue in a forum that was deemed appropriate by the Chairperson and/or other Members. In its non-paper contained in document JOB/DSB/2, Honduras had usefully identified a number of potential solutions to concerns around Rule 15 of the Working Procedures for Appellate Review. As Canada had stated at the 26 September 2018 DSB meeting, the criteria set out in Section 1 of the non-paper of (a) whether an oral hearing had been held; and (b) whether an Appellate Body member was within 60 days of the expiry of their term of office would, in Canada's view, be appropriate to determine when an Appellate Body member was eligible to continue to serve on cases beyond the expiry of their term. Instead of 60 days, a time-period of 90 days could also be envisaged. Regarding Section 2 of the non-paper and the issue of who decided if an Appellate Body member should serve after the expiry of their term of office, although Canada did not object to the Appellate Body's use of Rule 15 to date, it seemed clear that the United States now had strong objections to this practice. As such, Canada believed that option (b), the proposed application of the reverse consensus rule, was an option that could be further explored. If that did not resolve the concerns raised by the United States, another option would be to have a general and prospective DSB decision taken to authorize the service of Appellate Body members where certain criteria, such as those outlined in section one of the non-paper, were satisfied. It was important that such a decision be general and prospective so that the need for a DSB decision to be taken each time this issue arose was avoided. Canada would reiterate that vacancies on the Appellate Body, resulting from Members' failure to launch and conclude AB selection processes, was likely to necessitate greater recourse to Rule 15. Indeed, Members had seen such need very recently with the Appellate Body's invocation of Rule 15 to authorize Mr. Servansing to complete the disposition of seven appeals to which he had been appointed prior to the expiry of his term of office. Again, Canada believed that the simplest solution to reducing reliance on Rule 15 would be to unblock the launch of the AB selection processes. And as the concerns that had been cited as a justification to block the launch of AB selection processes were resolved, it would be advisable that Members work towards establishing the automatic launch of AB selection processes so that in the future, chances were minimized of the DSB being confronted with a situation where the failure to start AB selection processes threatened the effective functioning of the WTO dispute settlement system.

21.13. The representative of Panama said that Panama wished to thank Honduras for its non-paper contained in document JOB/DSB/2 which was a concrete contribution that proposed alternative solutions with the aim of facilitating a dialogue on two fundamental topics related to Rule 15 of the Working Procedures for Appellate Review. Panama considered that it was necessary that a forum be created for analysis and technical discussions over the proposals in Honduras' non-paper and over proposals made by any other Member. Panama wished to reiterate its willingness to participate in any process or initiative on the basis of concrete proposals and options that reflected the interests of the entire Membership with a view to identifying common solutions that could lead to an agreement.

21.14. The representative of Korea said that Korea believed that it was important to foster discussions on the functioning of the Appellate Body. Korea would constructively participate in any such discussions.

21.15. The representative of Singapore said that Singapore appreciated the efforts of Honduras in putting up its non-paper contained in document JOB/DSB/2 for the fostering of a discussion on issues relating to Rule 15 of the Working Procedures for Appellate Review, given the greater urgency now that there were only three Appellate Body members left. As stated in Singapore's earlier intervention at the present meeting, Singapore welcomed and was open to considering proposals and ideas from Members in trying to address the impasse. Discussions on these proposals could be conducted in any appropriate format.

21.16. The representative of the Bolivarian Republic of Venezuela said that Venezuela wished to thank Honduras for submitting its non-paper contained in document JOB/DSB/2 and for its proactive and positive attempt to solve this problem. Venezuela wished to participate in further discussions on this matter.

21.17. The representative of Chile said that Chile wished to thank Honduras for its non-paper contained in document JOB/DSB/2.

21.18. The representative of Brazil said that Brazil wished to thank Honduras for its contribution to the debate. Brazil was ready to engage in any discussions on this issue. This discussion presupposed participation and engagement of the Member that had first raised this concern. Participation in listening mode was not enough. The discussion under this item was different from the ones Members had had about other more conceptual topics. Members had the very straightforward task of searching for appropriate and concrete criteria that could define the moment until when an outgoing Appellate Body member could serve. Several ideas had been proposed. Any reasonable criterion could be acceptable, as long as it preserved the independence of the Appellate Body and prevented undue interference in its work. Any solution should also include the automatic launching of AB selection processes.

21.19. The representative of El Salvador said that El Salvador was grateful to Honduras for its non-paper contained in document JOB/DSB/2. This non-paper was an attempt to seek greater clarity in the scope of application of Rule 15 of the Working Procedures for Appellate Review. El Salvador was open to continue to discuss this topic.

21.20. The representative of Chinese Taipei said that as stated at previous DSB meeting, Chinese Taipei appreciated Honduras's non-paper contained in document JOB/DSB/2. As some delegates had previously stated at the present meeting, Chinese Taipei had some questions about how the criteria mentioned by Honduras in paragraph 1 of its non-paper would interact with the selection options mentioned in paragraph 2. Chinese Taipei stood ready to engage constructively with other Members to further discuss these issues.

21.21. The representative of Honduras said that Honduras wished to thank all delegations that had expressed their interest in the non-paper contained in document JOB/DSB/2. As the Vice-Minister of Honduras had stated earlier at the present meeting, Honduras was aware that other Members were also working on other proposals. Honduras urged those other Members to submit those proposals as early as possible. Honduras noted that there were some Members who were asking specific and substantive questions regarding the document that Honduras had submitted. For this reason, and as had been stated by many delegations at the present meeting, there was a need for an independent

discussion on this topic in an informal and open-ended meeting. This discussion should take place on the basis of the principle that "nothing is agreed until everything is agreed".

21.22. The DSB took note of the statements.