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Dispute Settlement Body
15 August 2019

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 15 AUGUST 2019

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

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the dispute: "United States - Certain Measures Relating to the Renewable Energy Sector" (DS510) was removed from the proposed Agenda following the decision of the United States to appeal the Panel Report.

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1.1. The Chairman noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, he invited delegations to provide up-to-date information about their compliance efforts. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already

been fully debated in the past and on which there appears to have been no change in Members' positions already on record". He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.198)

1.2. The Chairman drew attention to document WT/DS184/15/Add.198, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute three weeks ago on 22 July 2019, and again two weeks ago on 2 August 2019, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the DSB's recommendations and rulings that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

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

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.173)

1.6. The Chairman drew attention to document WT/DS160/24/Add.173, 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 three weeks ago on 22 July 2019, and again two weeks ago on 2 August 2019, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that, nearly two decades after the DSB had adopted the Panel Report in DS160, the United States still fell short of full compliance as required by the DSU. Since none of its 174 status reports provided thus far indicated any progress on implementation, this dispute remained unresolved. As a result, the United States had become the only WTO Member who failed to implement the adopted recommendations and rulings of the DSB under the TRIPS Agreement. As long as Section 110(5) of the US Copyright Act, which had been found to be WTO-inconsistent, remained in force, the United States would continue to fail to accord the minimum standard of protection as required by the TRIPS Agreement. Article 21.1 of the DSU stated that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China, therefore, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute without further delay.

1.10. The 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.136)

1.11. The Chairman drew attention to document WT/DS291/37/Add.136, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and concluded that there were no safety concerns. As explained by the EU and confirmed by the US delegation during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level. This had resulted in a clear improvement of the situation. It was also important to note that the slow reaction of applicants in certain applications also increased the overall average time needed for risk assessment. On 26 July 2019, the European Commission authorized ten genetically modified organisms (GMOs): seven for food and feed use,[1] two renewal authorizations[2] also for food and feed use and one carnation as ornamental cut flower. The authorizations were valid for ten years. This brought the total number of GMOs authorized in the EU to 145: 96 GM maize, 13 GM cotton, 20 GM soybean, 9 GM oilseed rape, 1 GM sugar beet and 6 GM carnations. No meetings of the member States Committee voting on proposals or of the Appeal Committee were organized since the most recent regular meeting of the DSB. At past DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover that "opt-out Directive". At past DSB meetings, the United States had also made certain references to the statement of the EU Group of Scientific Advisors. The EU wished to clarify that this statement focused on the future challenges for products obtained by new mutagenesis techniques. The statement did not state expressly nor imply that Directive 2001/18 would not be "fit for purpose" as regarded "conventional GMOs". The EU acted in line with its WTO obligations. Finally, the EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States remained concerned with the EU's approval of biotech products. While the United States appreciated and welcomed the European Commission's approval of several soy and corn products in July 2019, the United States continued to see delays that 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. The amendment of EU Directive 2001/18, through EU Directive 2015/413, permitted EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (GMOs), even where the European Food Safety Authority (EFSA) had concluded that the product was safe. This legislation permitted EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least 17 EU member States, as well as certain regions within EU member States, had submitted such requests with respect to MON-810 maize. The United States again emphasized the public statement issued by the EU's Group of Chief Scientific Advisors on 13 November 2018, in response to the 25 July 2018, European Court of Justice (ECJ) ruling that addressed the forms of mutagenesis that qualified for the exemption contained in EU Directive 2001/18/EC. The Directive had been a central issue in dispute in these WTO proceedings, and concerned the deliberate release into the environment of genetically modified organisms, or GMOs.

1.14. The United States said that contrary to the EU's statement at prior DSB meetings, this ECJ ruling related to previously authorized GMOs. The EU Group of Chief Scientific Advisors' statement spoke to the lack of scientific support for the regulatory framework under EU Directive 2001/18. The message provided in that statement was clear: "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose". The statement further advised that current scientific knowledge called into

[1] Cotton GHB614xLLCotton25xMON1598, maize 5307, maize MON 87403, maize 4114, maize MON87411, maize Bt11xMIR162x1507xGA21, soybean MON87751.

[2] Oilseed rape Ms8xRf3 and maize 1507xNK603.

question the definition of "GMOs" under the Directive and noted that mutagenesis, as well as transgenesis, occurred naturally. The EU should take this guidance into account in its reconsideration of the GMO Directive, in light of the evident advancements in scientific knowledge and technology. The United States urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific principles, and that decisions were taken without undue delay.

1.15. The representative of the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The European Union had different regulatory approaches to non-GMOs and to GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. Contrary to what the United States had just asserted, no EU member State had imposed any "ban". Under the terms of the relevant EU Directive, an EU member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law and were reasoned, proportional, non-discriminatory and based on compelling grounds. The free movement of seeds was embedded in Article 22 of Directive 2001/18/EC: "[m]ember States may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive". The EU also noted that according to the provisions of the opt-out Directive (Article 26b, point 8) the measures adopted under the Directive "shall not affect the free circulation of authorized GMOs" in the EU. The United States had made a brief reference to product MON-810 as an example of a product subject to a ban. The EU wished to inform delegations that currently, the EU Common Catalogue of varieties of agricultural species included 150 varieties of maize MON-810 which were allowed to be marketed in the EU. Up to now, the European Commission had never received any complaints from seed operators or other stakeholders concerning the restriction of marketing of MON-810 seeds in the EU. This confirmed the smooth functioning of the internal market of MON-810 seeds. The EU invited the United States to provide any evidence they might have at their disposal substantiating the disruption of the free movement of MON-810 seeds in the EU. In relation to the statement of the Group of Chief Scientific Advisors, the EU wished to recall that the Group of Chief Scientific Advisors was an independent group of scientific experts providing scientific advice to the European Commission. There had been many reactions to the judgement of the Court of Justice of the European Union, bringing forward a wide range of different views. The statement to which the United States had referred fed into on-going discussions on new mutagenesis techniques with all stakeholders. Some stakeholders agreed with that statement. However, many others considered that the current legislation was adequate to address the risks from new biotechnology developments. The European Commission, in particular**,** had a strong interest in this debate, which should go beyond the regulatory status of new technologies and focus on the way new products could help address societal challenges, such as climate change or reduction of use of pesticides, without negative consequences on health and environment protection.

1.16. 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.20)

1.17. The Chairman drew attention to document WT/DS464/17/Add.20, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping and countervailing measures on large residential washers from Korea.

1.18. The representative of the United States said that the United States had provided a status report in this dispute three weeks ago on 22 July 2019 and again two weeks ago on 2 August 2019, in accordance with Article 21.6 of the DSU. On 6 May 2019, the US Department of Commerce had published a notice in the US Federal Register announcing the revocation of the anti-dumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (6 May 2019)). With this action, the United States had completed implementation of the DSB's recommendations concerning those anti-dumping and countervailing duty orders. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to other measures challenged in this dispute.

1.19. The representative of Korea said that his country wished to thank the United States for its status report. Korea was currently evaluating if the revocation, in its effect, would achieve full compliance with the DSB's rulings and recommendations in terms of the "as applied" measures at

issue. At the same time, Korea again urged the United States to take prompt and appropriate steps to implement the DSB's recommendations for the "as such" measure in this dispute.

1.20. The representative of China said that the Panel and the Appellate Body in this dispute had made a number of important clarifications on relevant provisions of the Anti-Dumping Agreement, which included that: (i) both quantitative and qualitative assessments were required to establish a pattern of export prices which differed significantly; (ii) an investigating authority had to explain why both the W-W and the T-T methodologies could take into account appropriately the identified differences in export prices before resorting to the W-T methodology; and (iii) the use by the United States of differential pricing methodology and zeroing when applying the W-T methodology were "as such" WTO-inconsistent. Thus far, the United States had yet to fully address the DSB's recommendations and rulings in this dispute, especially regarding its "as such" WTO-inconsistent measures. Such behaviour left other Members with no other choice, but to repeatedly raise these same issues before panels and the Appellate Body. In addition to resources being wasted in future dispute settlement proceedings, the effectiveness of the dispute settlement mechanism would also be compromised. Article 21.1 of the DSU explicitly set out the implementation obligations, which should be observed by all Members without any derogation. The United States was not entitled to any exception to these rules agreed by Members back in 1995. China, therefore, urged the United States to faithfully implement the DSB's recommendations and rulings in all of its defensive cases, including this one.

1.21. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" was "as such" WTO-inconsistent. The United States had also ignored the DSB's recommendation that the United States bring itself into compliance with its obligations. Instead, the United States continued to apply the "as such" inconsistent differential pricing methodology in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters based on its inconsistent methodology. As a result, Canada had been forced to challenge the differential pricing methodology measure in the "US - Differential Pricing Methodology" dispute (DS534) and Viet Nam was currently doing the same in the "US - Fish Fillets" dispute (DS536). Before these Panels, the United States had simply re-litigated the dispute concerning the WTO-consistency of the differential pricing methodology and had asked the Panels to ignore the Appellate Body's findings. Canada remained deeply concerned with the failure of the United States to comply with the DSB's recommendations and rulings in this dispute. This failure seriously undermined the security and stability of the multilateral trading system.

1.22. The representative of the United States recalled that Canada had commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing. Canada had lost that dispute before the Panel. The United States was willing, of course, to discuss Canada's concerns bilaterally.

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

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.12)

1.24. The Chairman drew attention to document WT/DS471/17/Add.12, 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.

1.25. The representative of the United States said that the United States had provided a status report in this dispute three weeks ago on 22 July 2019 and again two weeks ago on 2 August 2019, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.26. The representative of China said that on 22 May 2017, the DSB had adopted the Appellate Body report and the modified Panel report in this dispute, which had found that certain measures taken by the United States were inconsistent with requirements of the Anti-Dumping Agreement, including that: (i) the use of zeroing under the W-T methodology were "as such" inconsistent with

Article 2.4.2; (ii) the so-called "single rate presumption" "as such" violated Articles 6.10 and 9.2; and (iii) the "adverse facts available" was a norm of general and prospective application, which could be subject to future "as such" challenges. China was deeply disappointed that, more than two years after the DSB had adopted recommendations and rulings in this dispute, and nearly 12 months after the expiry of the reasonable period of time, the United States continued to prolong implementation in this dispute. When China had sought the authorization to suspend in accordance with the DSU, rather than bringing its measures into conformity, the United States had chosen to further delay the resolution of this dispute by referring the matter to arbitration pursuant to Article 22.6 of the DSU. As such, its WTO-inconsistent measures continued to infringe China's legitimate economic interests, distorted relevant international markets and undermined the rules-based dispute settlement system. China noted, however, that when the United States was the complainant in a dispute, it never shied away from aggressively pursuing prompt implementation. This behaviour reflected a clear double standard employed by the United States, which breached the good faith obligation in resolving disputes under the DSU. Article 21.1 of the DSU provided that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China, therefore, urged the United States to take concrete actions to fulfil its WTO obligations and promptly bring its measures in conformity with the DSB's recommendations and rulings in this dispute.

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

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.7 – WT/DS478/22/Add.7)

1.28. The Chairman drew attention to document WT/DS477/21/Add.7 – WT/DS478/22/Add.7, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case concerning importation of horticultural products, animals and animal products.

1.29. The representative of Indonesia said that his country submitted this report pursuant to Article 21.6 of the DSU. As reported at the most recent DSB meeting, Indonesia had made further amendments to existing regulations by issuing Minister of Trade Regulation No. 29/2019 concerning Provisions for Import and Export of Animals and Animal Products and Minister of Trade Regulation No. 44/2019 concerning the Import Provision on Horticultural Products. In the meantime, the draft Minister of Agriculture regulations were still undergoing the enactment process. With regard to Measure 18, the draft amendment along with its academic drafts would be discussed in a meeting at the Ministerial level. Indonesia would continue to update and engage with New Zealand and the United States regarding matters related to the recommendation and rulings of the DSB.

1.30. The representative of New Zealand said that New Zealand wished to thank Indonesia for its statement and its status report although his country was disappointed that the status report did not seem to convey any progress since the July 2019 status report. New Zealand acknowledged the steps that Indonesia had taken to date to bring its regulations into compliance with the DSB's recommendations and rulings in this dispute, and Indonesia's commitment to comply fully with these recommendations and rulings. New Zealand noted that both of the compliance deadlines that had been agreed between the parties had since expired. New Zealand was seriously disappointed that full compliance had still not been reached in respect of a number of measures addressed in this dispute. New Zealand was particularly concerned about: (i) the failure to meet the 22 June 2019 deadline for the removal of Measure 18; (ii) the continued enforcement by Indonesia of limited application windows and validity periods; (iii) harvest period import bans;(iv) import realization requirements; and (v) restrictions placed on import volumes based on storage capacity. These issues, and others, continued to adversely impact New Zealand exporters. The New Zealand Embassy in Jakarta, therefore, continued to follow developments closely and would also appreciate direct updates on progress, including concrete timelines for further regulatory and legislative changes. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve long-term, commercially meaningful, compliance with the DSB's recommendations and rulings in this dispute.

1.31. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance with WTO rules. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States was still waiting to hear from Indonesia the concrete actions it would take to bring its measures into full compliance. The scope of Indonesia's "further amendment" to Measures 1-17 remained unclear, and it was not clear that Indonesia intended to make any changes with regard to Measure 18. The United States looked forward to receiving further detail from Indonesia regarding the planned changes to its regulations and laws.

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

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

2.3. The representative of Canada said that his country wished to thank the EU for placing this item on the DSB's Agenda. Canada agreed with the EU that this matter should remain subject to the surveillance of the DSB until the United States ceased to apply the measures at issue in this dispute.

2.4. The representative of Brazil said that, as an original party to the Byrd Amendment dispute, his country wished to thank, once again, the EU for keeping this item on the Agenda of the DSB. After more than 16 years since the adoption of the DSB's recommendations in this dispute, and more than 13 years after the date of the Deficit Reduction Act that had repealed the Byrd Amendment, anti-dumping and countervailing duties were still being disbursed to US domestic petitioners. Brazil called on the United States to comply fully with the DSB's recommendations and rulings in this dispute.

2.5. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) – had been enacted into law in February 2006. Accordingly, the United States had implemented the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 11 years ago. Even aside from this, the United States questioned the trade rationale for inscribing this item on the Agenda of the DSB. In May 2019, the EU had notified the DSB that disbursements related to EU exports to the United States had totalled US$4,660.86 in fiscal year 2018. As such, the level of countermeasures under the Arbitrator's formula in relation to goods entered before 2007 was US$3,355.82. The EU had announced that it would apply an additional duty of 0.001%– that is, one-one thousandth of a percent – on certain imports of the United States. These values were no doubt outweighed by the associated costs resulting from the

application of these countermeasures – or the DSB's taking up this Agenda item. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations, regardless of whether the complaining party disagreed about compliance. The practice of Members – including the European Union as a responding party – confirmed this widespread understanding of Article 21.6 of the DSU. Accordingly, since the United States had informed the DSB that it had come into compliance in this dispute, there was nothing more for the United States to provide in a status report.

2.6. The DSB took note of the statements.

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

A. Statement by the United States

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

3.2. The representative of the United States said that the United States noted that, once again, the European Union had not provided Members with a status report concerning the dispute "EC – Large Civil Aircraft" (DS316). As the United states had noted at several recent DSB meetings, the EU had argued – under a different Agenda item – that where the EU as a complaining party did not agree with another responding party Member's "assertion that it has implemented the DSB ruling", "the issue remains unresolved for the purposes of Article 21.6 DSU". Under this Agenda item, however, the EU argued that by submitting a compliance communication, the EU no longer needed to file a status report, even though the United States as the complaining party disagreed that the EU had complied. At recent DSB meetings, the European Union had attempted to reconcile this view with the EU's long-standing, contrary position. The EU argued that the situation in the "US — Offset Act (Byrd Amendment)" dispute (DS217) differed from that of the "EC – Large Civil Aircraft" dispute (DS316) because, in CDSOA, the dispute had been adjudicated and there were no further proceedings pending. With this statement, the EU suggested that the issue of compliance in the "US — Offset Act (Byrd Amendment)" dispute (DS217) had been adjudicated; in fact, it had not. The United States had repealed the Continued Dumping and Subsidy Offset Act of 2000 measure after all of the proceedings in the dispute. By way of contrast, in the "EC – Large Civil Aircraft" dispute (DS316), the EU's claim of compliance had already been rejected by the DSB through its adoption of compliance panel and appellate reports. The EU had also erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". The EU provided no explanation for how it read Article 21.6 of the DSU to contain this limitation. The EU essentially read the DSU as though the authorities given to the DSB were mutually exclusive rather than mutually complementary – but pointed to nothing in the text of the DSU to support that argument. Under the EU's own view, the EU should have provided a status report. Yet it had failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party. The US position had been consistent and clear: Under Article 21.6 of the DSU, once a responding Member provided the DSB with a status report that announced compliance, there was no further "progress" on which it could report and, therefore, no further obligation to provide a report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in the "EC – Large Civil Aircraft" dispute (DS316).

3.3. The representative of the European Union said that, in response to the US reference to the "US — Offset Act (Byrd Amendment)" dispute (DS217), the EU wished to clarify, in relation to its statement under the previous Agenda item, that it maintained its statement that the Byrd Amendment dispute had been adjudicated and that there were currently no further proceedings pending. This was a statement of fact. This statement did not suggest – as the United States seemed to imply – that the issue of compliance had been adjudicated. Regarding the "EC – Large Civil Aircraft" dispute (DS316), as in previous DSB meetings, the United States had again implied that the EU was taking inconsistent positions under Article 21.6 of the DSU, depending on whether the EU was a complaining party or a defending party in a dispute. The US assertions remained without merit. As the EU had repeatedly explained in past meetings of the DSB, the crucial point for the defending party's obligation to provide status reports to the DSB was the stage of the dispute. In the "EC – Large Civil Aircraft" dispute (DS316), the dispute was at a stage where the responding

party did not have an obligation to submit status reports to the DSB. The EU wished to remind delegations that in this dispute, the EU had notified to the WTO a new set of measures in a compliance communication which had been tabled at the 28 May 2018 DSB meeting. The United States had responded that the measures included in that communication did not bring the EU in full compliance with DSB's recommendations and rulings. In light of the US position, on 29 May 2018 the EU had requested consultations with the United States, under Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the dispute. Consequently, the EU had asked for the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. That compliance panel was currently reviewing "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. As part of that review, the compliance panel had held a meeting with the parties and third parties, and was assessing the parties' replies to its questions on compliance of the EU. The EU wished to stress that a compliance proceeding was still ongoing in this dispute. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU was the very subject matter of this ongoing litigation. He questioned how it could be said that the defending party should submit "status reports" to the DSB under these circumstances. The EU would have been very concerned with a reading of Article 21.6 of the DSU that would have required the defending party to notify the purported "status of its implementation efforts" through the submission of status reports to the DSB, while dispute settlement proceedings on that precise issue were ongoing. The view of the EU was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance.

3.4. The DSB took note of the statements.

4 UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS

A. Request for the establishment of a panel by China (WT/DS562/8)

4.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 July 2019 and had agreed to revert to it, should a requesting Member wished to do so. He drew attention to the communication from China contained in document WT/DS562/8, and invited the representative of China to speak.

4.2. The representative of China said that on 22 July 2019, China had respectfully requested that the DSB establish a panel, with standard terms of reference, to examine the matter contained in document WT/DS562/8. At that meeting, the DSB had decided to defer the establishment of a panel due to the US opposition to the request. In particular, the United States had argued that it had exercised its legitimate right to impose safeguard measures on imports of crystalline silicon photovoltaic (CSPV) products. According to the United States, the safeguard measures had been imposed on the basis of an open and transparent process, allegedly complying with both its domestic laws and WTO obligations. China did not deny the right of WTO Members to temporarily suspend concessions and take safeguard measures consistent with WTO rules. However, China noted that Article XIX of the GATT 1994 qualified safeguards as an "emergency action on imports" that had to be seen as an "extraordinary remedy" subject to specific and strict requirements. Non-compliance with these requirements impermissibly disrupted global trade flows as a whole since such measures were applied without regard for the origin of products. As China had explained at the 22 July 2019 DSB meeting, the United States had failed to conform to the most essential conditions that would have justified the imposition of safeguard measures on CSPV products. China was confident that the panel would also find the United States had not respected many of the procedural guarantees governing safeguard proceedings. These defects had resulted in the imposition of safeguard measures that did not constitute relief limited to what was necessary to "prevent or remedy serious injury and facilitate adjustment"[3], in accordance with the obligations under the Safeguards Agreement. As a final point, China wished to express its surprise at the contention of the United States that China's panel request included a claim that had not been referred to in the request for consultations, though the United States had not specified which claim China would not have referred to. As a matter of fact, China's panel request fully complied with Article 6.2 of the DSU. China's panel request contained exactly the same claims and the same exact obligations that had

[3] Article 5.1 of the Safeguard Agreement.

been referred to in its request for consultations. In light of the above, China wished to reiterate its request and urged the DSB to establish a panel, with standard terms of reference.

4.3. The representative of the United States said that the United States had stated at the 22 July 2019 DSB meeting that: (i) the WTO Agreement recognized the right of Members to temporarily suspend concessions and other obligations when a product was being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry; and (ii) the United States had exercised this right with respect to imports of crystalline silicon photovoltaic (CSPV) products. The United States had imposed a safeguard measure after the competent authority, the US International Trade Commission, had determined that increased imports of CSPV products were the substantial cause of serious injury to the domestic industry producing like or similar products. Accordingly, the United States regretted that China had chosen, for a second time, to request establishment of a panel with regard to this matter. The United States was prepared to engage in these proceedings and to explain to the panel that China had no legal basis for its claim. In light of China's stated confidence in the claims brought, the United States would expect China to support, in the context of this dispute, making the panel meetings open to observation by other WTO Members and the public and to making China's submissions publicly available. Indeed, the United States noted that China had made publicly available a submission in one recent dispute, "European Union – Measures Related to Price Comparison Methodologies" (DS516),[4] and the United States saw no reason why China would be less transparent in this dispute, challenging a safeguard measure, than in that dispute, challenging anti-dumping measures.

4.4. 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.

4.5. The representatives of Brazil, Canada, the European Union; India, Japan, Malaysia, the Philippines, the Russian Federation and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

5 INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

A. Request for the establishment of a panel by Brazil (WT/DS579/7)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 July 2019 and had agreed to revert to it should a requesting Member wish to do so. He drew attention to the communication from Brazil contained in document WT/DS579/7. He then invited the representative of Brazil to speak.

5.2. The representative of Brazil said that his country was requesting that the DSB establish a panel at the present meeting, with standard terms of reference, in order to examine India's measures on sugar and sugarcane. This was the second time Brazil was requesting the establishment of a panel, as India had blocked this panel request, for the first time, at the 22 July 2019 DSB meeting. Brazil continued to have serious concerns with regard to India's actions to provide support that exceeded the levels of domestic support that India was allowed to provide under the Agreement on Agriculture, and granted export subsidies that were prohibited under the SCM Agreement. Brazil had already noted the harmful consequences of India's measures for Brazilian sugar producers. The panel requests of Australia and Guatemala showed that producers from those countries were also being negatively affected by those measures. Brazil was still hopeful that India would make every effort to bring its measures into conformity with its WTO obligations. Given that the subject matter of the panel requests under this and the next two Agenda items were similar, Brazil requested that a single panel be established in accordance with Article 9.1 of the DSU to examine the complaints of Australia, Brazil and Guatemala. Brazil believed this was the most efficient course of action and the best use of WTO resources.

5.3. The representative of India said that his country was disappointed that Brazil had chosen to move forward with its second request for the establishment of a panel regarding India's measures

[4] Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the dispute: "European Union – Measures Related to Price Comparison Methodologies" (DS516) (Geneva, 6 December 2017), available at: http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf.

concerning sugar and sugarcane. As India had explained in its statement made at the 22 July 2019 DSB meeting in response to Brazil's first request for the establishment of a panel, the measures that were the subject matter of Brazil's request neither had any trade distorting effect on global sugar trade nor did they adversely affect Brazil's commercial interests. India wished to reiterate that these measures were consistent with its WTO obligations and were aimed at preventing the exploitation of over 35 million vulnerable, low-income, resource-poor farmers, and to enable them to have a just and equitable share in economic development. India noted that Brazil had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to the establishment of a single panel, as these matters were distinct and separate.

5.4. The representative of Brazil said that his country regretted India's decision to have separate panels for very similar disputes, dealing with essentially the same subject matter and being established concurrently. Brazil failed to see any advantage in having separate panels in these disputes. On the contrary, Brazil believed that separate panels would unduly burden an already overburdened Secretariat's resources. Nevertheless, Brazil remained ready to work constructively in order to harmonize the procedures to ensure coherence in the work of the panels.

5.5. 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.

5.6. The representatives of Australia, Canada, China, Colombia, Costa Rica, the European Union, Guatemala, Honduras, Japan, Panama, the Russian Federation, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

6 INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

A. Request for the establishment of a panel by Australia (WT/DS580/7)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 July 2019 and had agreed to revert to it should a requesting Member wish to do so. He drew attention to the communication from Australia contained in document WT/DS580/7, and invited the representative of Australia to speak.

6.2. The representative of Australia said that her country requested that the DSB establish a panel, with standard terms of reference, to examine India's measures concerning sugarcane and sugar. Australia recalled that it had first requested the establishment of a panel to examine this dispute at the 22 July 2019 DSB meeting as consultations held in April 2019 with India had failed to resolve the matter. Australia further noted that India had objected to its first panel request. Australia remained seriously concerned that the overproduction of highly subsidized sugar in India was contributing to a significant oversupply in the global sugar market. Australia wished to reiterate its view that India's domestic support and export subsidies for sugarcane and sugar were inconsistent with India's obligations under the WTO Agreement on Agriculture and the WTO SCM Agreement and, further, that India had failed to comply with its notification obligations in relation to sugarcane and sugar under the Agreement on Agriculture, the SCM Agreement and the GATT 1994. Australia noted that Brazil and Guatemala continued to share their concerns and that both Members also requested for a second time that the DSB establish a panel in relation to the same measure. Australia, therefore, repeated its request that a single panel be established in accordance with Article 9.1 of the DSU to examine the complaints of Australia, Brazil and Guatemala. To do so would best facilitate a consistent, clear and certain resolution of the dispute, and enable this matter to be dealt with most efficiently at a time when the resources of the WTO were constrained. Australia valued its strong political, economic and community ties with India. However, as India had taken no concrete steps to date to respond to Australia's long-standing concerns, Australia repeated its request that a panel be established.

6.3. The representative of India said that his country was disappointed that Australia had moved forward with its second request for the establishment of a panel regarding India's measures concerning sugar and sugarcane. As India had explained in its statement made at the 22 July 2019 DSB meeting in response to Australia's request for the establishment of a panel, the measures that were the subject matter of Australia's request had no bearing on world sugar trade or Australia's ability to compete in the global trade of sugar. India repeated that these measures were consistent

with its WTO obligations and were aimed at preventing the exploitation of over 35 million vulnerable, low-income, resource-poor farmers, and to enable them to have a just and equitable share in economic development. India noted that Australia had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to the establishment of a single panel, as these matters were distinct and separate.

6.4. The representative of Australia said that her country wished to reiterate its strong view that a single panel should be established under Article 9.1 of the DSU, particularly since the complainants' requests related to the same matter. Australia believed that it was in the interest of all Members that matters be considered in an efficient way, especially when the dispute settlement system was facing resourcing constraints. Australia considered that the certainty and the predictability of the WTO system would be best served by the establishment of a single panel under Article 9.1. It was obvious that India had failed to provide an explanation as to why it would not be feasible for the matter to be heard by a single panel.

6.5. 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.

6.6. The representatives of Brazil, Canada, China, Colombia, Costa Rica, the European Union, Guatemala, Honduras, Japan, Panama, the Russian Federation, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

7 INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

A. Request for the establishment of a panel by Guatemala (WT/DS581/8)

7.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 July 2019 and had agreed to revert to it should a requesting Member wish to do so. He then drew attention to the communication from Guatemala contained in document WT/DS581/8, and invited the representative of Guatemala to speak.

7.2. The representative of Guatemala recalled that, at the 22 July 2019 DSB meeting, India had objected to the establishment of a panel in this dispute. Guatemala, therefore, requested for the second time that the DSB establish a panel, with standard terms of reference, to examine India's measures concerning sugarcane and sugar as elaborated in Guatemala's request for the establishment of a panel contained in document WT/DS/581/8. To ensure the efficiency of the proceedings, Guatemala further requested that, in accordance with Article 9.1 of the DSU, a single panel be established to jointly examine the complaints of Guatemala, Australia and Brazil. In particular, Guatemala noted that India had not provided an adequate explanation as to why it would not be "feasible" for the matter to be heard by a single panel. In "India – Patents (EC)" (DS79), the Panel had suggested that it was feasible for multiple complaints to be heard by a single panel if two requirements were fulfilled: first, the complaints had to deal with the same matter, and second, the panel requests had to be submitted at the same time.[5] In the dispute at hand, the complaints related to the same matter, that is, the WTO-inconsistency of India's measures concerning sugarcane and sugar. In addition, the panel requests of Guatemala, Australia and Brazil were being submitted at the same time. Therefore, it was "feasible" for the matter to be heard by a single panel. Moreover, having multiple panels would require additional resources from India. For example, India would need to: (i) deal with three separate sets of hearings (one hearing for each dispute); (ii) respond individually to each written submission; and (iii) respond to different questions from different panels. Having multiple panels would not be in the interest of using scarce resources wisely and efficiently. Having multiple panels would also require additional resources from Guatemala, which was a small developing country with resource constraints. For example, Guatemala would need to deploy additional resources in requesting third party rights in the two parallel proceedings. Guatemala hoped that India would reconsider its objection to the establishment of a single panel under Article 9.1 of the DSU, and that India would use this opportunity to cooperate with the co-complainants to ensure the most efficient use of the parties', third parties' and Secretariat's resources in this dispute. Notwithstanding Guatemala's request for the establishment of a panel,

[5] See Panel Report, "India – Patents", para. 7.16.

Guatemala remained open to discussing a possible mutually agreed solution with India that would address its concerns.

7.3. The representative of India said that India was disappointed that Guatemala had chosen to move forward with its second request for the establishment of a panel regarding India's measures concerning sugar and sugarcane. As India had explained in its statement made at the 22 July 2019 DSB meeting in response to Guatemala's request for the establishment of a panel, the measures that were the subject matter of Guatemala's request neither had any trade distorting effect on global sugar trade nor did they adversely affect Guatemala's commercial interests. India wished to reiterate that these measures were consistent with its WTO obligations and were aimed at preventing the exploitation of over 35 million vulnerable, low-income, resource-poor farmers, and to enable them to have a just and equitable share in economic development. India noted that Guatemala had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to the establishment of a single panel, as these matters were distinct and separate.

7.4. 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.

7.5. The representatives of Australia, Brazil, Canada, China, Colombia, Costa Rica, the European Union, Honduras, Japan, Panama, the Russian Federation, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

8 TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION, IMPORTATION AND MARKETING OF PHARMACEUTICAL PRODUCTS

A. Request for the establishment of a panel by the European Union (WT/DS583/3)

8.1. The Chairman drew attention to the communication from the European Union contained in document WT/DS583/3. He then invited the representative of the European Union to speak.

8.2. The representative of the European Union said that the Turkish authorities had adopted measures to achieve progressively the localization in Turkey of the production of a substantial part of the pharmaceutical products consumed in Turkey. In order to achieve that objective, Turkey had implemented several measures. One such measure was a localization requirement, whereby Turkey required foreign producers of pharmaceutical products exporting to Turkey to move their production into Turkey, in order for their products to be eligible for the national reimbursement scheme. As the Turkish social security scheme covered the vast majority of sales of medicines to patients, it was much more difficult for a product that was not reimbursed to access the Turkish market. Another measure was an import ban on localized products, whereby the importation of a pharmaceutical product that was localized was no longer permitted. A third category of measures was a prioritization measure. This consisted of Turkey giving priority to the review of applications of domestic pharmaceutical products for inclusion in the list of products covered by the reimbursement scheme, as well as with respect to any pricing and licensing policies and processes, over the review of the applications of like imported products. These measures were a clear violation of Turkey's WTO obligation to treat foreign companies on an equal footing with domestic ones. EU exports of pharmaceutical products to Turkey were worth more than EUR2.5 billion each year. Already at the time of the present meeting, the competitive opportunities of EU pharmaceutical products imported into Turkey were significantly reduced compared to like domestically produced products. The EU had raised this issue with Turkish authorities repeatedly over a long period of time without success. The present request for the establishment of a panel came after consultations with the Turkish government which had taken place in May of 2019. These consultations had failed to resolve the matter. The EU urged Turkey to bring these measures in line with its WTO obligations. To this end, the EU requested the establishment of a panel to assess fully the relevant measures.

8.3. The representative of Turkey said that her country deeply regretted that the European Union had decided to request establishment of a panel in this dispute. Turkey considered the EU's panel request to be premature. Turkey had fully engaged in consultations with the European Union and remained ready to continue a constructive discussion in order to arrive at a mutually acceptable solution in this dispute. Turkey also considered the European Union's request to be misplaced. Indeed, the matter raised in the EU's request for the establishment of a panel related to Turkey's

social security system and policies that were aimed at ensuring a fair and uninterrupted access to medicines for all patients in Turkey. These healthcare policies and any specific measures taken in their context were fully consistent with Turkey's rights and obligations under the WTO covered agreements. The EU's allegations against Turkey were based on a misunderstanding of Turkey's social security and healthcare systems. Turkey disagreed with the EU's decision to rely on the WTO dispute settlement system to challenge what were essentially measures adopted to ensure that its citizens had a reliable and affordable access to healthcare. Each WTO Member should be free to organize its social security system in a way which maximized accessibility while guaranteeing financial sustainability. Given the societal importance of providing affordable healthcare, any concerns relating to Turkey's public health policies were not matters that should be referred to a panel. In these circumstances, Turkey could not agree to the establishment of a panel as requested by the European Union at the present meeting.

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

9 UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA: RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

A. Report of the Appellate Body (WT/DS437/AB/RW and WT/DS437/AB/RW/Add.1) and Report of the Panel (WT/DS437/RW and WT/DS437/RW/Add.1)

9.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS437/28 transmitting the Appellate Body Report in the dispute: "United States – Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China", which had been circulated on 16 July 2019 in document WT/DS437/AB/RW and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report". He then asked if any representative of the parties to the dispute wished to present views on the Reports before the DSB.

9.2. The representative of China said that his country had initiated this dispute nearly seven years ago in order to address one of the most pernicious and unlawful aspects of how the US Department of Commerce (USDOC) conducted countervailing duty investigations against Chinese products. In truth, there were many aspects of the USDOC's countervailing duty practice that China could have challenged. However, China had decided to focus on the USDOC's practice of manufacturing non-existent "input subsidies" in order to inflate countervailing duty margins far beyond what any impartial and unbiased investigating authority could lawfully determine. As China had consistently explained, the USDOC's identification of alleged "input subsidies" to downstream manufacturers of finished products failed all three elements of an actionable subsidy: there was no financial contribution, there was no benefit, and there was no basis to conclude that any "subsidy", even if it had existed, was specific to certain enterprises. What the USDOC identified as "input subsidies" were, in fact, ordinary commercial transactions between unrelated parties at prevailing market prices for the input in question. The recommendations and rulings that the DSB was adopting at the present meeting had confirmed that China was right about at least two of these three elements. For the reasons that China would explain at the present meeting, China was not entirely satisfied with the Panel and Appellate Body reports that Members were considering, just as the United States was not entirely satisfied with these reports. But these reports were nevertheless sufficient to establish that the United States had acted unlawfully in the investigations at issue by countervailing alleged "input subsidies" that did not, in fact, exist.

9.3. With regard to the notion of "public body", the findings of the Panel and Appellate Body concerning the proper interpretation of the term "public body" under Article 1.1(a)(1) of the SCM Agreement, China said that nearly a decade ago, the Appellate Body had rejected the USDOC's application of a *per se* rule of majority government ownership to determine whether Chinese enterprises were "public bodies" under Article 1.1(a)(1) of the SCM Agreement. In the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), the Appellate Body had explained that an investigating authority conducting a public body analysis instead had to determine whether

the entity was "vested with authority to exercise governmental functions". The Appellate Body had explained that an investigating authority had to "engage in a careful evaluation of the entity in question" in order to "identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government". In the wake of the adoption of the Appellate Body report in the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), the USDOC had made no attempt to come into compliance with the DSB's recommendations and rulings by engaging in a "careful evaluation", as described by the Appellate Body, when conducting a public body analysis of Chinese enterprises. Instead, the USDOC had simply taken the *per se* rule of majority government ownership that the Appellate Body had expressly rejected and had replaced it with a *per se* rule that was substantially broader. The old *per se* rule had led the USDOC to conclude that all majority government-owned entities in China were public bodies. The new *per se* rule led the USDOC to conclude that all companies in China were public bodies, because the USDOC took the view that all companies in China were allegedly vested with authority to perform the so-called "government function" of "maintaining and upholding the socialist market economy". To China, it was immediately evident that the USDOC's new *per se* rule was irreconcilable with the Appellate Body's interpretive analysis in the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379). China was a socialist market economy, and so China believed that the USDOC's conclusion that "maintaining and upholding the socialist market economy" was a "government function" in China was meaningless in the absence of any attempt to demonstrate that this alleged "government function" had a connection to the conduct alleged to constitute a financial contribution. Yet the USDOC had never made any attempt to demonstrate such a connection, because the USDOC took the view that an entity vested with authority to perform any "government function" was a public body, even when the authority vested in the entity had no connection whatsoever with the conduct at issue under Article 1.1(a)(1) of the SCM Agreement. The fact that the Panel and the Appellate Body had upheld this sweeping interpretation in the reports that were being considered at the present meeting was dumbfounding to China. The purpose of Article 1.1(a)(1) of the SCM Agreement was to "set out rules relating to the question of attribution of conduct to a State". China believed that it confounded the entire purpose of the inquiry to attribute conduct to a WTO Member even when that conduct was unrelated to any government authority with which an entity had been vested. What was deeply disappointing to China about the Appellate Body's analysis was its utter failure to even address this fundamental issue. In the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), the Appellate Body had found that its public body interpretation "coincide[d] with the essence of Article 5" of the ILC Articles, which attributed to the State the conduct of a person or entity that was not an organ of the State if "empowered by the law of the State to exercise elements of the governmental authority provided the person or entity is acting in that capacity in the particular instance". In the Report before the DSB at the present meeting, the Appellate Body had not even attempted to explain how its interpretation "coincide[d] with the essence of Article 5" of the ILC Articles if any entity "empowered by the law of the State to exercise elements of the governmental authority" could be deemed a public body regardless of whether that entity had been acting in that capacity when engaged in the conduct that was the subject of the financial contribution inquiry. In the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), the Appellate Body had found that "too broad an interpretation of the term 'public body'" could "risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies". China believed that the Appellate Body's interpretative analysis under Article 1.1(a)(1) in the current report should be of grave concern to all Members – if investigating authorities treated entities vested with authority to perform any "government function" as public bodies, the "delicate balance embodied in the SCM Agreement" would be upset in precisely the way that the Appellate Body had once feared.

9.4. With regard to the findings of the Panel and Appellate Body related to the USDOC's use of non-Chinese benchmarks to evaluate the adequacy of remuneration under Article 14(d) of the SCM Agreement, China said that the USDOC's abuses of Article 14(d) were well known to the Membership. There had been no fewer than eight separate challenges to the USDOC's use of out-of-country benchmarks under this provision. Several of these disputes remained underway. China considered that it was useful to evaluate the present Reports in their broader historical context. The history of the "out-of-country benchmark" issue under Article 14(d) provided a case study of how the United States abused trade remedies and ignored the rulings of this body. This history also illustrated the inconsistent attitudes of the United States toward the role of panels and the Appellate Body in interpreting and applying the covered agreements. The representative of China invited Members to be honest with each other, especially as people who negotiated and interpreted treaties: the text of

Article 14(d) of the SCM Agreement did not contemplate the use of out-of-country benchmarks under any circumstance. The text was clear: the adequacy of remuneration for the provision of a good was to be determined "in relation to prevailing market conditions for the good in the country of provision". Yet in the "US – Softwood Lumber IV" dispute (DS257), the United States had persuaded the Appellate Body to overrule the Panel in that dispute and to create an exception to this unambiguous rule. The Appellate Body had held that an investigating authority may, in "very limited" circumstances, use a benchmark other than private prices for the good in the country of provision.

9.5. China observed, first of all, that the United States did not seem to have a problem with the Appellate Body creating "judge-made" rules when they were rules that the United States agreed with. When the United States accused the Appellate Body of "straying from the text" or "overreaching", what the United States really meant was that it was dissatisfied with how the Appellate Body had interpreted a particular provision in the covered agreements. The United States believed that the Appellate Body "exceeds its authority" or "departs from what the Members agreed" whenever it did not accept whatever interpretation the United States favoured. China invited Members to look at what the United States had proceeded to do with this newly-created exception. Far from constraining its use of out-of-country benchmarks to "very limited" circumstances, as the Appellate Body had envisioned, the USDOC had started to find "distortions" around every corner. The USDOC's use of out-of-country benchmarks had rapidly become the norm, not the exception. It was not difficult to see why: by replacing available in-country prices with benchmarks of its own choosing, the USDOC was able to manufacture "subsidies" and increase countervailing duty margins to practically whatever level it wished. The 15 years of litigation under Article 14(d) that had ensued were the predictable consequence of giving in to the US demand for an exception to the text that the Members had negotiated. The focus of these disputes had quickly moved away from the text of the provision and toward the meaning of the exception that the Appellate Body had created. Canada, China, India, Indonesia and Turkey had all been forced to come before the DSB, some more than once, in their efforts to rein in the USDOC's abuses of the "very limited" exception to the clear requirement of Article 14(d). These disputes had consumed a significant amount of the DSB's resources and of those of the Secretariat. China had hoped that, in view of this unfortunate history, the Appellate Body would have used this appeal to return to the text of Article 14(d) and impose more clearly defined limitations on when, as a matter of law, an investigating authority could reject in-country prices as benchmarks. Such an approach would have brought greater certainty to this area of jurisprudence and, perhaps, have reduced the volume of litigation under Article 14(d) in the years to come. China regretted that the Appellate Body had opted, once again, to focus on the meaning of its own prior reports instead of the meaning of the provision it had been called upon to interpret.

9.6. China said that at the same time, both the Panel and the Appellate Body in these compliance proceedings had made clear that the Appellate Body meant what it had said in the "US – Softwood Lumber IV" dispute (DS257): that is, that the circumstances in which an investigating authority could resort to out-of-country benchmarks were indeed "very limited". By setting a high evidentiary bar for when an investigating authority could reject in-country prices as benchmarks, the Panel and the Appellate Body had indicated to investigating authorities and reviewing panels that it should be only in rare circumstances that an investigating authority was allowed to reject in-country prices as benchmarks. The recommendations and rulings that the DSB would adopt at the present meeting should, in particular, bring to an end one of the most dangerous aspects of the USDOC's practice under Article 14(d) of the SCM Agreement. In investigation after investigation, the USDOC had identified aspects of a Member's economy or market regulation that it did not agree with and had cited those factors as reasons for rejecting in-country prices, without ever demonstrating that those factors had any effect upon in-country prices. The USDOC's "distortion" findings had been based on presumptions and inferences, at best, not hard evidence that specific government "interventions" had materially affected in-country prices to such an extent that they could no longer be considered market-determined. The USDOC had apparently believed that Article 14(d) embodied the US understanding of how markets should be regulated, and that any deviation from this understanding was, necessarily, a "distortion". Going forward, the USDOC would need to base any decision to reject in-country prices on positive evidence that "price distortion actually results from government intervention in the market". The USDOC could no longer presume that in-country prices were "distorted" and could no longer force respondents to prove the contrary. In addition, the USDOC had to cease its well-documented practice of simply ignoring evidence that parties placed on the record to demonstrate that in-country prices were, in fact, market-determined. As a result of this decision, the USDOC must now "engage with and analyse the methods, data, explanations, and supporting evidence put forward by interested parties in order to ensure that its finding of price distortion is

supported, and not diminished or contradicted, by evidence and explanations on the record". The decision to adopt these reports at the present meeting meant, moreover, that the USDOC could no longer rely on its "cookie-cutter" rationales for routinely rejecting in-country benchmarks. Henceforth, the USDOC would have to engage with the facts of each investigation. If the United States implemented these obligations in good faith, as China presumed that it would, the recommendations and rulings that Members would adopt at the present meeting should go a long way toward addressing the concerns that China and other WTO Members had had with the USDOC's abuse of the limited exception created in the "US – Softwood Lumber IV" dispute (DS257). The use of in-country benchmarks should be the norm, not the exception. China trusted that the USDOC would revise its practices accordingly so that China and other Members were not forced to challenge the USDOC's determinations on a regular basis, as had been the case since the "US – Softwood Lumber IV" dispute (DS257).

9.7. With regard to the DSB's recommendations and rulings concerning specificity under Article 2.1(c) of the SCM Agreement, China said that the findings and conclusions of both the Panel and the Appellate Body in this matter reaffirmed that an investigating authority could not simply summon specificity into existence, which was what the USDOC had been doing for years. A valid finding of specificity was a separate and independent requirement for imposing a countervailing duty. It was not merely a consequence of finding that there was a "subsidy". The USDOC's approach to specificity in its investigations of Chinese products, including in the determinations at issue, illustrated the fictitious nature of the "input subsidies" that the USDOC purported to identify. In the real world, the input sales that the USDOC considered to be "subsidies" were garden-variety transactions between independent sellers and purchasers operating at arm's length. By using an out-of-country benchmark (unlawfully), the USDOC found these transactions to be "subsidies". The USDOC then reasoned that because these transactions occurred repeatedly – which, of course, they did, because the manufacturers of a product had to procure the necessary inputs on a regular basis – it had to be the case that these alleged "subsidies" were provided pursuant to a "subsidy programme". The findings of the Panel and the Appellate Body made clear that the USDOC had to stop engaging in this self-fulfilling approach to specificity. In assessing whether there was specificity under the first factor of Article 2.1(c) of the SCM Agreement, an investigating authority first had to identify the relevant "subsidy programme". A "subsidy programme" within the meaning of Article 2.1(c) was a "plan or scheme" pursuant to which financial contributions that conferred a benefit were provided to certain enterprises. The mere repeat provision of inputs to downstream enterprises did not constitute a "subsidy programme". An investigating authority could not observe the existence of the individual transactions that it had found to constitute subsidies and conclude, on that basis alone, that there was a "subsidy programme". Nor may an investigating authority rely on the fact that the inputs in question had been provided on a regular basis. As the Appellate Body had rightly held, this "would circumvent the legal disciplines of Article 2.1(c)". Rather, an investigating authority had to identify a plan or scheme pursuant to which the subsidy in question had been provided, as evidenced by a systematic series of actions. That was what a "subsidy programme" was.

9.8. China said that if the USDOC were to faithfully implement these recommendations and rulings, it would find that no such "subsidy programmes" existed for the inputs in question (or, indeed, for any ordinary industrial input). That was because China did not subsidize industrial inputs. If and when the USDOC used proper in-country benchmarks to evaluate the transactions in question, it would find that there was no "subsidy" and hence no "subsidy programme" even under its self-fulfilling approach to specificity. Beyond that, even if the USDOC were to identify a subsidy "benefit" in certain individual transactions, it would not find that any such "subsidies" had been provided systematically such that they would provide evidence of an unwritten "plan or scheme". While China presumed that the United States would implement its obligations under Article 2 of the SCM Agreement in good faith, China wished to take this opportunity to remind the United States that any affirmative finding of specificity "shall be clearly substantiated on the basis of positive evidence", in accordance with Article 2.4. As anyone who dealt with the USDOC on a regular basis was aware, the USDOC had a practice of issuing burdensome questionnaires that presumed the existence of the matter being investigated and then resorting to so-called "adverse facts available" when the respondents were unable to demonstrate to the USDOC's satisfaction that the matter did not exist. This was clearly an abuse of the procedural requirements of the SCM Agreement, and one that China would be monitoring carefully against.

9.9. In conclusion, China said that it hoped that its remarks made clear that the United States did not have a monopoly on dissatisfaction with Appellate Body reports. Any Member that was active in WTO dispute settlement had received an Appellate Body report with which it disagreed, sometimes strongly. The report at issue at the present meeting was such a report for China, at least with respect to the public body issue. Where the United States did appear to have a monopoly was in thinking that an adverse Appellate Body report meant that the Appellate Body had somehow exceeded its authority under the DSU. China did not believe that was the case. China believed that Members should work together to ensure that this vitally important system kept working. As for the specific dispute at issue, the recommendations and rulings that the DSB would adopt at the present meeting made clear that the USDOC should cease its practice of countervailing alleged "input subsidies" in investigations of Chinese products. These countervailing duty determinations were, at a minimum, based on unlawful approaches to the evaluation of benefit and specificity. Once these errors were corrected, there was no basis in law or fact to conclude that the manufacturers of the products under investigation had received inputs for less than adequate remuneration pursuant to a subsidy programme that was limited to certain enterprises. While the recommendations and rulings that the DSB would adopt at the present meeting related only to the specific countervailing duty investigations at issue, China called upon the United States to reform its countervailing duty practices more generally to conform to these rulings, with respect to investigations of both Chinese products and those of other Members. The USDOC's abuse of Article 14(d) of the SCM Agreement, in particular, had gone on for far too long. Especially at a time when the resources of the DS mechanism were under strain, Members should not be forced to keep returning to the DSB to ensure that the United States adhered to its commitments under the SCM Agreement. China trusted that the United States would take this consideration into account when evaluating how it would bring itself into compliance with these recommendations and rulings.

9.10. The representative of the United States said that this proceeding had involved important questions concerning the types of analysis that the Subsidies Agreement[6] required for the imposition of countervailing duties in order to address injury caused by subsidized imports. In the original proceeding, the Appellate Body had found that the US Department of Commerce (Commerce) had not adequately explained its countervailing duty determinations in certain respects. The United States strongly criticized that Appellate Body report on two grounds.[7] First, because the Appellate Body report had adopted an approach suggesting that WTO adjudicators were to conduct *independent* investigations and apply new legal standards, regardless of what a party had *actually* argued before the panel. Second, because the Appellate Body had found that an administering authority needed to examine prices from State-Owned Enterprises (SOEs) for the purpose of determining market benchmarks, rather than looking primarily to *private* prices from arm's-length transactions.

9.11. Despite these criticisms, to implement the DSB's recommendations, Commerce had made revised determinations, adding detailed analysis that the DSB had found lacking in the original determinations. Under any fair reading of the Commerce determinations, the Subsidies Agreement, and the DSB recommendations in this dispute, the United States had brought the challenged measures into compliance with WTO rules. Regrettably, the compliance Panel and two of three persons on appeal had continued to find fault with certain aspects of Commerce's determinations. The three issues on appeal had involved the compliance Panel's findings on (i) public body, (ii) third-country benchmarks and market distortion, and (iii) *de facto* specificity. On the issue of public body, although the appellate report recognized that Commerce had proved through an exhaustive analysis that China used SOEs to subsidize and distort its economy, the report had repeated an unclear and inaccurate statement of the criteria for determining whether an entity was a public body. Rather than clarify how that approach was mistaken, the appellate report continued to endorse an approach that was nowhere reflected in the text of the Subsidies Agreement. The result was to significantly limit the ability of governments to effectively combat unfairly subsidized imports. On the issue of out-of-country benchmarks and market distortion, the appellate report had found that, notwithstanding that China used SOEs to subsidize and distort its economy, Commerce had to use distorted Chinese prices to measure subsidies, unless Commerce provided even more analysis than the hundreds of pages in these investigations. This conclusion ignored the findings of the World Bank, OECD working papers, economic surveys, and other objective evidence, all cited by Commerce in the determinations at issue. On the issue of *de facto* specificity, the report had

[6] Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement").

[7] See US Statement at 26 January 2015, Meeting of WTO Dispute Settlement Body (https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan16.DSB_.Stmt_.as-delivered.Fin_.Public.pdf).

proceeded to find that evidence of a "systematic series of actions" was required and had agreed with the compliance Panel that Commerce had not adequately explained the "systematic" nature of the subsidies at issue. Yet none of these so-called requirements was reflected in the Subsidies Agreement. On each of these three issues, the dissent had strongly criticized the findings as, among other things, reflecting a fundamental misunderstanding of the Subsidies Agreement, exceeding the mandate of the Appellate Body to review issues of law covered in the panel report, and articulating an incoherent legal standard that was not in accordance with the ordinary principles of treaty interpretation. Through the interpretations applied in this proceeding, based primarily on erroneous approaches by the Appellate Body in past reports, the WTO dispute settlement system was weakening the ability of WTO Members to use WTO tools to discipline injurious subsidies. The Subsidies Agreement was not meant to provide cover for, and render untouchable, one Member's policy of providing massive subsidies to its industries through a complex web of laws, regulations, policies, and industrial plans. Finding that the kinds of subsidies at issue in this dispute could not be addressed using existing WTO remedies, such as countervailing duties, called into question the usefulness of the WTO to help WTO Members address the most urgent economic problems in today's world economy. In its statement under this Agenda item, the United States would address specific aspects of the findings of the appellate report that were erroneous and undermined the interests of all WTO Members in a fair-trading system. These serious substantive concerns included erroneous interpretations of "public body" and out-of-country benchmark, diminishing US rights and adding to US obligations, engaging in fact-finding, and treating prior reports as "precedent".

9.12. First, with respect to the issue of public body, the United States said that it was pleased that the compliance Panel and the appeal had decisively rejected China's proposed interpretation. China had argued that an investigating authority had, in all cases, to establish a "clear logical connection" between an identified "government function" and the conduct alleged to constitute a financial contribution.[8] The compliance Panel had rejected China's contention and found that Article 1.1(a)(1) of the Subsidies Agreement "does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution".[9] The appellate report had agreed and found that "the relevant inquiry hinges on the *entity*", the "core characteristics" of the entity, and the entity's "relationship with the government".[10] While it had been correct to reject the interpretation that China had proposed on appeal, the approach of the so-called "majority" to the interpretation of the term "public body" continued to be deeply problematic. As the dissenting member had emphasized, "the majority has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body, and [the dissenting member] disagree[d] with the majority's implication that a clearer articulation of the criteria is neither warranted nor necessary".[11] The dissent had continued that "the continuing lack of clarity as to what is a 'public body' represents an undue emphasis on 'precedent', which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body divisions repeated the original flaw while trying to navigate around it".[12] The "original mistake", as the dissent had put it,[13] was the Appellate Body's attempt, in the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), to define the term "public body" as "an entity that possesses, exercises or is vested with *governmental authority*", including because the entity had "the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority".[14] Under the Appellate Body's interpretation, even where a government owned or controlled an entity, that would not have been sufficient to hold the government responsible for any injurious subsidies the entity provided. The Appellate Body's "governmental authority" test significantly limited the ability of governments to effectively combat unfairly subsidized imports. The Appellate Body's approach was nowhere reflected in the text of the Subsidies Agreement. If an entity had no regulatory or supervisory authority, but was nonetheless able to be controlled by the government – making any transfer of economic resources by that entity a conveyance of the government's own resources – it would have made no sense to conclude that this transfer of public resources was not a financial contribution under Article 1.1(a)(1). On the other hand, if an entity had the power to "regulate" individuals or "otherwise restrain their conduct", but not the power to provide financial contributions of government resources, its regulatory powers were

[8] Appellate report, para. 5.90.
[9] "US – Countervailing Measures" (China) (Article 21.5 – US) (Panel), para. 7.28.
[10] Appellate report, para. 5.100.
[11] Appellate report, para. 5.243 (separate opinion of one division member).
[12] Appellate report, para. 5.244 (separate opinion of one division member).
[13] Appellate report, para. 5.245 (separate opinion of one division member).
[14] "US – Anti-Dumping and Countervailing Duties" (China) (AB), para. 290 (citing Canada – Dairy (AB), para. 97).

not relevant to the Subsidies Agreement. The Appellate Body's interpretation, therefore, did not reflect the structure of either Article 1.1(a)(1) or of the Subsidies Agreement. The failure of the Appellate Body's interpretation to capture a potentially vast number of government-controlled entities undermined the disciplines of the Subsidies Agreement. The Appellate Body's "original mistake"[15] also had led to no end of confusion for WTO Members and panels.

9.13. The United States said that for its part, China had advocated throughout this dispute for three different incorrect interpretations of the term "public body", all of which China had argued were consistent with the Appellate Body's prior findings. Before the original Panel, China had argued that "a public body … must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others".[16] The original Panel had rejected China's proposed interpretation.[17] The Appellate Body had rejected that interpretation as well in the "US – Carbon Steel (India)" dispute (DS436).[18] Early in this compliance Panel proceeding, China had argued that an entity could be deemed a "public body" only when the "entity alleged to be providing a financial contribution has been vested with governmental authority to carry out governmental functions, and is exercising *that* authority to perform *those* functions, when it engages in the conduct enumerated in Article 1.1(a)(1)".[19] The United States had observed, as had certain of the third parties, that an implication of China's proposed interpretation was that the "governmental function" and the conduct under Article 1.1(a)(1) had to be the same, but such an interpretation was not supported by the Subsidies Agreement or findings in prior reports.[20] China had abandoned that proposed interpretation. Late in the compliance Panel proceeding, and on appeal, China had shifted its position again, arguing that Article 1.1(a)(1) required that there be "a 'clear logical connection'" between "the 'government function' identified by the investigating authority" and the "conduct alleged to constitute a financial contribution under Article 1.1(a)(1)".[21] China had insisted before the compliance Panel and on appeal that it "[did] not mean that the 'government function' and the conduct at issue under Article 1.1(a)(1) must be identical".[22] But China had continued throughout to make statements demonstrating that China actually held this incorrect view.[23] As explained earlier, the compliance Panel and the appeal had come to the correct conclusion, and had rightly rejected China's proposed interpretations. It was evident, though, that WTO Members and panelists remained confused by interpretive findings in prior Appellate Body reports concerning the meaning of the term "public body". As noted, China had engaged in various misguided efforts to further misinterpret the term "public body". And the Panel in the "US – Pipe and Tube Products (Turkey)" dispute (DS523), in its report circulated to Members on 18 December 2018, had misinterpreted the term "public body" on the basis of past reports, finding, *inter alia*, that the ability of the government to intervene in an entity's critical operations and key decisions was not relevant to a public body determination; that Panel had required evidence that the government actually had exercised that control.[24] Such a requirement was not supported by prior Appellate Body findings, and conflated the analysis of entrustment or direction of a private body with a public body analysis. The United States had appealed that Panel's findings.

9.14. The United States had explained during the oral hearing in this appeal that, because of prior Appellate Body findings, clarification was sorely needed. Such clarification could be found by returning to the text of the Subsidies Agreement itself. Article 1.1(a)(1) of the Subsidies Agreement concerned whether there was a "financial contribution" by a government or any public body. The broad language used and the multiple methods of conveying value described in Article 1.1(a)(1)

[15] Appellate report, para. 5.245 (separate opinion of one division member).
[16] "US – Countervailing Measures" (Panel), para. 7.35 (summarizing the main arguments of China).
[17] See "US – Countervailing Measures" (China) (Panel), para. 7.67.
[18] See "US – Carbon Steel" (India) (AB), para. 4.17.
[19] First Written Submission of China (4 January 2017) ("China's First Written Submission"), para. 79 (italics in original).
[20] See, e.g., First Written Submission of the United States of America (6 February 2017) ("US First Written Submission"), paras. 29-30; Third Party Written Submission by the European Union (13 February 2017), para. 11; Third Party Submission of Japan (13 February 2017), para. 3; Third Party Oral Statement of Australia (11 May 2017), para. 6; Responses of Canada to Questions to the Third Parties from the Panel in Connection with the Substantive Meeting (31 May 2017), para. 4.
[21] China's Other Appellant Submission, para. 30. See also Answers of the People's Republic of China to Questions from the Panel (31 May 2017) ("China's Responses to Panel Questions"), para. 4.
[22] China's Responses to Panel Questions, para. 4. See also US – Countervailing Measures (China) (Article 21.5 – US) (Panel), para. 7.27; China's Other Appellant Submission, footnote 15.
[23] See US Appellee Submission, para. 98.
[24] "US – Pipe and Tube Products" (Turkey) (Panel), para. 7.42. On 30 January 2019, the United States appealed the findings of the panel in US – Pipe and Tube Products" (Turkey) (Panel). WT/DS523/5.

revealed an intention to capture within the meaning of "financial contribution" a wide array of transfers of value. That is, the purpose of the financial contribution analysis was to determine whether a transfer of value had been made and could be attributed to the government. As explained in an earlier Appellate Body report, Article 1.1(a)(1) "defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member".[25] If the entity was "a government or any public body", and its conduct fell within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there was a financial contribution.[26] The use of distinct terms in Article 1.1(a)(1) to describe the relevant entities – "a government" and "any public body" – suggested that these terms had distinct meanings.[27] That both entities were referred to collectively as "government" and were capable of making a "financial contribution" suggested that the core attribute they shared was the ability to convey the economic resources of the public. After all, control over and authority to dispose of the public's economic resources was a core function of government in every WTO Member. The context supplied by the term "financial contribution" was a further indication of the common concept between "government" and "public body". The list of actions described in the subparagraphs of Article 1.1(a)(1) demonstrated that to make a "financial contribution" was to convey value. Thus, if a "financial contribution" meant to convey something of value, this suggested that the concept that the Subsidies Agreement term sought to capture was the use by a government of its resources, or resources it controlled, to convey value to economic actors. If a government undertook the activities described in Article 1.1(a)(1), there was a conveyance of value from a Member to a recipient. Equally, when there was an entity with resources the Member could control, and the entity engaged in the same activities, there was a conveyance of value from a Member to a recipient. Indeed, even under the Appellate Body's approach of seeking an "exercise of governmental authority", an entity that was able to be controlled by the government had "authority" over government resources – and thus should be found to be a "public body". The United States had called upon the Appellate Body to clarify findings in prior Appellate Body reports regarding the interpretation of the term "public body". Specifically, the United States had requested that the Appellate Body confirm that a public body was any entity that a government meaningfully controlled, such that when the entity conveyed economic resources, it was transferring the public's resources. Under such circumstances, the transfer of financial resources would constitute a "financial contribution" attributable to the government.

9.15. The United States said that regrettably, the appeal had not clarified the Appellate Body's interpretation[28] but had stuck with an approach that had no basis in the text of the Subsidies Agreement.[29] One Division member, though, "[i]n the hope of providing clearer guidance to future litigants and panels, and of encouraging them not to feel unduly constrained by past statements on this subject", had offered a "restatement, which incorporates many of the concepts developed by the Appellate Body, while … clarifying the criteria properly".[30] The "restatement" reads as follows: "Whether an entity was a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operated. Just as no two governments were exactly alike, the precise contours and characteristics of a public body were bound to differ from entity to entity, State to State, and case to case. An entity may be found to be a public body when the government had the ability to control that entity and/or its conduct to convey financial value. There was no requirement for an investigating authority to determine in each case whether the investigated entity 'possesses, exercises or is vested with governmental authority'".[31] The United States encouraged all WTO Members – as well as future WTO adjudicators – to reflect on this "restatement", which reflected the notion that a "public body" was an entity that can convey

[25] "US – Anti-Dumping and Countervailing Duties" (China) (AB), para. 284.
[26] "US – Anti-Dumping and Countervailing Duties" (China) (AB), para. 284.
[27] See "US – Countervailing Duty Measures on Certain Products from China" (Panel), para. 7.68.
[28] Appellate report, para. 5.97 (views of two Division members; italics in original).
[29] See Cartland, Depayre, & Woznowski, Is Something Going Wrong in the WTO Dispute Settlement? Journal of World Trade 46, no. 5 (2012), at 1004-05 ("Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing *what kinds of entities might provide 'gifts' to certain other entities*, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others' behaviour) for that entity to be able to provide gifts that might distort trade, *that is, to channel trade distorting government resources to particular recipients in an economy*".) (italics added).
[30] Appellate report, para. 5.248 (separate views of one Division member).
[31] Appellate report, para. 5.248 (separate views of one Division member).

the government's financial resources – the very issue the Subsidies Agreement had been intended to discipline.

9.16. Second, with regard to the issue of benchmarks, and turning to Article 14(d) of the Subsidies Agreement and the use of out-of-country benchmarks, "[t]his should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC record, and applied the wrong legal standard".[32] But "[r]ather than reviewing the Panel's findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seems ... that the majority instead engaged in its own review of the USDOC's determinations and, based on that review, upheld the Panel's findings that were based on the wrong legal standard and reflected virtually no engagement with the USDOC's determinations".[33] Instead of undertaking "an analysis of the reasoning provided by the Panel",[34] the majority "effectively acted as a panel in the first instance, and, having done that, articulat[ed] an incoherent legal standard".[35] The strong language of this criticism came from the separate opinion of the dissent. The separate opinion recognized that it "does not make for easy reading", but concluded that it was nonetheless "important to explain at length the errors at both the Panel and majority levels on this issue so that this dissent may serve as guidance for future litigants and panels".[36] The United States agreed that it was important to take the time to understand and reflect upon these errors. The United States, too, recognized that it would be easier to simply accept the conclusions of the appellate report. But it was precisely that kind of uncritical and unquestioning approach, coupled with reliance on certain words in past Appellate Body reports, that had led the compliance Panel to apply the wrong legal interpretation in this dispute. The effectiveness of WTO subsidies disciplines would be seriously undermined if this erroneous approach to Article 14(d) was applied in future disputes. The United States said that the ability to use out-of-country benchmarks when prices were distorted in the country where the subsidy was provided was critical to the proper functioning of the agreed disciplines on subsidies. This was because Article 14 contemplated market-determined prices as the appropriate benchmark for measuring the adequacy of remuneration. Prior reports had consistently reached the same conclusion that, properly interpreted, Article 14(d) referred to market-determined prices and permitted out-of-country prices to be used as a benchmark where market-determined prices were not found in the country of provision. This approach comported with the references to a "market" in the text of Article 14 and ensured that any benchmark used to measure the adequacy of remuneration reflected a market price resulting from arm's-length transactions between independent buyers and sellers. And indeed, as an initial matter, the compliance Panel had first considered and correctly rejected China's argument that out-of-country benchmarks could only be used if domestic prices had been effectively determined by the government.[37] The compliance Panel report, like the appellate report, had correctly found that Article 14(d) did not support such an interpretation – and the United States noted there was no dissent on that point.[38] However, the compliance Panel then proceeded to find that the USDOC had failed to "explain how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price".[39] The compliance Panel had never questioned the extensive evidence the USDOC had relied on, but rather faulted the USDOC because it had not relied upon a *quantitative* price analysis. By limiting itself to such an approach, the compliance Panel had set aside, without examining, the USDOC's comprehensive analysis of the evidence that these prices in China could not be considered market-determined. The dissent in the appellate report explained that: "[T]he USDOC's analysis led it to conclude that '*the prices* of steel produced by China's SIEs in the domestic market cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d) of the Subsidies Agreement'"; "Similarly, the USDOC found that 'the entire structure of the steel market is distorted by long-standing, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, *private prices* cannot be considered market based or usable as potential benchmarks'"; "The

[32] Appellate report, para. 5.268.
[33] Appellate report, para. 5.256.
[34] Appellate report, para. 5.256.
[35] Appellate report, para. 5.268.
[36] Appellate report, para. 5.269.
[37] "US – Countervailing Measures" (Article 21.5 – China) (Panel), para. 7.174.
[38] See "US – Countervailing Measures" (Article 21.5 – China) (Panel), para. 7.174; appellate report, para. 5.148; see also 5.249 ("I concur with the majority in rejecting China's interpretation of Article 14(d) of the Subsidies Agreement, including China's claim that circumstances justifying recourse to out-of-country prices are limited to those in which the government 'effectively determines' the price at which a good is sold".).
[39] "US – Countervailing Measures" (Article 21.5 – China) (Panel), paras. 7.204-206; see id. at para. 7.223.

emphasis of the USDOC's analysis in the Benchmark Memorandum was on the extent to which China's SIEs and private actors in the steel sector are insulated from market forces and not responsive to market pressures and disciplines, i.e., on a qualitative assessment of the nature and effects of the various government interventions in the steel market"; "These government interventions, taken together, are at the very least capable of significantly hampering competition in the market and thereby distorting firms' decision-making process with regard to prices. This conclusion is in line with the understanding that government interventions that do not impact prices directly may distort market conditions to such an extent that prices can no longer be considered as market-determined"; "Therefore, only a meaningful examination by the Panel of the USDOC's analysis, reasoning, and underlying evidence could allow for a conclusion as to whether or not the USDOC provided in this case a sufficient explanation for its decision to have recourse to out-of-country prices. Yet, the Panel did not carry out any such review of the USDOC's analysis".[40]

9.17. As the United States had explained during the appeal, "[i]t appears that the compliance Panel understood its approach to be based on the approach that the Appellate Body has articulated, particularly in *US – Carbon Steel (India)*. However ... the compliance Panel misconstrued the Appellate Body's approach in that report".[41] In doing so, the compliance Panel had examined the USDOC's determinations by looking only for a single kind of price analysis, specifically, one that would have demonstrated the "deviat[ion]" from "in-country prices" and "a market-determined price".[42] Effectively, the compliance Panel had considered that the only way to show whether the price was a valid benchmark price was to compare it to a valid benchmark price. Of course, where there were no valid benchmark prices, that approach made no sense. And such a nonsensical interpretation of Article 14(d) could not be the correct interpretation. Yet the compliance Panel believed it had been following what the Appellate Body had said in prior reports. The United States had highlighted this misapprehension in the appeal and had explained that "[t]he compliance Panel's confusion suggests ... that the Appellate Body should take this opportunity to clarify its articulation of the proper approach under Article 14(d) and, if necessary, modify that approach" to ensure that panels could apply it in a manner that reflected the correct interpretation of that provision.[43] Yet instead of clarifying the matter, the so-called "majority" had committed the same error as the compliance Panel. Both findings *purported* not to require a quantitative price analysis, but in effect both required exactly that. The dissent set out how the compliance Panel and the majority had erred by "effectively reading Article 14(d) as imposing an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record".[44] It was all the more troubling that the compliance Panel and the majority had "professed" to recognize that the type of benchmark analysis an investigating authority could conduct would vary depending on the circumstances of the case and the characteristics of the relevant market.[45]

9.18. The United States said that the dissent explained that: "The majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, but in fact, the majority rejected the USDOC's extensive qualitative analysis and wrote an opinion that, in my view, can only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices".[46] The dissent, at paragraph 5.252, illustrated how both the compliance Panel and the majority had dismissed the "extensive qualitative analysis" as inadequate while they had never engaged with or questioned the validity of the evidence. "Here is what the USDOC did, which the Panel dismissed in three sentences and without any objection from the majority. In its Benchmark Memorandum, the USDOC assessed a number of factors relating to the Government of the People's Republic of China's (GOC's) intervention with state-invested enterprises (SIEs) in general, and in China's steel sector specifically. In particular, the USDOC examined: (i) the involvement of the GOC in the functioning of China's SIEs; (ii) detailed industrial plans directing ministries to reduce the number of firms, and to increase the scale of production; (iii) government control exerted over appointments to the board of directors and corporate positions; (iv) evidence regarding controlled mergers and acquisitions; and (v) bankruptcy prevention and other indicia of government

[40] Appellate report, para. 5.255 (italics in original) (citations omitted).
[41] *See* US Appellant Submission, para. 81.
[42] See "US – Countervailing Measures" (Article 21.5 – China) (Panel), para. 7.204.
[43] See US Appellant Submission, para. 81.
[44] Appellate report, para. 5.250.
[45] See Appellate report, para. 5.253.
[46] Appellate report, para. 5.251.

intervention with the functioning of the market. In assessing the functioning of SIEs in the steel sector in particular, the USDOC pointed to the sector's place as a 'pillar' industry in which the state retains 'somewhat strong influence'; evidence of increasing excess capacity; export restraints; "five-year plans" detailing favoured and unfavoured production scales, investments, technologies, products, and production locations; strict control over investments; control over SIEs' appointment processes; hindered bankruptcy of large SIEs; and preferential access to capital, land, and energy". With respect to the prices of private steel producers in China, the USDOC examined a number of factors, including the SIEs' significant market share, the presence of many SIE steel producers shielded from competitive market forces, export restraints on steel input products, restrictions on foreign investment, and other factors. "In addition, in the Supporting Benchmark Memorandum, the USDOC referred to the inadequacy of questionnaire responses leading to an absence of representative price data, and a need to rely, in part, on facts available with respect to the input-specific market analysis of the three steel inputs. In the Final Benchmark Determination, the USDOC additionally explained why it could not carry out a price alignment analysis to further support its explanation that private steel input prices in the underlying proceedings were distorted. Finally, with respect to the Solar Panels investigation and in light of the GOC's failure to respond to the USDOC's request for information, the USDOC relied entirely on facts available. The Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC's conclusions, ran to hundreds of pages".[47]

9.19. The United States said that the dissent had explained further that "somehow, the Panel discarded the entire reasoning and supporting evidence in the Benchmark Memorandum and Supporting Benchmark Memorandum in a single paragraph, characterizing the USDOC's determinations as 'not even [an] attempt' to provide an explanation as to why in-country steel prices are not market-determined. And the majority, writing more extensively, upheld the Panel".[48] The dissent was right to be alarmed and perplexed at this outcome.[49] For example, with respect to the *Solar Panels* determination, the dissent stated: "Inexplicably, the majority upheld this finding .... I see no basis whatsoever in Article 14(d) for this approach, nor do I agree with the manner in which the majority reviewed the Panel's analysis. ... Given that the Panel *did not even begin* to examine the substance of the evidence ... it is unclear on what basis the majority upheld the Panel's conclusion, or what the majority considered the USDOC was required to do".[50] It was also important to note, however, that the dissent did much more than simply disagree with the conclusions of the Panel and the majority. In fact, the dissent took on the majority's analysis at every point along the way to the majority's erroneous conclusion.[51] And the dissent showed how the majority had erred in each and every one of those points.

9.20. The United States said that it appreciated the diligent approach that had been undertaken in the dissent and regretted that the United States could only summarize three main points in this meeting. First, the USDOC's analysis might have been qualitative, but it expressly stated that it had

[47] Appellate report, para. 5.252 (citations omitted).

[48] Appellate report, para. 5.253.

[49] See Appellate report, para. 5.254 ("In finding that the USDOC 'failed to explain how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price' without any assessment of the USDOC's arguments and evidence, the Panel in effect faulted the USDOC for not having further analysed in-country prices, even where it had already found those prices to have been distorted. Why that should have been required in this case is not clear. Provided that it has sufficiently explained why it considers the respective government interventions to have distorted domestic prices, I do not see why the USDOC should have been required to rely on or further analyse such in-country prices in the context of a benchmarking analysis by, for example, comparing in-country prices with a hypothetical market-determined benchmark and finding the existence of a deviation. Indeed, such prices may reflect the very same government interventions that gave rise to the subsidy the USDOC sought to countervail. The Panel does not appear to have recognized this in its review of the USDOC's determinations. Nor, regrettably, have my colleagues. In any event, the result is that the Panel considered the USDOC's analysis and reasoning regarding various types of government interventions and policies affecting prices to be *a priori* insufficient to establish price distortion".).

[50] Appellate report, para. 5.259 (italics added).

[51] See, e.g., Appellate report, para. 5.263 ("Thus, instead of being 'largely ignored as the Panel asserted, and the majority appears to have implied, in-country prices and the Ordover Report were discussed by the USDOC, but their relevance was rejected. This was not only because their underlying rationale was different from that of the USDOC, but also because the evidence therein was not particularly probative for, and did not cast doubt on, its own analysis in the Benchmark Memorandum".).

been focused on *prices* of SIEs and private *prices*.[52] Second, the USDOC's analysis had, in fact, considered the specific input markets.[53] Third, the compliance Panel and the majority had applied the standard in an impossible way – a way which "suggests that, in the Panel's view, the USDOC's approach would *never* sufficiently justify recourse to out-of-country prices, independently of the evidence before it".[54] The dissent further explained that the compliance Panel's "analysis of whether the USDOC provided a reasoned and adequate explanation for its conclusion that in-country prices are not market-determined was divorced from its discussion of the record evidence" and, therefore, *could not* be considered to reflect the correct interpretation of Article 14(d).[55] This result diminished the rights of WTO Members to counteract subsidies that were resulting in harms to their workers and businesses and imposed additional obligations that were not found in the text of the Agreement.[56] Ultimately, the compliance Panel in this dispute had sought to avoid error by simply reciting what prior appellate reports had said about benchmarks. And, ultimately, the compliance Panel had been successful in avoiding reversal by taking this approach. But in doing so the compliance Panel had failed to interpret the text of Article 14(d) and to consider whether it had been applying an interpretation that made any sense under the facts of this case. And it was that kind of approach that led panels to confusion and error when they simply attempted to apply what the Appellate Body had said in prior reports as if those words constituted "precedent" that had to be followed absent "cogent reasons".[57] As this dispute illustrated, taking this approach had led the compliance Panel to forego engaging with the question at issue and thus had appeared to encourage the Appellate Body to step in the shoes of the Panel at the appellate stage and, "[i]n this way ... assume[] the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel".[58] As the dissent pointed out, "that would appear to exceed the Appellate Body's mandate".[59]

9.21. Third, turning to the issue of specificity under Article 2.1(c) of the Subsidies Agreement, the United States said that it was concerned that the findings of the compliance Panel and the so-called majority evinced a similarly problematic approach. The United States had appealed the compliance Panel's finding that the USDOC had needed more evidence of a "plan or scheme" to establish that the subsidies at issue had been provided pursuant to a subsidy "programme". The compliance Panel had erred in its assessment of the "existence of a subsidy programme" by interpreting "programme" in a manner that was not consistent with the ordinary meaning of the term in Article 2.1 or the object and purpose of the Subsidies Agreement. Specifically, the compliance Panel had erred by interpreting the obligation under Article 2.1(c) as a requirement to demonstrate that subsidies had been "systematically" provided pursuant to an overarching "subsidy programme".[60] The majority had explained that it had disagreed with the premise of the US claim on appeal, i.e., that the compliance Panel had required a demonstration of "systematic subsidization".[61] The majority stated that "[i]n our view, the United States draws inferences from the Panel's statement it references that

[52] See Appellate report, para. 55.256 ("Where did the majority get this, considering that the Panel did not engage in any such assessment and indeed provided no substantive analysis of the USDOC's reasoning and underlying evidence?").

[53] Appellate report, para. 5.257 ("While the USDOC did not base, and indeed was not required to base, its analysis on input-specific prices, it appears, even from the Panel's description of the USDOC's analysis, that the USDOC did in fact make findings with regard to the specific steel markets at issue".).

[54] Appellate report, para. 5.258.

[55] Appellate report, para. 5.258-259.

[56] Appellate report, para. 5.266 ("[T]he compliance Panel engaged in an] overly narrow application of the standard requiring the conduct of a price analysis as a condition for recourse to out-of-country prices. Despite the fact that the Panel rejected China's assertion that the only situation that merits recourse to out-of-country prices is where the government is so predominant that it effectively determines the prices of the goods in question, it appears that the Panel was looking for a kind of price alignment analysis that requires a quantification of the impact of government intervention on in-country prices by establishing the extent to which they deviate from a market-determined benchmark. In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case".).

[57] See Appellate report, para. 5.244 ("I believe the continuing lack of clarity as to what is a 'public body' represents an instance of undue emphasis on "precedent", which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here".) (citations omitted).

[58] Appellate report, para. 5.256.

[59] Appellate report, para. 5.256.

[60] *See* US Appellant Submission, paras. 192-195 (quoting Panel Report, para. 7.263).

[61] Appellate report, para. 5.233.

the Panel did not make".[62] Yet, later within the very same paragraph, the majority conceded, "[t]hat said, in establishing an unwritten subsidy programme, adequate evidence is required of a *systematic* series of actions".[63] In other words, the majority actually considered that evidence of *systematic* subsidization was required, even though no such obligation was found in the text of the Subsidies Agreement. The United States agreed with the dissent that "the Panel and majority fundamentally misunderstand the role of Article 2.1 within the Subsidies Agreement, give the term 'subsidy programme' a meaning that is not supported by the text and that is unreasonable, and ignore reasoning and analysis by the USDOC that was part of the case and should have been considered".[64] The dissent went further, warning Members that "[t]he Panel and majority decisions, would, I believe, if followed in the future, enable circumvention of the disciplines of the Subsidies Agreement and even discourage the transparent management of subsidies".[65] The United States urged other Members to read closely the concerns that were expressed in the dissent on this issue. The dissenting opinion expressed grave concern with the approach taken by the majority, stating: "I also consider that the majority's decision upholding the Panel's finding is wrong in several important respects and would, if followed, enable circumvention of the disciplines of the Subsidies Agreement and even discourage the transparent management of subsidies. I believe such a result is not contemplated under the Subsidies Agreement, was not intended by the Subsidies Agreement's drafters, and is not in accordance with customary principles of treaty interpretation".[66] The United States shared these concerns. Any other Member that considered subsidies to be a major contributor to current tensions in the global trading system should be concerned as well. It was difficult to view this appeal, and past Appellate Body reports on these issues, as anything other than a serious weakening of WTO subsidy disciplines.

9.22. With regard to the status of the appellate report, the United States said that it viewed the document before the DSB at the present meeting as not a valid Appellate Body report and objected to its adoption. The United States wished to raise two important systemic concerns. The first concern regarded the service on this appeal of an ex-Appellate Body member whose term had expired on 30 September 2018.[67] The DSB had taken no action to permit him to continue to serve as an Appellate Body member. Therefore, he had not been an Appellate Body member on the date of circulation of this document. As the United States had explained with respect to prior reports for appeals on which an ex-Appellate Body member had served, under these circumstances, the appellate "report" had not been provided and circulated on behalf of three Appellate Body members, as required under Article 17.1 of the DSU.[68] In fact, given that the two valid Appellate Body members might have voted in opposite ways on the issues of public body, benchmark, and specificity, there might not even have been a "majority" view in the document, only two separate opinions. With regard to the second systemic concern, mandatory language in Article 17.5 of the DSU states: "In no case shall the proceedings exceed 90 days". And that provision specifically stated that "the proceedings" encompassed "the date the Appellate Body circulates its report". The Appellate Body had notified the DSB through a letter dated 26 June 2018, that it would not be able to complete its report within 60 days. The letter had gone on to state that it would not be possible for the Appellate Body to circulate a report within the 90-day time-frame required by Article 17.5. And, in fact, 446 days had passed between the date of the Notice of Appeal in this dispute and circulation of the document as a purported Appellate Body report. As the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17 and, therefore, it was not subject to the adoption procedures reflected in Article 17.14. Rather, the DSB would have to consider its adoption subject to the positive consensus rule applicable to DSB decisions, pursuant to Article 2.4 of the DSU and WTO Agreement Article IX:1, note 3.

9.23. In closing, the United States said that it was deeply troubling that China was using the WTO dispute settlement system to seek to evade the disciplines on subsidies that all WTO Members

[62] Appellate report, para. 5.233.
[63] Appellate report, para. 5.233 (underline added; italics in original).
[64] Appellate report, para. 5.270.
[65] Appellate report, para. 5.270.
[66] Appellate report, para. 5.280.
[67] Dispute Settlement Body, Minutes of Meeting Held on 26 September 2014, Document WT/DSB/M/350, paras. 2.2-2.3 ("[2.2] Therefore, he wished to propose that, at the present meeting, the DSB take a decision to appoint Mr. Servansing as a member of the Appellate Body for a four-year term starting on 1 October 2014. [2.3.] The DSB so agreed".).
[68] Article 17.1 of the DSU ("The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case".).

had agreed to in the Subsidies Agreement. While the United States had been the responding Member in several disputes China had brought, China had been – and continued to be – the serial offender. The continuing and increasing role that the Chinese government took in managing the economy in China, including by providing massive subsidies that distorted both China's economy and the world economy, was a *fact* widely known by observers, commentators, and WTO Members. China's assertion during the present proceeding that the subsidies that Commerce had found to exist were "completely fictitious" was patently absurd. In the section 129 proceedings to implement the original DSB recommendations, the U.S. Department of Commerce had explained its conclusions in preliminary and final determinations and supporting analysis memoranda that, altogether, spanned almost 150 pages. Commerce's determinations were supported by literally thousands of pages of evidence, which Commerce had discussed at length, and Commerce's determinations were based on the totality of that evidence. It was clear on the face of Commerce's determinations that they were unbiased and objective, they presented reasoned and adequate explanations for the conclusions that Commerce reached, and those conclusions were supported by ample – truly massive amounts of – evidence on the administrative record. An unbiased and objective investigating authority in any WTO Member could have reached the same conclusions. The idea that what Commerce had done in the section 129 determinations was not sufficient to meet the requirements of the Subsidies Agreement was, simply put, incredible. The dissent was correct that, if followed, the approach of the compliance Panel and the appellate report would enable circumvention of the disciplines of the Subsidies Agreement, discourage the transparent management of subsidies, and that such a result was not contemplated under the Subsidies Agreement, had not been intended by the Subsidies Agreement's drafters, and was not in accordance with customary principles of treaty interpretation. The approach in the appellate report called into question the ability of Members to use WTO tools to counteract subsidies provided by a Member like China that were damaging a Member's workers and businesses. That was a very serious problem, with grave implications for the global trading system.

9.24. The representative of China said that, with regard to the separate opinion, China noted that the United States had repeatedly mentioned and commended the separate dissenting opinion in this Appellate Body report. China respected the right of individual members of the Appellate Body to provide separate opinions. It was, however, the majority opinion that provided the basis for the DSB's recommendations and rulings. To the extent that the United States was suggesting that future panels should follow the opinion of the dissenting member rather than the recommendations and rulings that Members would adopt at the present meeting, China did not see how this would have contributed to the DSU's goal of "providing security and predictability to the multilateral trading system". A critical function of the dispute settlement system was to "clarify" the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". When provisions of the covered agreements had been "clarified" in this manner and such clarifications had been adopted by the DSB, those clarifications should govern future disputes absent cogent reasons.

9.25. With regard to the issue of public body, China said that the United States had argued in the "US – Carbon Steel (India)" dispute (DS436) that an entity was a "public body" when the government had the ability to control that entity's resources as its own. The Appellate Body had considered and rejected this interpretation. China agreed with the United States that the Appellate Body had overly complicated the interpretation of the term "public body". The problem had begun in the "US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379) when the Appellate Body had invented the ambiguous concept of "meaningful control". Not surprisingly, the United States had exploited this opening to try to enforce its position that government control of an entity was sufficient to conclude that the entity was a "public body" – a position that the Appellate Body had rejected in that dispute. As a result of the report that was being considered for adoption at the present meeting, Members had an interpretation of the term "public body" that bore no connection to the question of state attribution, which, in China's view, was what the term "public body" must have been concerned with. The Appellate Body had been right that a "public body" was an entity that "possesses, exercises or is vested with governmental authority", but wrong in its conclusion that the "governmental authority" with which an entity was vested needed not bear any relationship to the conduct being attributed to the state. This made no sense. It did not make sense, for example, that a company vested with governmental authority to carry out certain police functions on its industrial properties was considered a "public body" when it engaged in its entirely ordinary business of selling the products it manufactured. Yet that appeared to be the consequence of the report that was being considered for adoption at the present meeting. China believed that the proper interpretation of the term "public body" was nowhere near as complicated or contradictory as the Appellate Body had made it out to be. An entity was a "public body" when it was vested with governmental authority

and exercised that authority when engaged in the conduct that was being attributed to the state. Full stop. This was the interpretation of the term "public body" that best comported with accepted principles of treaty interpretation, and that properly recognized that the interpretation of the term "public body" was fundamentally a question of state attribution. Notwithstanding China's concerns about the interpretation of the term "public body" articulated by the Appellate Body in the present report, China was prepared to adopt this report and move on. However, if the United States intended to keep advocating its understanding of the term "public body" in future dispute settlement proceedings, China would do the same. Because China's understanding of this term was correct, and the US understanding of that matter was not.

9.26. With regard to the non-existence of a subsidy, China noted that the United States in its statement had suggested the so-called existence of the subsidy. However, the United States misapprehended the consequences of the reports that were being considered for adoption at the present meeting. As a result of the recommendations and rulings contained in these reports, there was no valid finding that the Government of China had provided "input subsidies" to manufacturers of the products under investigation. As everyone here was aware, a "subsidy" under the SCM Agreement was a financial contribution that conferred a benefit. Because the USDOC's benefit determinations had been unlawful, there was no finding that the provision of inputs had given rise to a subsidy. The United States was, therefore, mistaken when it claimed that the present reports acknowledged that the Government of China had provided "input subsidies" to manufacturers of the products under investigation. There was no such finding by the Panel or the Appellate Body. It was characteristic of the United States, however, to assume the conclusion of what it claimed to be investigating. In its countervailing duty investigations of Chinese products, the USDOC began with the conclusion that inputs were subsidized, and then bent the law and the facts to fit that predetermined conclusion. That was what the USDOC had to stop doing as a result of the recommendations and rulings that were being considered for adoption at the present meeting.

9.27. With regard to a so-called price distortion in China, China said that in its statement, the United States had continued with its false accusations on a so-called price distortion in China. It was time for the United States to stop trafficking in ridiculous caricatures of the Chinese economy. According to the US distorted worldview, there was not a single market-determined price in China. The United States maintained this position notwithstanding the fact that the USDOC's decision in 2007 to begin applying countervailing duties to Chinese products had been premised on its own finding that "market forces now determine the prices of more than 90% of products traded in China". Notwithstanding this finding, the USDOC had not, to the best of China's knowledge, identified a single market-determined price in a countervailing duty investigation of Chinese products in the 12 years that had passed since the USDOC's decision. This was all a charade. The United States knew perfectly well that market forces determined the prices of industrial inputs in the Chinese economy. The problem for the USDOC was that these market-determined benchmark prices would not have given it the "input subsidies" that it was looking for. As the Panel and Appellate Body had correctly found, the USDOC had simply ignored undisputed evidence on the record that domestic Chinese prices for steel inputs had been determined by market forces. The USDOC had ignored this undisputed evidence because it had not fit the USDOC's predetermined conclusion that Chinese steel prices were "distorted". As a result of the recommendations and rulings that were being considered for adoption at the present meeting, the USDOC could no longer operate on the basis of presumptions and preordained conclusions. Going forward, it had to base any decision to reject Chinese benchmark prices on hard evidence that those prices were "distorted" as a result of government intervention. The days of "cookie-cutter" rationales for rejecting all Chinese prices were over.

9.28. With regard to the negative consensus rule for adopting Appellate Body reports, China said that the United States had suggested that the negative consensus rule could not be applied to this report since it had not been circulated within 90 days and one adjudicator had ceased to be an Appellate Body member when the report had been circulated. China disagreed. China wished to stress that the report before Members at the present meeting was an Appellate Body report which had to be adopted under the negative consensus rule set out in Article 17.14 of the DSU. Article 17.14 of the DSU was crystal clear that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the members". At the present meeting, there was no consensus among Members not to adopt this Appellate Body report. Therefore, this Appellate Body report would be adopted in accordance with Article 17.14 of

the DSU. Any suggestion to derogate from the application of the negative consensus rule or to impose precondition to it was without legal merit.

9.29. The representative of Australia said that her country noted the views expressed by the United States regarding the status of the Appellate Body report in this dispute. Australia confirmed its view that the report would be adopted at the present meeting under the three stages provided for by Article 17.14 of the DSU, specifically that the report would be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decided by consensus otherwise. Australia further underscored the principle of binding adoption of panel and appellate body reports by negative consensus as fundamental to the assurance of security and predictability provided by the WTO dispute settlement system.

9.30. The representative of the European Union said that the European Union was a third party in this dispute the importance of which had been significant also for the European Union in relation to several of the matters at issue. The European Union wished to make several points related to the separate opinion expressed in the Appellate Body report. Pursuant to the DSU, an individual Appellate Body member was entitled to set out his or her views in a separate opinion. However, that opinion should also aspire to being capable of being a correct decision of the matter at issue in the dispute at hand. In this respect, a calling into question of prior jurisprudence would have had to be combined with a separation between those aspects which the original dispute had already settled in a binding manner and those not yet clarified at that stage. It should also have explained how the majority's alleged errors related to any grounds of appeal actually raised by the parties. There was another observation which the European Union wished to express in relation to the separate opinion, namely the accusation levelled at the majority of the Division of acting like a panel and of making factual findings. It appeared to the European Union that the separate opinion itself made a significant number of statements on facts, namely as to what findings the US Department of Commerce had made or had not made. Be that as it may, the even more important point to make might be that it was perfectly correct for the Appellate Body to review panel findings where they consisted of legal evaluations of certain facts, in order to decide on the consistency of the measures at issue with the WTO Agreements. With these important caveats, the European Union wished to thank the Panel and the Appellate Body, including the member of the Division having expressed a separate opinion, for their work in this dispute. As had been stated, the DSU allowed separate opinions by individual Appellate Body members on a division. Also, such an individual Appellate Body member was entitled to consider his or her individual opinion to constitute more correct and hence better guidance than the majority decision for future panels and Appellate Body divisions. Likewise, the majority was entitled to consider its findings to be the correct, and hence better guidance. Future litigants or panels in other disputes could rely on either in support of their arguments, but this did not change the fact that this Appellate Body report stood for the legal interpretations as expressed by the majority and hence as expressed by the Appellate Body as a collegial body. There was a final important point which the European Union had to raise in relation to the separate opinion contained in this Appellate Body report. The Appellate Body was a standing and collegial adjudicative institution. This collegial character had not only been considered paramount by virtually everyone who had ever served on the Appellate Body and had spoken to this aspect. It was also an aspect which the European Union had consistently considered important, including in the consideration of nominated candidates proposed for appointment to the Appellate Body. The right of individual members to express separate opinions had to be exercised with respect for the integrity of that collegial institution overall. Disagreements between individual members of a collegial adjudicative body were legitimate and normal, but it was also important that the institution as a whole was intact. Therefore, it appeared more appropriate to express such disagreements, if chosen to do so in a separate opinion, in a sober and nuanced legal explanation of what was considered more accurate.

9.31. The European Union also wished to comment on the US statement made at the present meeting. Negative consensus was applicable to the adoption of the Appellate Body report, including the Panel report as modified by the Appellate Body report, in the present dispute. Pursuant to Article 17.14 of the DSU, Appellate Body reports were adopted by the DSB and unconditionally accepted by the parties. The only circumstance in which this did not occur was if the DSB decided by consensus not to adopt an Appellate Body report. The European Union did not join such a consensus at the present meeting and, consequently, the Appellate Body report would be adopted by the DSB. The Appellate Body report was adopted by the DSB and unconditionally accepted by the parties by "operation of law", as the Appellate Body had confirmed in its report in the "US – Continued Suspension" dispute (DS320), at paragraphs 310, 355 and 367; or "automatically", as the Appellate Body had confirmed in its report in the "US – Large Civil Aircraft (2nd complaint)"

dispute (DS353), at paragraphs 524, 531, 532 and 549. Neither the responding party, nor any other WTO Member had the legal authority to prevent this from occurring by any means. Whatever any Member said, whatever any Member did and whatever was recorded in the minutes of the DSB meeting was incapable as a matter of law of negating the observation that what was provided for in Article 17.14 of the DSU had occurred. With these remarks, the European Union wished again to thank all involved in this dispute for the contribution they had made.

9.32. The representative of Canada said that Canada had participated as a third party in this dispute because of its systemic interest in the appropriate application of the SCM Agreement concerning the test to determine what properly constituted a "public body", the use of out-of-country benchmarks under Article 14(d), and the legal standard for measures implementing DSB recommendations to fall within a compliance panel's terms of reference. Canada would comment on each of these points in turn. First, in general, Canada was pleased with the Appellate Body's findings rejecting China's interpretation of the legal standard for a "public body" under the SCM Agreement, which would have rendered the term "public body" redundant, effectively making it equivalent to a private body entrusted or directed by the government. The Appellate Body had confirmed that public body determinations were made based on the core characteristics of an entity, not its conduct in granting an individual contribution. While this outcome was consistent with prior Appellate Body determinations, Canada nevertheless continued to have concerns that this standard was unwieldly and impractical for investigating authorities to implement in practice. Second, Canada was also pleased with the Appellate Body's clarification that the use of out-of-country benchmarks under Article 14(d) of the SCM Agreement could only occur in "very limited" circumstances. The Appellate Body had properly found that investigating authorities could not reject in-market prices on the basis of all government interventions, or any price distortion. Rather, it found that a reasonable and unbiased investigating authority had to provide an adequate explanation based on positive record evidence of how a government intervention resulted in price distortion such that the in-market prices could no longer be considered market determined. Third, Canada agreed with the Appellate Body's finding that the measures at issue fell within the Panel's terms of reference due to their close nexus with the original measure, independent of the timing of the measure taken to comply. The exclusion of measures completed during the compliance proceedings from the scope of those proceedings would have frustrated the objectives of the dispute settlement system. Canada was also pleased that the Appellate Body had affirmed the Panel's finding that the interrelated effects of original, Section 129, administrative and sunset review determinations were sufficient for the subsequent reviews to be considered measures taken to comply. Additionally, Canada recognized the separate opinion issued by one member of the Division in this dispute. Canada noted that while separate opinions could play a healthy role in the WTO dispute settlement system, as they did in many systems of adjudication, they must not be provided or construed so as to undermine the objectives of that system, including providing security and predictability to the multilateral trading system. That objective entailed that disputes pertaining to similar situations be resolved in the same way, absent cogent reasons. It was Canada's view that separate opinions could contribute to a productive discussion on the different ways a particular claim could be approached or thought of so as to broaden the Members' understanding of the disciplines in various WTO Agreements. However, such a discussion could not contribute to the system without a functioning Appellate Body to clarify the provisions of the covered agreements. As another point, Canada wished to reiterate its view that the fact that an Appellate Body report had been circulated after 90 days did not modify its character as a valid AB report subject to the negative consensus rule for its adoption. Finally, Canada wished to thank the AB members and the Secretariat staff for their work in this dispute.

9.33. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS437/AB/RW and Add.1 and the Panel Report contained in WT/DS437/RW and Add.1, as upheld by the Appellate Body Report.

9.34. Following the adoption, the representative of the United States said that the United States had described serious substantive concerns, including erroneous interpretations of "public body", out-of-country benchmark, and specificity; diminishing US rights and adding to US obligations; engaging in fact-finding; and treating prior reports as "precedent". Given these concerns, the United States did not endorse the findings set out in the document circulated as a purported Appellate Body report. Nor could the United States support an ex-Appellate Body member's continuation of service without authorization by the DSB, or a failure to adhere to the deadline in Article 17.5 of the DSU. Accordingly, the United States reiterated its view that the document before the DSB at the present meeting was not a valid Appellate Body report, objected to adoption of the document, and did not join a consensus to adopt it.

9.35. Prior to the consideration of item 10, the Chairman invited the representative of the European Union to make a statement with regard to item 9. The representative of the European Union said that his delegation wished to make a statement that related to item 9 of the Agenda of the present meeting. Under that Agenda item, the DSB had adopted the Appellate Body Report and the corresponding Panel Report in the "US – Countervailing Measures (China)" dispute (DS437). Following the adoption of the Appellate Body Report by the DSB, the United States had made a certain statement. In response to that statement, the European Union wished to remind Members that the DSB had adopted the Appellate Body Report in that dispute. Therefore, subsequent adjudicators in this same dispute, including arbitration panels, would proceed on the basis that the Appellate Body Report had been adopted and unconditionally accepted by the parties. They would quantify nullification or impairment accordingly. They would reject any attempt by the defending party to frustrate their work by asserting that, at the relevant DSB meeting, the defending party purported to "object" to the adoption of the Appellate Body Report.

10 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ANGOLA; ARGENTINA; AUSTRALIA; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CANADA; CENTRAL AFRICAN REPUBLIC; CHAD; CHILE; CHINA; COLOMBIA; CONGO; COSTA RICA; CÔTE D'IVOIRE; CUBA; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; ESWATINI; THE EUROPEAN UNION; GABON; THE GAMBIA; GHANA; GUATEMALA; GUINEA; GUINEA-BISSAU; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KENYA; REPUBLIC OF KOREA; LESOTHO; LIECHTENSTEIN; MADAGASCAR; MALAWI; MALI; MAURITANIA; MAURITIUS; MEXICO; MOROCCO; MOZAMBIQUE; NAMIBIA; NEW ZEALAND; NICARAGUA; NIGER; NIGERIA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; QATAR; RUSSIAN FEDERATION; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SINGAPORE; SOUTH AFRICA; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TANZANIA; TOGO; TUNISIA; TURKEY; UGANDA; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.13)

10.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He drew attention to the proposal contained in document WT/DSB/W/609/Rev.13 and invited the representative of Mexico to speak.

10.2. The representative of Mexico, speaking on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.13, said that the delegations in question had agreed to submit the joint proposal dated 2 August 2019 to launch the AB selection processes. Her delegation, on behalf of these 114 Members, wished to make the following statement. The increasing and considerable number of Members submitting this joint proposal, reflected a common concern with the current situation in the Appellate Body that was seriously affecting its 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, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out in the joint proposal before the DSB at the present meeting. This proposal sought to: "(i) start six 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 due to 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; a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; a fifth process to replace Mr. Ujal Singh Bhatia, whose second term will expire on 10 December 2019; and a sixth process to replace Mr. Thomas R. Graham whose second term will expire on 10 December 2019; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issues its recommendation within 60 days after the deadline for nominations of candidates". The proponents were flexible with regard to the deadlines for the AB selection processes, but believed that 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 system and the dispute settlement system.

10.3. The representative of Qatar said that Qatar was deeply concerned about the continuing absence of consensus in the DSB to fill the vacancies in the Appellate Body, which risked undermining the functioning of the WTO's dispute settlement system as a whole. The WTO dispute settlement

system, including the Appellate Body, had provided an important contribution to the WTO's rules-based system. This being said, Qatar took note of, and shared some of the concerns expressed by Members and supported the efforts that had been undertaken to improve the functioning of the Appellate Body in line with the mandate given to the Appellate Body by Members under the DSU. Qatar expressed its gratitude to Amb. Walker for his efforts in facilitating the informal process on matters related to the functioning of the Appellate Body and in seeking convergence in the positions of Members. The informal process had allowed Members to focus on the main issues that seemed to trouble the Membership in respect of the functioning of the Appellate Body and had identified a number of possible clarifications that could be made either through informal guidance or decisions to be adopted by the DSB or the General Council. At the present meeting, Qatar wished to share some of its views on the issues raised in the informal process which reflected the key concerns of Members.

10.4. With regard to Rule 15 of the Working Procedures for Appellate Review, Qatar noted that the DSU failed to address the issue of how to deal with Appellate Body members whose term expired in the course of an appeal proceeding. Although Qatar considered that Rule 15 of the Working Procedures for Appellate Review offered a possible solution to the problem, Qatar shared the view of certain Members that this was ultimately a question for the Membership to decide on. Moreover, Qatar was of the view that the possible extension of an Appellate Body member's mandate should remain exceptional and limited to circumstances where not doing so would lead to undue delays in the process and a wasteful use of resources. Therefore, Qatar believed that it should be clarified that an Appellate Body member could only continue to serve on a division after the expiry of its term in case the oral hearing in the relevant proceeding had already taken place before the expiry of the member's mandate. This, in turn, meant that it should also be clarified that a member whose term expired within 60 days following the start of the appeal process should not be appointed to serve on the division hearing the appeal. It was the DSB that should have the final word in approving the extension of a member's mandate in such circumstances.

10.5. With regard to the 90-day rule, Qatar considered that Article 17.5 of the DSU was very clear in stating that: "[i]n no case shall the proceedings exceed 90 days". The Appellate Body was thus required to complete its review within the 90-day deadline. This being said, as with any rule, there should be the possibility, in exceptional circumstances and with the consent of the parties and the DSB, to deviate from this rule where the appeal raised issues of particular complexity or in other exceptional circumstances. In an effort to enable the Appellate Body to meet this demanding 90-day deadline, Qatar supported the idea of allowing the issuance of Appellate Body reports in the original language only to be followed later by the translations into the two other languages. In addition, Qatar would be willing to consider proposals to increase the number of Appellate Body members from seven to nine and to make membership in the Appellate Body a full-time occupation. Qatar was also not opposed to discussing further the possibility of making additional resources available to the Appellate Body Secretariat for purposes of assisting the Appellate Body members in meeting the deadline of 90 days. Qatar was of the view that if the Members imposed compliance with such a deadline, they should also be willing to provide the means and resources necessary for making it possible to comply with such deadline.

10.6. With regard to issues of law including municipal law, Qatar noted that Article 17.6 of the DSU was also very clear in that it limited the review by the Appellate Body to issues of law and legal interpretations. The panels were the trier of facts. In this respect, Qatar agreed with the view expressed by other Members that the meaning of municipal law was a matter of fact under public international law. A panel's finding on the meaning of a Member's domestic law was thus not subject to review by the Appellate Body. Only the panel's legal characterization of such municipal law for purposes of its consistency with WTO law was a matter that could be reviewed by the Appellate Body. In respect of Members' frequent resort to Article 11 of the DSU to address factual findings by panels, Qatar considered that the Appellate Body should urge restraint in the development of such claims by limiting such appeals to basic questions of due process and respect of fundamental rights of the parties to a fair and unbiased process. However, Qatar did not consider that the system would be served by effectively preventing any appeal from panels' examination of the facts and evidence. As long as such appeals were limited to clear and manifest errors in panels' process of evaluation of the evidence and arguments before them, appeals under Article 11 of the DSU could play an important part in the proper functioning of the system.

10.7. With regard to advisory opinions, in a similar vein, Qatar considered that Articles 17.12 and 17.13 of the DSU were clear: the Appellate Body had to address each of the issues raised on appeal

by the parties to the dispute to the extent this was necessary for upholding, modifying or reversing the legal findings and conclusions of panels. These provisions did not entitle the Appellate Body to engage in "*obiter dicta*" or provide what effectively were "advisory opinions" on issues not directly relevant to the resolution of the dispute or that had not been raised by the parties. To the extent possible, Qatar supported the Appellate Body's use of "judicial economy" whenever it had made such findings as sufficed to settle the dispute.

10.8. With regard to precedent, Qatar noted Amb. Walker's conclusion that there was no disagreement that binding precedent was not created through WTO dispute settlement proceedings. However, Qatar also agreed that consistency and predictability in the interpretation of Members' rights and obligations was of significant value to Members and provided the kind of security and predictability to the multilateral trading system that was envisaged in Article 3.2 of the DSU. Qatar believed, therefore, that adopted panel and Appellate Body reports were to be taken into consideration and provided guidance to panels and the Appellate Body in subsequent disputes. A system where the same issues and legal provisions were interpreted differently depending on the composition of the panel or the Appellate Body would not serve the system's objective of providing security and predictability.

10.9. With regard to overreach, Qatar said that there was no doubt that Article 3.2 of the DSU made it very clear that the DSB's rulings and recommendations could not add to or diminish the rights and obligations provided for in the covered agreements. Qatar considered that it was difficult *ex ante* to develop guidelines that would ensure that the Appellate Body would not exceed its mandate and refrain from issuing findings that would add to or diminish the rights and obligations provided in the covered agreements. Therefore, Qatar supported the notion of institutionalizing a mechanism that ensured appropriate oversight by the Membership of the functioning of the Appellate Body in the light of this essential limitation. In particular, Qatar considered that an annual review meeting between the Appellate Body and the Membership could provide the proper forum for exercising the necessary checks and balances on the Appellate Body.

10.10. In conclusion, Qatar said that the WTO dispute settlement system was an essential component of the rules-based system that had served international trade so well. The Appellate Body was an important part of the system and had been a deliberate creation by the Members. Article 17 of the DSU and the possibility of bringing an appeal before the standing Appellate Body was as much part of the rights and obligations of Members as any other provision, unless and until the Members decided by consensus to do away with the Appellate Body. The system was not perfect and a review of the functioning of the system in general and the Appellate Body in particular was a welcome endeavour that Qatar was keen to actively be a part of. However, Qatar was concerned that this valuable discussion was being overshadowed by the threat of paralysis of the Appellate Body if Members did not immediately start the AB selection processes. A discussion on how to improve the functioning of the Appellate Body presupposed that there still was a functioning Appellate Body to begin with. To ensure that this was the case by the end of 2019, Members had to act with urgency as of this moment.

10.11. The representative of the European Union said that his delegation wished to refer to its statements made on this matter at previous DSB meetings, starting in February 2017. The gravity and urgency of the situation was increasing as months went by. WTO Members had a shared responsibility to resolve this issue as soon as possible and to fill the outstanding vacancies as required by Article 17.2 of the DSU. The EU wished to thank all Members that had co-sponsored the proposal to launch the AB selection processes. The European Union invited all other Members to endorse this proposal so that new AB members could be appointed as soon as possible. The EU also wished to recall that concrete proposals had been submitted to the General Council with a view to unblocking the AB selection processes. These proposals amounted to serious attempts at responding to the concerns related to AB appointments, and were currently being discussed under the auspices of the General Council Chair. The EU invited all Members to engage constructively in these discussions so that the AB vacancies could be filled as soon as possible.

10.12. The representative of the United States thanked Amb. Walker for the continued work on these issues. As the United States had explained at prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at recent DSB meetings, for more than 16 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO

Members, and the appellate document in the "US – Countervailing Measures (China)" dispute (DS437) discussed under the previous Agenda item was another egregious example of many of the concerns the United States had been raising. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system, and would continue its efforts and its discussions with Members and with the Chair to seek a solution on these important issues.

10.13. The representative of Canada said that Canada supported the statement made by Mexico, and shared the concerns expressed by many Members. There were 114 official co-sponsors to this proposal at the present meeting. The fact that such a critical mass sought to launch the AB selection processes was a testimony to the importance that the WTO Membership accorded to the dispute settlement system, particularly a fully-functioning Appellate Body. Canada remained committed to working with other interested Members, including the United States, with a view to addressing concerns and undertaking the AB selection processes expeditiously. However, Canada deeply regretted that the DSB had not been able to comply with its legal obligation under Article 17.2 of the DSU to appoint AB members to fill the vacancies. The text of the DSU was clear: "[v]acancies shall be filled as they arise". This requirement did not provide for exceptions or justifications not to replenish the Appellate Body.

10.14. The representative of China said that China supported the statement made by Mexico on behalf of 114 Members. China welcomed the African Group for coming on board and also wished to encourage those who had not co-sponsored the proposal contained in document WT/DSB/W/609/Rev.13 to do so in order to support the well-functioned dispute settlement system, which benefitted the entire Membership. China regretted that the AB selection processes had, once again, not been launched due to the illegal blockage of the United States. More regrettably, in less than four months from the present meeting, the Appellate Body, a cornerstone of "the glorious experiment with the rule of law in international relations" and an indispensable component of the single undertaking of the Uruguay Round negotiations, would be incapable of hearing new appeals and would gradually come to a halt. In response to this unprecedented crisis created by the United States, Members continued to try every means to accommodate the concerns of the United States as long as the essential features of the dispute settlement system could be preserved, which included the independence and impartiality of the Appellate Body and the negative consensus rule for the adoption of reports. Yet, these efforts still fell short of making a breakthrough because the United States had not changed its passive approach in the informal process on matters related to the functioning of the Appellate Body.

10.15. China recalled that at the General Council meeting held on 23-24 July 2019, the United States had, for the first time since February 2019, made comments on specific elements of the proposed reforms. However, those comments appeared not materially different from those made by the United States back in February. Aside from criticism against proposals and the Facilitator's Report regarding the informal process on matters related to the functioning of the Appellate Body, the United States continued to fail to come up with concrete solutions. In addition, some of the US interpretations of the DSU provisions appeared even contradictory to one another. For example, the United States highlighted the mandatory term "shall" to suggest the obligation of the 90-day deadline rule. Ironically, by blocking the AB selection processes, the United States appeared to reject the mandatory nature of the same "shall" used in Article 17.2 of the DSU. The existing two-tier system served the entire Membership well, which was especially the case for the United States. As the main architect and principal beneficiary of the current system, the wining rate of the United States, both in its offensive and defensive cases, surpassed that of the global average. Although the appellate procedures and practices could be further improved, blocking the AB selection processes was not a feasible means to achieve that end. Without a well-functioning Appellate Body, the dispute settlement system would gradually slide from a rules-based system to a power-based one. In the long term, no Member could capitalize on the collapse of the Appellate Body. If one were truly obsessed with its might, it was important to remember that "might ebbs and flows". Given the increasing urgency faced by Members, China renewed its firm support to Amb. Walker as Facilitator of the informal process on matters related to the functioning of the Appellate Body and stood ready to continue to work with others in a constructive and responsible manner with a view to solving this deadlock expeditiously.

10.16. The representative of Cuba said that Cuba wished to reiterate its deep concern with the on-going, prolonged situation in which the AB selection processes found itself due to a blockage caused by a single Member. The constantly increasing number of co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.13 reflected a concern shared by the majority of the Membership. This was affecting the functioning of the dispute settlement system generally and harmed the interests of its Members which were trying to find a solution to this impasse. The practice of voicing concerns without proposing solutions was neither positive nor constructive for this Organization. At the 23-24 July 2019 General Council meeting, the Facilitator of the informal process on the functioning of the Appellate Body had presented a new progress report aimed at seeking a solution. This report reflected certain points of convergence in some areas. The reality was that the Member that expressed concerns was not satisfied with the proposals that had been presented. However, this same Member had not presented a proposal of its own in order to find a solution. Instead, this Member had simply repeated the same concerns. Cuba was concerned that the current situation would be prolonged until December 2019, at which point the Appellate Body would cease its operations. If so, this would be very harmful to the Organization, especially in light of the forthcoming 12th Ministerial Conference, during which the main themes on which Members had to focus their attention would result exclusively from the Ministerial mandates. All Members should show good will in order to find solutions and commit themselves to genuine dialogues.

10.17. 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.13. It also wished to emphasize the systemic importance of commencing the AB selection processes as soon as possible and to refer to its statements made at previous DSB meetings on this critical issue.

10.18. The representative of Hong Kong, China said that his delegation wished to refer to its statements made at previous DSB meetings and wished to reiterate its disappointment and concern that the impasse over the AB selection processes remained unresolved. Hong Kong, China appreciated efforts made by various Members to address some Member's concerns with the Appellate Body in the informal process under the auspices of the General Council. Hong Kong, China was committed to engaging constructively to find a solution as soon as possible. His delegation urged all Members, and in particular those who had raised systemic concerns, to do the same. Hong Kong, China wished to emphasize that the discussion on improving the DSU should not be a reason to delay the AB appointments. It was not justifiable to attach preconditions to the launch of the AB selection processes. Hong Kong, China called on Members to lift the blockage of the AB selection processes without further delay.

10.19. The representative of Malaysia said that her delegation wished to add Malaysia to the list of cosponsors of the proposal contained in document WT/DSB/W/609/Rev.13.

10.20. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this matter and wished to reiterate its serious concerns regarding the DSB's inability to commence the AB selection processes. Members had a collective responsibility to fill the vacancies in the Appellate Body as they arose under Article 17.2 of the DSU. Therefore, India called on all WTO Members to engage constructively, pursuant to Article 17.2 of the DSU, to immediately start the AB selection processes as a priority.

10.21. The representative of Chinese Taipei said that his delegation simply wished to refer to its statements made at previous DSB meetings on this matter. Again, Chinese Taipei wished to call for all Members' constructive engagement to find a solution to this impasse as soon as possible.

10.22. The representative of Brazil said that Brazil wished to refer to its statements made at previous DSB meetings regarding the urgency of launching the AB selection processes. At present, there was a very significant majority of WTO Members who formally supported the proposal under this Agenda item. Brazil, of course, supported the immediate launching of the AB selection processes. Otherwise, the Membership would continue to be in breach of its collective obligation to maintain a standing Appellate Body, in which vacancies had to be filled as they arose. As Members all knew, an informal process was taking place within the ambit of the General Council under the guidance of Amb. Walker so as to help Members overcome this impasse. Brazil was prepared to continue engaging with Members in this context. As Brazil had noted elsewhere, in the coming months Members needed to think of the end game, and to work constructively towards the successful conclusion of that process.

10.23. The representative of Norway said that Norway welcomed the new co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.13. Norway wished to refer to its statements made at previous DSB meetings under this Agenda item, and to underline, once again, its serious concerns about the need to solve this situation, which was becoming increasingly urgent.

10.24. The representative of Singapore said that Singapore wished to refer to its statements made at previous DSB meetings and wished to reiterate its serious systemic concerns regarding the failure to launch the AB selection processes. Singapore welcomed the 38 members of the African Group who had formally joined as co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.13, as well as Malaysia which had expressed its intention of joining as a co-sponsor of the same proposal at the present meeting. This brought the total number of co-sponsors to 115. While the number of co-sponsors continued to increase, the time left until 10 December 2019 was decreasing, and Members did not appear to be any closer to a solution to the impasse. Singapore looked forward to redoubled efforts in the informal process on matters related to the functioning of the Appellate Body after the summer break and urged all Members, especially those who had raised concerns, to actively engage. The AB selection processes should also be allowed to proceed unconditionally in the meantime. Singapore would continue to engage constructively and collaboratively towards resolving this impasse.

10.25. The representative of Mexico, speaking on behalf of the 114 co-sponsors of this proposal, expressed regret that for the twenty-sixth occasion, Members had still not been able to start the AB selection processes and had continuously failed to fulfill their duties as Members of this Organization. The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body should not serve as a pretext to 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. Article 17.2 of the DSU clearly stated that "[v]acancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members had to comply with their obligation under the DSU to fill the AB vacancies. 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 WTO Members.

10.26. The representative of Mexico said that Mexico wished to welcome the countries that had decided to join the list of cosponsors of the proposal contained in document WT/DSB/W/609/Rev.13, which accordingly comprised 115 Members, including Malaysia, which had expressed its interest in becoming a co-sponsor during the present meeting. Mexico encouraged all other Members to also co-sponsor the proposal. Despite the repeated attempts to launch the AB selection processes to fill its vacancies, the Appellate Body would no longer be operational in 17 weeks. To date, over ten proposals had been submitted as part of the informal process on Appellate Body matters conducted under the auspices of the General Council, with the aim of addressing the concerns expressed. This should be reason enough to launch the AB selection processes to fill the AB vacancies. However, more importantly, Members had to separate the AB selection processes from any other concerns. All Members had a shared responsibility to resolve this issue as soon as possible. Therefore, Mexico, wished to reiterate its willingness to work on finding a solution and urgently appealed to all Members to immediately initiate, in a responsible manner, the selection processes to replace six of the seven Appellate Body members.

10.27. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its serious concerns regarding the DSB's inability to commence the AB selection processes. Australia welcomed progress to date in the General Council's informal process on the Appellate Body matters and the anticipated transition to text-based discussions after the summer break as a positive step forward. In this regard, Australia recognized the significant contributions of many Members to the discussions and of Amb. Walker's leadership. However, Australia was clear-eyed about the hard work required in the second half of 2019 to address key concerns regarding the functioning of the Appellate Body. Australia was strongly committed to the work ahead and encouraged Members to continue solutions-focused, active engagement and to demonstrate the necessary flexibility to agree to pragmatic solutions in the interest of all Members.

10.28. The representative of Korea said that his country welcomed the new co-sponsors and supported the statement made by Mexico based on the joint proposal contained in document WT/DSB/W/609/Rev.13. Korea wished to refer to its statements made at previous DSB meetings.

10.29. The representative of Japan said that Japan wished to refer to its statements made at previous DSB meetings. Japan continued to support the informal process on matters related to the functioning of the Appellate Body that was being facilitated by Amb. Walker. The active engagement of all WTO Members was essential in their common endeavours.

10.30. The representative of Switzerland said that Switzerland wished to refer to its statements made on this matter at previous DSB meetings. The situation was alarming, and Switzerland deeply regretted that the DSB was still unable to launch the AB selection processes. Switzerland stood ready to continue the discussions in the context of the informal process on matters related to the functioning of the Appellate Body under the auspices of the General Council with a view to finding concrete solutions. Once again, Switzerland urged all Members to engage constructively in order to solve this impasse without further delay.

10.31. The Chairman thanked all delegations for their statements. He said that, as in the past, the DSB would take note of the statements expressing the respective positions, which would be reflected in the minutes of this meeting. As a certain number of delegations had noted again at the present meeting, this matter required urgent engagement on the part of all WTO Members. As Members were aware, under the auspices of the General Council, he had agreed to assist the Chair of the General Council, as Facilitator, in an informal process of focused discussions on Appellate Body matters. He then recalled that on 23 July 2019, he had provided a third progress report to the General Council on these informal consultations. This report had been circulated to all Members in document JOB/GC/220. The Chairman said that, as he had stated at the 23 July 2019 General Council meeting, he would be relying on feedback from the General Council Chair and Members in taking forward the next phase of this work, and that his door remained open to all delegations.

10.32. the DSB took note of the statements.

11 STATEMENT BY THE EUROPEAN UNION REGARDING CANADA/EU INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU

11.1. The representative of the European Union, speaking under "Other Business", recalled that, on 25 July 2019, the European Union and Canada had notified the DSB of their Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU. He said that the text of the arrangement had been circulated to the WTO Membership in document JOB/DSB/1/Add.11. The EU had agreed with Canada that both delegations would jointly present their Interim Appeal Arbitration Arrangement at the 30 September 2019 DSB meeting.

11.2. The DSB took note of the statement.