RESTRICTED

WT/DSB/M/421

2 April 2019

(19-2062) Page: 1/49

Dispute Settlement Body
21 November 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 21 NOVEMBER 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the dispute on: "Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear: Recourse to Article 21.5 of the DSU by Colombia/Recourse to Article 21.5 of the DSU by Panama" (DS461) was removed from the proposed Agenda following Panama's decision to appeal the Panel Report. Also, the item concerning the adoption of the Panel Report in the dispute on: "Morocco – Anti-dumping Measures on Certain Hot-Rolled Steel from Turkey" (DS513) was removed from the proposed Agenda following Morocco's decision to appeal the Panel Report.

Table of Contents

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.189)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.164)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.127)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.11)

E. European Union – Anti-dumping measures on biodiesel from Indonesia: Status report by the European Union (WT/DS480/8/Add.3)

F. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.3)

G. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18/Add.2)

H. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.2)

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

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.189)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.189, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 8 November 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that Japan wished to thank the United States for its most recent status report and the statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings in order 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.164)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.164, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 8 November2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that the United States had submitted its 165th status report for the present DSB meeting. Once again, this status report was neither materially different from the reports submitted by the United States ahead of previous DSB meetings, nor from the very first report submitted by the United States in November 2004. This item had stayed on the Agenda of DSB meetings for a significant amount of time. There was still no implementation action by the United States after more than 14 years. China said that as a result of such persistent non-compliance, Section 110(5) of the US Copyright Act, which had been found inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. The United States continued to fail to accord to intellectual property right holders the minimum standard of protection required by the TRIPS Agreement. As such, the United States remained the only Member that failed to implement the DSB's recommendations and rulings under the TRIPS Agreement long after the expiration of the reasonable period of time (RPT). Article II.2 of the Marrakesh Agreement Establishing the World Trade Organization provided that: "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 are … binding on all Members". 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 urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute. China strongly suggested that the United States consider including in its next status report the specific reasons as to why there has been no implementation of the DSB's recommendations and rulings in this dispute.

1.10. The representative of the United States said that as the United States had noted at prior meetings of the DSB, by intervening under this Agenda item, China attempted to give the appearance of concern for intellectual property rights. As the United States had noted at the last DSB meeting of 29 October 2018, China's intervention was ironic, given Agenda item 5, the second request for establishment of a panel by the United States in the "China – Certain Measures Concerning the Protection of Intellectual Property Rights" dispute (DS542). The United States said that it would address China's purported interest in protecting intellectual property rights under that Agenda item.

1.11. The representative of China said that the US intervention tried to derail the discussion under this Agenda item by suggesting that its intellectual property protection was superior to that of China. The US claim lacked credibility given the simple fact that the United States had deliberately delayed the implementation of the DSB's recommendations and rulings in this dispute for more than 14 years. One thing was clear: China had fully complied with the TRIPS Agreement while the United States had not. China believed that until the United States faithfully and completely met its obligations under the TRIPS Agreement, the comparison suggested by the United States was clearly without legal justification. With regard to the false claims against China's protection of intellectual property rights. China wished to refer to its statement made at the 28 May 2018 DSB meeting. As always, China welcomed and was willing to engage in good faith and objective discussions with other Members on intellectual property issues. China wished to emphasize again that the issue was whether the United States had implemented the DSB's recommendations and rulings in this dispute. China said that the answer was negative. China, once again, urged the United States to faithfully and promptly honour its implementation obligation.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.127)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.127, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.14. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. On 3 December2018, four draft authorizations – one for the renewal of GM oilseed rape[1], two for new GM maize[2] and one for new cotton[3] – would be presented for a vote in an EU member States Committee. On 7 December 2018, one draft authorization on a cut flower[4] would be submitted for a vote to the Appeal Committee, as it had received "no opinion" in an EU member State Committee on 18 October 2018. The EU was committed to acting in accordance with its WTO obligations. More generally, and as the EU had stated many times at previous DSB meetings, the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.15. The representative of the United States said that the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States remained concerned with the EU's measures affecting the approval of biotech products. Delays persisted and affected dozens of applications that had been awaiting approval for months or years, or that had already received approval. Even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. As the United States had highlighted at several prior DSB meetings, the EU maintained legislation that permitted EU member States to "opt out" of certain approvals, even where the European Food Safety Authority (EFSA) had concluded that the product was safe. Of note, at least 17 EU member States, as well as certain regions within EU member States, had submitted requests to opt out of EU approvals. The United States further noted a recent public statement issued by the European Union's Group of Chief

[1] Renewal of oilseed rape Ms8xRf3 (for feed).
[2] Maize 5307 and Maize MON 87403.
[3] Cotton GHB614xLLCotton25xMON15985.
[4] Carnation Dianthus caryophyllus L. line FLO-40685-2.

Scientific Advisors on 13 November 2018, in response to the 25 July 2018 ruling by the European Court of Justice ("ECJ") that addressed the forms of mutagenesis that qualified for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerned the Deliberate Release into the Environment of Genetically Modified Organisms (GMOs). The EU Group of Chief Scientific Advisors' statement recognized that: "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 United States urged the European Union to finally act in a manner that would bring into compliance the measures at issue in this dispute. The United States furthermore 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.

1.16. The representative of the European Union said that no EU member State had imposed any ban. Moreover, under the terms of what the United States referred to as the "opt-out directive", a member State could adopt measures restricting or prohibiting cultivation only if such measures were: in line with EU law; reasoned, proportional and non-discriminatory; and based on compelling grounds. In any event, the opt-out directive was not covered by the DSB's recommendations and rulings in this dispute. In July 2018, the European Court of Justice (ECJ) had provided an important clarification regarding the scope of application of the GMO legislation in relation to organisms obtained by mutagenesis techniques. The ECJ had ruled that organisms obtained by means of new techniques or methods of mutagenesis, which had appeared or had been mostly developed following the adoption of Directive 2001/18/EC, fell within the scope of that Directive. The European Commission was now working to ensure proper implementation of this ruling together with the EU member States. Operators in and outside the EU remained responsible for ensuring that products which were placed on the market were safe and complied with all relevant regulatory requirements.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.11)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.11, 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.

1.19. The representative of the United States said that the United States had provided a status report in this dispute on 8 November 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the US Trade Representative had requested that the US Department of Commerce make a determination under section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce had reviewed those comments and rebuttal comments and had taken them into account for purposes of preparing the final determination. On 4 June 2018, Commerce had issued a final determination, in which Commerce had revised certain aspects of its original determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programs, in accordance with findings adopted by the DSB. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to anti-dumping measures challenged in this dispute.

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

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

1.22. The representative of the United States said that the United States took note of Canada's statement and would convey it to capital. To be clear, however, it was incorrect to suggest that the United States had taken no action in relation to the anti-dumping findings in this dispute. As the United States had noted at the present meeting, the United States continued to consult with interested parties on options to address the DSB's recommendations. That internal process was ongoing.

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

E. European Union – Anti-dumping measures on biodiesel from Indonesia: Status report by the European Union (WT/DS480/8/Add.3)

1.24. The Chairperson drew attention to document WT/DS480/8/Add.3, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on biodiesel from Indonesia.

1.25. The representative of the European Union said that the European Union (EU) had provided a final status report with the precise indication of the publication references of Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013. As already mentioned during the 29 October 2018 DSB meeting, the Regulation was published in the Official Journal of the European Union on 19 October 2018.[5] According to its Article 4, the aforementioned Regulation had entered into force on 20 October 2018. No imports of biodiesel in the European Union from Indonesia or Argentina were subject to anti-dumping duties following the entry into force of the Regulation. The EU wished to reiterate that the adoption of this Regulation ensured the full implementation of the DSB's recommendations and rulings in this dispute.

1.26. The representative of Indonesia said that Indonesia wished to thank the EU for its status report and its statement made at the present meeting regarding its obligation under Article 21.6 of the DSU in this dispute. Indonesia wished to express its appreciation to the EU for adopting Implementing Regulation (EU) 2018/1570 of 18 October 2018 amending Implementing Regulation (EU) No 1194/2013 of 19 November 2013. Indonesia further wished to thank the EU for its commitment to reimburse the definitive anti-dumping duties and the provisional anti-dumping duties that had been definitively collected. In this latter connection, Indonesia would also appreciate if the EU could swiftly process the requests for reimbursement of the concerned exporters for the costs that they had incurred in connection with the relevant court cases.

1.27. The DSB took note of the statements.

F. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.3)

1.28. The Chairperson drew attention to document WT/DS471/17/Add.3, 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.

1.29. The representative of the United States said that the United States had provided a status report in this dispute on 8 November 2018, in accordance with Article 21.6 of the DSU. As explained

[5] OJ L 262, 19.10.2018, p. 40.

in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.30. The representative of China said that the Appellate Body Report in this dispute had been circulated to Members on 11 May 2017. On 22 May 2017, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report. The Arbitration pursuant to Article 21.3(c) of the DSU had determined the reasonable period of time (RPT) to be 15 months. The RPT had expired on 22 August 2018. Thus far, the United States had submitted four status reports. None of the status reports indicated any substantive implementation progress by the United States to address the DSB's recommendations in this dispute other than "consulting with the interested parties". China was again very disappointed and deeply concerned with the failure by the United States to implement the DSB's recommendations and rulings. The WTO-inconsistent measures taken by the US had seriously infringed China's legitimate economic and trade interests, distorted the relevant international market as well as seriously damaged the rules-based multilateral trading system. This should alert all Members and the international community. On 9 September 2018, China had requested authorization from the DSB to suspend concessions or other obligations and the matter had been referred to arbitration in line with the Article 22.6 of the DSU. China once again urged the United States to take concrete actions, comply with WTO rules, and faithfully implement the DSB's recommendations and rulings in this dispute in order to fully comply with its obligations under the covered agreements.

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

1.32. The representative of China said that China noted that the United States had repeatedly expressed its willingness to discuss its implementation of the DSB's recommendations and rulings in this dispute with China. Regrettably, such good words never translated into concrete action. Although China encouraged the United States to expedite its internal process, that process itself did not qualify as action in terms of WTO implementation. The following was a clear-cut question: had the United States completely honoured its implementation obligation in this dispute? The answer to that question was negative. Three months after the expiry of the RPT, the United States still kept its inconsistent measures intact at the expense of China's businesses and workers. As Article 21.1 of the DSU stated: "[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 and promptly bring its measures into conformity with its WTO obligations, rather than further delay the process of implementing the DSB's recommendations and rulings.

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

G. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18/Add.2)

1.34. The Chairperson drew attention to document WT/DS484/18/Add.2, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case on measures concerning the importation of chicken meat and chicken products.

1.35. The representative of Indonesia said that her country had submitted its status report in this dispute in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted the recommendations and rulings in this dispute. At the 22 January 2018 DSB meeting, Indonesia had informed the DSB of its intention to implement the recommendations and rulings of the DSB in this dispute. Indonesia and Brazil had also informed the DSB, on 15 March 2018, of their agreement regarding the reasonable period of time (RPT) for Indonesia to implement the recommendations and rulings of the DSB. The RPT in this dispute had elapsed on 22 July 2018. Indonesia had undertaken the necessary steps to adjust the relevant measures by amending its regulations, namely: (i) Ministry of Agriculture Regulation No. 23/2018, which entered into force on 24 May 2018; and

(ii) Ministry of Trade Regulation No. 65/2018, which entered into force on 31 May 2018. Indonesia had notified these regulations to the Committee on Import Licensing on 13 August 2018 in documents G/LIC/N/2/IDN/39 and G/LIC/N/2/IDN/41. Indonesia wished to thank Brazil for its statements made at previous DSB meetings in response to its previous status reports. Indonesia said that it had already explained to Brazil that all animal products, whether they were included in or excluded from the annexes to the aforementioned Regulations, were allowed to be imported. Importers could then modify any information contained in their recommendation and import approvals at any time without any sanction. With regard to the distribution plan, Indonesia's domestic producers also needed to have a plan for their products to be distributed. Indonesia wished to thank Brazil for having responded to a new questionnaire on country approvals in order to import chicken meat and chicken products. Regarding the process, the Ministry of Agriculture was currently conducting an internal examination. This process would be followed by a risk analysis process to be conducted by a risk analysis team. The risk analysis team would consist of members from the Ministry of Agriculture and the Expert Commission on Animal Health and Quarantine. The constitution of this team would take into account Indonesia's national budget for conducting such process. Moreover, business unit approval for the importation of poultry meat and poultry products had to refer to applicable rules regarding State revenue, as well as to non-tax mechanisms. Indonesia stood ready to continue to consult and would remain in constant communication with Brazil with respect to any matter relating thereto.

1.36. The representative of Brazil said that her country wished to thank Indonesia for its third status report. Brazil wished to share with Members some concerns regarding Indonesia's implementation of the DSB's recommendations and rulings in the present dispute, as it had done at previous DSB meetings. These concerns related to the following topics: (i) the "positive list requirement"; (ii) the distribution plan requirement; (iii) amendments to the terms of import licences; and, most importantly, (iv) the prompt analysis of Brazil's veterinary health certificate for the importation of chicken meat and chicken products. With regard to the first issue, Brazil noted that Indonesia's positive list had not ceased to exist. Indonesia had chosen to maintain the list and had included some of the HS codes of chicken meat and chicken products that had been the subject of Brazil's complaint. However, one HS code had yet to be included in Indonesia's positive list. As for distribution plans, Indonesia had further eliminated the requirement of distribution reports with information regarding use or place of sale of imported chicken meat and chicken products. However, the requirement of distribution plans continued to be in force by virtue of Article 22(1)(l) of Ministry of Agriculture Regulation 34/2016. Brazil noted moreover that Indonesia had introduced the possibility of making changes to the terms of the import licenses. Notwithstanding this, amendments to import licenses were subject to several requirements. Sanctions on importers continued to apply in the event that these requirements were not strictly observed. Brazil also wished to highlight the unsatisfactory status of the analysis of Brazil's veterinary health certificate for the importation of chicken meat and chicken products. After nearly ten years, Brazil was still waiting for concrete progress in this respect. Brazil, once again, asked Indonesia to include in its future status reports the status of the analysis and approval of this certificate, which was a fundamental step for opening the Indonesian market. The reasonable period of time for Indonesia to comply with the DSB's recommendations and rulings in this dispute had expired on 22 July 2018. Full implementation, as Brazil had explained at the present meeting, remained to be seen. Brazil thus urged Indonesia to approve Brazil's veterinary health certificate in a timely manner and to fully comply with the DSB's recommendations and rulings in the present dispute. Brazil remained ready to work with Indonesia with respect to any aspect of this dispute.

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

H. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.2)

1.38. The Chairperson drew attention to document WT/DS488/12/Add.2, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on certain oil country tubular goods from Korea.

1.39. The representative of the United States said that the United States had provided a status report in this dispute on 8 November 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.40. The representative of Korea said that Korea wished to thank the United States for its status report and for its statement made at the present meeting. Korea had been closely monitoring the status of implementation by the United States of the DSB's recommendations and rulings in this dispute. Korea was concerned that no specific action to implement the DSB's recommendations and rulings had been taken. Korea strongly requested that the United States resolve the uncertainty surrounding implementation without delay.

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

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

A. Statement by the European Union

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

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

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

2.4. The representative of Canada said that Canada wished to thank the European Union for placing this item on the Agenda of the present meeting. Canada shared the EU's view that this dispute had to remain subject to monitoring by the DSB until the United States ceased to apply the measures at issue 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 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 10 years ago. With respect to the EU's request for status reports in this matter, as the United States had 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 and rulings, regardless of whether the complaining party disagreed about compliance. The practice of Members confirmed this widespread understanding of Article 21.6 of the DSU as no status report had been submitted by any Member in any dispute this month, or for previous DSB meetings, where the responding Member had claimed compliance and the complaining Member disagreed. The EU had explained at the previous DSB meeting that, in its view, the issue of compliance "remains unresolved for the purposes of Article 21.6". Under such a standard, the United States would expect the EU to provide status reports in any dispute where there was a disagreement between the parties on the EU's compliance, including the "EC – Large Civil Aircraft" dispute (DS316). Given the EU's failure to provide a status report in that dispute again prior to the present meeting, the United States failed to see how the EU's behaviour was consistent

with the alleged systemic view it had been espousing under this Agenda item for more than ten years. As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance.

2.6. The representative of the European Union said that the United States had referred to the "EC – Large Civil Aircraft" dispute (DS316) at the present meeting. The European Union noted that the United States had placed an item related to that dispute on the Agenda of the present meeting. The EU would therefore respond to US comments under that Agenda item. The United States had also stated that the EU had failed to provide status reports in a number of cases that involved the EU. This was not correct. The EU had provided status reports on all cases that involved it. For the present meeting of the DSB, the relevant disputes were the "EC – Approval and Marketing of Biotech Products" (DS291) dispute and the "EU – Biodiesel (Indonesia)" (DS480) dispute.

2.7. The DSB took note of the statements.

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

A. Statement by the United States

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

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

3.3. The representative of the European Union said that as the EU had indicated at previous DSB meetings, there was a difference between the "EC – Large Civil Aircraft" dispute (DS316) and the "US — Offset Act (Byrd Amendment)" disputes (DS217, DS234). In the "US — Offset Act (Byrd Amendment)" disputes (DS217, DS234), the disputes had been adjudicated and there were no further compliance proceedings pending. Under Article 21.6 of the DSU, the issue of implementation shall remain on the DSB's Agenda until the issue was resolved. In the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes, the EU did not agree with the US assertion that the United States had implemented the DSB's recommendations and rulings. Therefore, the issue remained unresolved for the purposes of Article 21.6 of the DSU. In the "EC – Large Civil Aircraft" dispute (DS316), once the Appellate Body report on compliance had been issued, the EU had notified to the WTO a new set of measures in a compliance communication and tabled at the 28 May 2018 DSB meeting. With respect to the measures included in that communication, the United States had

expressed the view that the EU had not yet fully complied with the DSB's recommendations. In response to this US view, on 29 May 2018, the EU had requested consultations with the United States under Articles 4 and 21.5 of the DSU. After these consultations had failed, the EU had requested the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. Hence, compliance proceedings in this dispute were therefore still ongoing. Whether or not the matter was resolved was the very subject matter of this ongoing litigation. With regard to the US comment on Article 21.6 of the DSU, the EU would be very concerned with a reading of this provision which would have required the implementing Member to notify the status of implementation while litigation on this issue was ongoing. This view was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures. In the dispute at hand, and following disagreement between the parties regarding compliance, the DSB had exercised its function through the establishment of a compliance panel. The matter was currently with the adjudicators and had therefore been temporarily taken out of the DSB's surveillance.

3.4. The DSB took note of the statements.

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

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

4.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the European Union contained in document WT/DS475/21, and invited the representative of the European Union to speak.

4.2. The representative of the European Union said that the EU requested for the second time the establishment of a panel at the present meeting to examine the consistency of the measures taken by the Russian Federation with the WTO rules to comply with the DSB's recommendations and rulings in this dispute. The EU hoped that the panel established today could be composed and start its work as soon as possible. The EU had been waiting a long time for the opening of the Russian market to pig products from the EU, in line with the DSB's recommendations and rulings in this dispute.

4.3. The representative of the Russian Federation said that her country regretted that the EU had decided to request for the second time the establishment of a panel under Article 21.5 of the DSU with respect to Russia's measures on the importation of live pigs, pork and other pig products from the EU. Russia wished to refer to its statement made at the 29 October 2018 DSB meeting under the same Agenda item. Russia believed that the DSB's recommendations and rulings in this dispute had been fully and timely implemented, and that all the measures deemed to violate Russia's WTO commitments under the SPS Agreement had been brought into conformity. Moreover, Russia noted that proceedings under Article 21.5 of the DSU were limited to measures taken to comply with the DSB's recommendations and rulings. However, in its panel request the EU had referred to certain measures which had not been "taken to comply" with the DSB's recommendations and rulings by Russia. Russia thus believed that there was no legal basis for the EU to request the establishment of a panel under Article 21.5 of the DSU.

4.4. The representative of the European Union said that the EU would not enter into a detailed discussion of legal arguments at the present meeting. The EU simply wished to recall that Russia had kept the ban on the importation of pig and pork products in place. Russia had claimed compliance with the DSB's recommendations and rulings while its market was still closed to such products. What the EU intended to challenge was Russia's failure to comply with its obligations under the DSB's recommendations and rulings.

4.5. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the European Union in document WT/DS475/21. It was agreed that the Panel would have standard terms of reference.

4.6. The representatives of Australia, China, India, Japan, Kazakhstan, Ukraine and the United States reserved their third-party rights to participate in the Panel's proceedings.

5 CHINA – CERTAIN MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

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

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS542/8, and invited the representative of the United States to speak.

5.2. The representative of the United States said that as the United States had noted at the 29 October 2018 DSB meeting, China had implemented policies that consistently sought to disadvantage foreign companies for the benefit of Chinese industry. These policies denied foreign patent holders, including US companies, basic patent rights to stop a Chinese entity from using the technology after a licensing contract ended. China also imposed mandatory adverse contract terms that discriminated against and were less favourable for imported foreign technology. These policies, reflected in Chinese legal instruments, were inconsistent with Articles 3 and 28 of the TRIPS Agreement because they failed to provide the intellectual property rights to which China had committed when it had acceded to the WTO. China had been engaging in industrial policy which had resulted in the discriminatory transfer of intellectual property and technology to the detriment of the United States and its workers and businesses. China's stated intention was to achieve global dominance in advanced technology. These unfair policies and practices affected all WTO Members, not just the United States. The United States had estimated that some of China's policies were causing US$50 billion in annual harm to the United States alone. The aggregate impact of China's policies to all WTO Members worldwide would be much higher. The best way for China to support fairness in the world trading system was to remedy the problems it had created. China should change its behaviour: stop distorting markets, stop forcing companies to transfer technology, and create a level playing field that would give all countries a better chance to succeed. For the past several years, the United States had repeatedly raised concerns about China's policies relating to technology licensing that did not comport with China's WTO commitments. As these efforts had failed to resolve this dispute, the United States was now proceeding for the second time to request that the DSB establish a panel. Accordingly, the United States was requesting that the DSB establish a panel to examine the matter set out in its panel request, with standard terms of reference.

5.3. The representative of China said that China was disappointed that the United States had requested for the second time the establishment of a panel to examine the subject matter of this dispute. The US accusations were based on a deliberate misrepresentation of Chinese law and practice. It was clear that the so-called "forced technology transfer" alleged by the United States was not within its request for consultations or its request for the establishment of a panel in this dispute. It was therefore not relevant to the present dispute. Technology transfer in the course of cooperation between China and developed countries such as the United States was voluntary in nature. It was driven by real market demands and the willingness of suppliers, and generally reflected a buoyant but competitive Chinese market. The Chinese Government had never introduced policies or practices that forced foreign owners to transfer technology as part of the cooperation process. The US accusations were meritless. They were based on a deliberate misrepresentation of Chinese laws and practices, as well as on allegations from unidentifiable sources. To date, China had not heard any convincing evidence to support the US claims. The technological upgrade of Chinese firms was a natural result of various factors, such as a four-decade adherence to the open-up policy, a traditional hard-working spirit, dedication to education, and the natural spill overs of foreign technologies in the course of business cooperation. None of these factors related to a so-called "forced technology transfer". Characterizing voluntary technology transactions as forced showed a deliberate distortion of basic facts and an ignorance of the spirit of such transactions. China did maintain some equity cooperation requirements in certain areas. These requirements were a practice common to many Members and were in line with China's international obligations. They did not constitute forced technology transfers. By contrast, the United States, in the absence of a WTO authorization, had illegally imposed punitive, hefty tariffs on other Members, which bluntly breached WTO rules and disciplines such as most-favoured-nation treatment and tariff binding. Such unilateral measures had undermined the legitimate interests of all Members, including China. More importantly, these unilateral measures had jeopardized the authority of the WTO and its dispute settlement system, and exposed the multilateral trading system and international trade order to unprecedented risks. In this respect, nine Members had initiated dispute settlement proceedings against the United States regarding its Section 232 measures. China had also challenged the

US Section 301 measures in two disputes this year. China's message was clear and consistent. China took its commitments seriously and expected its partners to do the same with theirs. While China was ready to engage in good faith discussions of any intellectual property issue at any time, China was also fully prepared to safeguard its legitimate interests under the covered agreements. China was not enthusiastic about playing blaming games which directly conflicted with the fundamental values that underpinned the creation of this Organization. China understood that a panel would be established at the present meeting. China stood ready to defend its legitimate rights and interests in future proceedings.

5.4. The representative of Japan said that as stated at the 29 October 2018 DSB meeting, Japan, as one of the major exporters of technology to China, had repeatedly raised concerns with China's laws, regulations and other measures identified by the United States in its panel request. In particular, the Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies (TIER) seemed to impair the ability of foreign intellectual property right holders to protect their intellectual property rights. This measure mandated contractual terms in technology transfer agreements between foreign and Chinese partners in a manner detrimental to the interest of foreign partners. Japan shared the concerns of the United States regarding the WTO consistency of the measures challenged in this dispute. The measures at issue were discriminatory and failed to provide sufficient protection of intellectual property rights in China. Japan emphasized the importance of stronger protection of intellectual property rights and their effective enforcement.

5.5. The representative of the European Union said that the EU shared the US concerns regarding China's technology transfer laws and practices and welcomed the establishment of a panel pursuant to the US request in this dispute in order to make an objective assessment of China's alleged discriminatory measures on the licensing of imported technology. The EU would become a third party in this dispute, and looked forward to the opportunity of setting out its views in the course of these proceedings. At the 29 October 2018 DSB meeting, China had qualified the US allegations as unfounded and as misrepresenting Chinese laws and practices. The EU disagreed with that position. On 1 June 2018, the EU had filed a request for consultations that covered the claims brought forward by the United States in this dispute. Like the United States, the EU believed that China's laws and policies discriminated against and were less favourable to imported foreign technology, and imposed mandatory adverse contract terms on foreign intellectual property right holders. The EU considered that these laws and policies were contrary to China's obligations under the TRIPS Agreement and China's commitments under its Protocol of Accession. However, the problems with China's technology transfer policies were much broader than the issues addressed in this dispute and in the EU's request for consultations. The EU concerns came as no surprise to China and other Members. China's technology transfer policies were discussed at length both in multilateral and in bilateral meetings and were described in detail in the Section 301 report issued by the United States in March 2018. The EU agreed with many of the factual findings made by the United States in that report. However, the EU believed that the only way to find solutions to these issues was through the rules-based multilateral trading system. That was the reason why the EU supported initiatives, such as the one of the United States in this dispute, to resolve matters that were of concern to Members in a fair and objective manner, using the legal means available under WTO Agreements.

5.6. 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.

5.7. The representatives of the European Union, India, Japan, Kazakhstan, Korea, Norway, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Turkey and Ukraine reserved their third-party rights to participate in the Panel's proceedings.

6 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

6.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from China contained in document WT/DS544/8, and invited the representative of China to speak.

6.2. The representative of China said that China wished to refer to its previous statement made at the 29 October 2018 DSB meeting regarding this dispute. China requested the DSB to establish a

panel at the present meeting. To avoid repetition, China would not discuss in detail how the Section 232 measures taken by the US were essentially safeguard measures, or how those measures were inconsistent with the GATT 1994 and the Agreement on Safeguards. China wished to confirm that its statement made at the 29 October 2018 DSB meeting regarding this dispute remained fully valid. Notably, besides China, there were 8 other Members who had similarly requested to establish panels for disputes based on the same measures and similar legal grounds at the present meeting. China believed that there was a shared understanding among various Members that the measures at issue were inconsistent with the core principles of the covered agreements. China considered that the matters at issue had significant systematic implications for the WTO. Members had to faithfully fulfil their obligations and commitments under WTO Agreements. Members also had to use or invoke the security exception provisions within WTO Agreements on a bona fide basis. And the DSB had full authority to examine the measures at issue in this dispute. Pursuant to Article 9.1 of the DSU, China requested the establishment of a single panel to examine the complaints under Agenda items 7, 8,9,10 and 11, as well as Agenda items 16,17 and 18 of the present meeting, which related to the same matter.

6.3. The representative of the United States said that China's second panel request in this dispute continued China's pattern of using the WTO dispute settlement system as an instrument to promote its non-market economic policies. These non-market policies were widely recognized by WTO Members as leading to massive excess capacity and distortions of world markets while damaging the interests of market-based economies and the businesses and workers who operate under these principles. In particular, China's policies had created and maintained excess capacity in the steel and aluminium sectors, and undermined the basic fairness of international trade. WTO Members already knew that these sectors were suffering under conditions of excess capacity directly caused by China's non-market economic system. Driven by its industrial policy, China had created new plants and maintained existing production contrary to market signals. Under such conditions, it was impossible for businesses and workers in the United States, the European Union, Canada, Mexico, Norway, and other WTO Members, to earn a sufficient return in the market to remain viable over the longer term. As the report from the US Secretary of Commerce noted: "[f]ree markets globally are adversely affected by substantial chronic global excess steel production led by China. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined."[6] Reports from the United States, however, were not the only ones that recognized the pervasive problems in the steel and aluminium sectors. The September 2018 Global Steel Forum Ministerial Report, agreed by 33 member countries, had stated: "[e]xcess steelmaking capacity … depresses prices, undermines profitability, generates damaging trade distortions, jeopardizes the very existence of companies and branches across the world, creates regional imbalances, undermines the fight against environmental challenges and dangerously destabilizes world trading relations."[7] And the OECD had reported that Chinese steel excess capacity was estimated at 300 million metric tons, dwarfing total US production capacity.[8] In the case of aluminium, since 2008, China had added 30 million metric tons in new capacity – that is, more than the current combined capacity of the nine largest producers after China. China's non-market policies also had led to global conditions in which core US industries, which were vital to US national security, were not able to survive and invest for the future on market-based terms. This devastating effect on US industries critical to US national defence could place the United States in a position where it was unable to meet national defence demands in a national emergency. The President of the United States had determined that, under these conditions, imports of steel and aluminium threatened to impair US national security. The United States had given detailed explanations that the measures at issue were taken pursuant to Article XXI of the GATT 1994. In particular, the United States had explained the determination by the US President that these measures were necessary to address the threat that imports of steel and aluminium articles pose to US national security. Some Members had expressed concerns that invoking the national security exception in these circumstances would undermine the international trading system. This was erroneous, and completely backwards. Rather, what threatened the international trading system was that China was attempting to use the WTO dispute settlement system to prevent any action by any Member to address its unfair, trade-distorting policies. China's choice to pursue dispute settlement against WTO Members defending their legitimate interests would make WTO rules an instrument for China to protect its non-market

[6] The Effect of Imports of Steel on the National Security, 11 January 2018, p. 55.

[7] Global Steel Forum Ministerial Report, Sept. 20, 2018, p. 1.

[8] OECD, High Level Meeting: Excess Capacity and Structural Adjustment in the Steel Sector, April 2016, http://www/oecd/org/sti/ind/background%20document%20No%202_FINAL_Meeting/pdf.

behaviour that was devastating the ability of Members to defend their national security interests. WTO rules did not make market-oriented WTO Members helpless in the face of blatant, unfair distortions that undermined their national security. GATT 1994 Article XXI reflected the common understanding, from the very beginning of the international trading system, that each WTO Member could judge for itself the actions necessary to protect its essential security interests. Were it otherwise, then the WTO and the international trading system would lose all credibility and support among US citizens. If China maintained its misguided request for a panel to make findings that the United States had not acted consistently with WTO rules in this dispute, there was no finding a panel could make other than to note that the United States had invoked Article XXI. China had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. Therefore, the United States did not agree to establish a single panel under Article 9.1 of the DSU.

6.4. The representative of China said that not surprisingly, the United States had once again singled out China to disguise its illegal safeguard measures. This was not new. During the 29 October 2018 DSB meeting, the United States had opted for a similar diversion tactic when it had accused China of adopting so-called non-market economic policies and of causing overcapacity.[9] Those accusations were meritless and based on distorted and fictitious facts. Although China had rebutted these accusations in multiple fora including General Council meetings, DSB meetings and recent SCM Committee meetings on many occasions, it seemed that a brief reiteration of these rebuttals was still needed to shed light on these issues. With respect to the so-called excess capacity issue, China recognized that overcapacity in the steel and aluminium sectors had arisen alongside with the stimulus policies in response to the financial crisis from 2008 onward. Such issue constituted a global challenge that should be addressed by joint efforts. In this regard, China had already implemented numerous actions to absorb its increased capacity and had made sincere contributions to help the global steel and aluminium markets recover, even though those actions had caused tremendous adjustment pains to China's businesses and workers. As for the expression "non-market practice", China wished to reiterate that there was no definition of "market economy" within WTO rules, and that there was no one-size-fits-all "market economy" standard throughout the world. The arguments in the US Department of Commerce's report pursuant to Section 232 were unfounded. The statement made by the United States at the present meeting reeked of hypocrisy. The invocation of non-market economic policies and overcapacity by the United States showed serious efforts aimed at further strengthening its national security disguise over its safeguard measures. The DSB was mandated to strip off any disguise over protective measures and to bring them into conformity with WTO rules. If the United States had truly believed that its allegations had legal merit under the covered agreements, then it would have agreed to comply with the rules-based WTO dispute settlement system. China did not share the same enthusiasm as the United States for playing the blame game. Members were not ruled by the law of the jungle. China wished to call for following WTO rules and for abiding by them. Nothing could ultimately justify any Member placing itself above WTO rules agreed by the Membership, including that same Member. China also deeply regretted the opposition of the United States to China's request for the establishment of a single panel for panel requests that related to the same matter. China recalled that Article 9.3 of the DSU stated that: "[i]f more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized". China requested that if separate panels were established to examine the disputes regarding the US measures at issue, then Article 9.3 of the DSU had to apply in order to secure the efficiency of the proceedings.

[9] United States, Statement at the Dispute Settlement Body Meeting, 29 October 2018, pp. 28-30.

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 Canada, Colombia, the European Union, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

7 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

7.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the European Union contained in document WT/DS548/14, and invited the representative of the European Union to speak.

7.2. The representative of the European Union said that as it had done at the 29 October 2018 DSB meeting, the EU would speak only under this Agenda item, and had not and would not take the floor under the preceding and the seven subsequent Agenda items that all concerned the same US measures. This was, again, to avoid repetition. However, the spirit of this EU statement also applied to the aforementioned Agenda items. The EU would not repeat the explanation it had given at the 29 October 2018 DSB meeting regarding its perfectly reasonable rationale for bringing this dispute, and notably why the US measures were safeguard measures and incompatible with WTO law. The EU wished to refer to its statement made at the 29 October 2018 DSB meeting, which remained fully valid. Instead, the EU wished to focus on some of the statements which the US had made last time, and to provide a response. First, in terms of production overcapacity, the EU shared the US deep concern regarding overcapacity, and agreed that there was a need to urgently eliminate it and the direct and indirect government support that caused it. However, actions taken in this regard had to comply with EU and US international obligations. Also, the US action under Section 232 failed to address the root causes of the problem. The EU looked forward to the full and prompt implementation of the important outcomes of the Paris Ministerial of the Global Forum for Steel Excess Capacity, which had focused precisely on such root causes. At the 29 October 2018 DSB meeting, the EU had discussed seven panel requests related to the US measures. At the present meeting, there were nine such panel requests. This was the first such occurrence in the history of the WTO. This was testimony to the fact that the United States was quite alone with its view that its measures were completely acceptable and should be left alone. The United States had alleged that: "if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole". The reality was that the WTO as a whole would be undermined and its value questioned if individual Members could protect their domestic industries against competition from abroad whenever they wished, without conditions and without legal review in the WTO. In certain respects, it might well have been a good thing that the past record of GATT and WTO dispute settlement presented few cases where the invocation of GATT 1994 Article XXI had been an issue, and none where such an invocation had been adjudicated. Also, the EU could easily agree with the US on the importance of GATT 1994 Article XXI in balancing rights and obligations under the GATT 1994. However, this could not mean that there should be no review of the use of this exception where it had suddenly been used so differently and had even been blatantly abused. At the 29 October 2018 DSB meeting, the United States had focused heavily on a Member's prerogative "to determine, for itself, what is in its own essential security interests". The United States never seemed to have paid attention to the fact that GATT 1994 Article XXI(b) contained other conditions that had to be satisfied. The EU had noticed that certain bilateral trade agreements of the United States did not contain these other conditions, and that certain other bilateral trade agreements stated that there had to be no judicial review once the security exception was invoked. However, the GATT 1994 differed from these bilateral US trade agreements. The EU believed that in such a situation the most reasonable course of action for all involved was to calmly and soberly pursue the avenue of WTO dispute settlement system, as was foreseen by the covered agreements, one of which included Article XXI. The EU, contrary to what the United States had stated at the 29 October 2018 DSB meeting, defended a perfectly consistent position regarding GATT 1994 Article XXI, which was on record and public in the context of the ongoing "Russia – Traffic in Transit" dispute (DS512). The 1982 EEC statement in the GATT Council had been made at a time when there had been no binding and compulsory dispute settlement system. It had not been made

to defend a measure of commercial protectionism aimed at helping out a struggling domestic industry. Rather, at that time, one of the member States of the then European Economic Community and today of the European Union had found itself in a situation falling squarely within GATT 1994 Article XXI(b)(iii). Finally, the fact that nine panel requests were tabled at the present meeting, seven of which for the second time, in relation to the same US measures and based on virtually identical legal claims, also meant procedurally that Article 9 of the DSU applied. Accordingly, the EU requested the establishment of a single panel pursuant to Article 9.1 of the DSU. Under the previous Agenda item, the United States had stated that it refused the establishment of a single panel pursuant to Article 9.1 DSU. The first paragraph of Article 9 of the DSU provided that a single panel "should be established to examine [multiple] … complaints … related to the same matter … whenever possible". The panel requests tabled today made it 100% feasible to establish a single panel. It should not be in line with Article 9.1 of the DSU to ignore it when there was no valid reason for not following it.

7.3. The representative of the United States said that the United States was deeply disappointed that the EU had submitted a second panel request in this dispute. As the United States had explained in its statement regarding this item at the prior DSB meeting of 29 October 2018, the EU knew as well as any Member the extent and nature of the problems arising from China's excessive steel and aluminium production, and the risks that excess capacity posed to the global economic system. The United States had made clear that it considered the Section 232 measures necessary for the protection of its essential security interests, given the key roles steel and aluminium played to its national defence. The US measures were therefore justified under Article XXI of the GATT 1994 and not subject to review by a WTO panel. This had been the clear and unequivocal position of the United States for over 70 years, and had also been the position of the European Union and its member States, with good reason. The EU should well know the risks posed to the WTO dispute settlement system when a Member challenged measures taken for the protection of essential security interests. For example, in 1982, when certain European actions had been before the GATT Council, the European Economic Community and its member States had stated that Article XXI was a reflection of a Member's "inherent rights". They had stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement ... [since] every contracting party was – in the last resort – the judge of its exercise of these rights."[10] Some GATT Contracting Parties had questioned the validity of the European Community's invocation of Article XXI[11], but the United States in the same meeting had stood by the European Community and supported the European position.[12] The United States had expressed unequivocally that: "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise in the view of the United States, since no country could participate in GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests."[13] The position of the United States remained the same in 2018 as the United States had expressed in 1982, 1949[14], and indeed during the negotiation of the GATT itself.[15] *Nothing* had changed in the text of Article XXI since 1982. But the *European* position had changed completely. The EU position taken at the present meeting therefore lacked any principled rationale. Because the United States had invoked Article XXI, there was no basis for a WTO panel to review the claims of breach raised by the European Union. Nor was there any basis for a WTO panel to review the invocation of Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. If the EU maintained its misguided request for a panel to make findings that the United States had not acted consistently with WTO rules in this dispute, there was no finding a panel could make other than to note that the United States had invoked Article XXI. Instead of litigating fruitlessly, the EU and its member States should reconsider and find common and effective means to advance EU and US shared interests.

[10] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

[11] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 12 (statements of Argentina and Brazil).

[12] See also GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 9-11 (statements of New Zealand, Norway, Canada, the United Kingdom, and Australia, also supporting the EEC position).

[13] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 8.

[14] Contracting Parties, Summary Record of the Twenty-Second Meeting Held on 8 June 1949, GATT/CP.3/SR.22, p. 3.

[15] See U.S. Answers Questions from the Panel and the Russian Federation, Russia – Measures Concerning Traffic in Transit (WT/DS512), paras. 1-15 (explaining negotiating history, including statements by U.S. delegate; available at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf).

The EU had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. Therefore, the United States did not agree to establish a single panel under Article 9.1 of the DSU.

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 Canada, China, Colombia, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

8 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

8.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from Canada contained in document WT/DS550/11, and invited the representative of Canada to speak.

8.2. The representative of Canada said that Canada continued to be deeply disappointed that this matter remained unresolved at this time. Canada wished to note that the conclusion of the NAFTA renegotiations was a major step to modernize and reinvigorate Canada's economic and security partnership with the United States. Canada also wished to note that the continued imposition of steel and aluminium tariffs on the pretence of national security would only harm Canadian and US supply chains, as well as companies and workers in both Canada and the United States. As Canada had repeatedly conveyed to the United States, it was inconceivable that imports of steel and aluminium products from Canada could be construed to pose a national security risk to the United States. While WTO Members had to be able to take actions necessary to protect their national security interests pursuant to GATT 1994 Article XXI, Canada considered that Members should be prudent and sparing in their use of GATT 1994 Article XXI in order to guard against its abuse. For this reason, Canada remained extremely concerned with the United States' invocation of GATT 1994 Article XXI to justify the imposition of tariffs on steel and aluminium from Canada on national security grounds. The justification of national security for these tariffs undermined the integrity of the international rules-based trading system of which the United States was a part and continued to benefit from. Therefore, Canada had no choice but to request that the DSB establish a panel to examine the matter set out in its panel request. As Canada had stated at the 29 October 2018 DSB meeting, Canada's position was that a single panel should be established under Article 9.1 of the DSU for the "United States – Certain Measures on Steel and Aluminium Products" disputes with China (DS544), the EU (DS548), Canada (DS550), Mexico (DS551), Norway (DS552), the Russian Federation (DS554) and Turkey (DS564), as they were all related to the same matter. It would be appropriate to establish a single panel to examine these disputes, particularly given the complainants' willingness to coordinate and proceed in this manner.

8.3. The representative of the United States said that the United States was disappointed that Canada had requested the establishment of a panel in this dispute for the second time. As the United States had explained in its statement at the prior DSB meeting of 29 October 2018 addressing Canada's panel request in this dispute, because the United States had invoked Article XXI of the GATT 1994, there was no basis for a panel to review Canada's claims of WTO-inconsistency. The US position was therefore completely consistent with the Canadian position – at least, as had been expressed by Canada when its own invocation of Article XXI had been challenged back in 1982.[16] As

[16] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 10-11 (statement by Canada: "Canada was convinced that the situation which had necessitated the measures had to be satisfactorily resolved by appropriate action elsewhere, as the GATT had neither the competence nor the responsibility to deal with the political issue which had been raised. His delegation could not, therefore, accept the notion that there had been a violation of the General Agreement").

there was no finding a panel could make other than to note that the United States had invoked Article XXI, the United States did not see any point to this request. The United States also recalled that Canadian and US authorities had been engaging in constructive discussions towards resolving concerns surrounding these matters. The United States was hopeful that these discussions might be concluded satisfactorily. Canada had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. The United States therefore did not agree to establish a single panel under Article 9.1 of the DSU.

8.4. The representative of Canada said that Canada did not agree with the US view that actions taken pursuant to GATT 1994 Article XXI were not subject to review by a WTO panel. Panels did not have the discretion to decline exercising the jurisdiction conferred on them by the panel's terms of reference. They also did not have the discretion not to discharge the obligations imposed on them by Article 11 of the DSU. Accordingly, if GATT 1994 Article XXI was invoked by a Member in a dispute, its applicability was a matter that the panel had to examine, unless consideration of that Article had been excluded from the panel's terms of reference, which could only occur if the disputing parties agreed. The plain reading of Article 9.1 of the DSU provided that a single panel had to be established, whenever feasible, for the examination of multiple complaints related to the same matter. These circumstances were met at the present meeting. Canada was disappointed that the United States had taken its position with regard to a single panel under Article 9.1 of the DSU. Canada remained of the view that these disputes were related to the same matter. Canada, therefore, requested the harmonization of the panel proceedings in these disputes pursuant to Article 9.3 of the DSU.

8.5. The representative of the United States said that as the United States had stated earlier at the present meeting, the United States saw no basis for this dispute as there were no findings a panel could make on Canada's claims. Therefore, as there was nothing to examine, Article 9.3 of the DSU did not apply. In response to Canada's reference to Article 9.3 of the DSU, and China's earlier reference to that Article, that provision did not contain any reference to DSB action. Article 9.3 of the DSU therefore did not authorize the DSB to make a decision on the matter of choosing panelists or on the harmonization of timetables. Therefore, the DSB did not need and could not consider this issue at all.

8.6. 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.

8.7. The representatives of China, Colombia, the European Union, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

9 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

9.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. The Chairperson drew attention to the communication from Mexico contained in document WT/DS551/11, and invited the representative of Mexico to speak.

9.2. The representative of Mexico said that Mexico welcomed the opportunity to address, once again, concerns over the measures imposed by the United States on certain steel and aluminium products. Mexico considered that these measures raised legal and systemic concerns. First, these measures raised legal concerns in terms of the nature of safeguard measures, regardless of how a Member characterized such measures and of the domestic legal basis on which that Member had adopted them. This necessarily had an impact on the applicability of the Agreement on Safeguards and, therefore, on the rights and obligations of Members under that Agreement. Second, these

concerns were legal in terms of the nature and scope of Article XXI of the GATT 1994. That Article could be invoked by Members as an exception. Therefore, this dispute raised issues regarding the type of measures that qualified under that Article and the way in which Members could justify such measures in accordance with this provision. Mexico's systemic concerns stemmed from the view that the United States seemed to have of the relationship that existed between national security issues and the WTO dispute settlement mechanism. The United States had indicated that: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."[17] Mexico did not agree with this view, since it appeared to be inconsistent with the dispute settlement objectives and commitments of Members. It would also defeat the purpose and impede the function of the DSB and, consequently, of the panels and the Appellate Body. It would also have an impact on Members' rights under the covered agreements and, ultimately, would cause a crisis in the multilateral trading system. Because the aforementioned legal and systemic considerations were of great significance, Mexico was requesting, for the second time, the establishment of a panel with standard terms of reference. Given that there were nine requests for the establishment of a panel to address the same measures adopted by the United States, a single panel should be established under Article 9.1 of the DSU, in order to examine the WTO-consistency of the US measures. Finally, Mexico noted that, as in previous cases, the United States objected to the establishment of a single panel. In this regard, Mexico considered that there was no legal basis or valid reasons not to establish a single panel, in accordance with Article 9.1 of the DSU, since the panel requests submitted at the present meeting related to the same matter.

9.3. The representative of the United States said that the United States was disappointed that Mexico had requested the establishment of a panel in this dispute for the second time. As the United States had explained in its statement at the DSB meeting of 29 October 2018 addressing Mexico's panel request in this dispute, because the United States had invoked Article XXI of the GATT 1994, there was no basis for a panel to review Mexico's claims of WTO-inconsistency. As there was no finding a panel could make other than to note that the United States had invoked Article XXI, the United States did not see any point to this request. The United States also recalled that Mexican and US authorities had been engaging in constructive discussions towards resolving concerns surrounding these matters. The United States was hopeful that these discussions might be concluded satisfactorily. Mexico had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must decide to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. The United States therefore did not agree to establish a single panel under Article 9.1 of the DSU.

9.4. The representative of Japan said that his delegation wished to make a statement in relation to items 6-11 and items 16 - 18 of the Agenda of the present meeting. Japan had carefully listened to the views expressed by the United States and the complaining parties in these disputes at the 29 October 2018 DSB meeting and at the present meeting. Japan noted that Article 3.7 of the DSU stated that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute" and "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred". As these disputes involved issues that posed a difficult challenge to the WTO dispute settlement system, Japan encouraged the parties to these disputes to make every effort to seek a mutually acceptable solution even during the panels' proceedings.

9.5. 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.

9.6. The representatives of Canada, China, Colombia, the European Union, Guatemala, Honduras, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

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

10 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

10.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. The Chairperson drew attention to the communication from Norway contained in document WT/DS552/10, and invited the representative of Norway to speak.

10.2. The representative of Norway said that at the 29 October 2018 DSB meeting, Norway had requested the establishment of a panel in this dispute regarding US additional tariffs on certain steel and aluminium products of 25% and 10% respectively. At the 29 October 2018 DSB meeting, Norway had outlined some important points related to this dispute, which Norway would not repeat at the present meeting. It was Norway's firm view that the additional tariffs were inconsistent with the United States' WTO obligations, in particular under the Agreement on Safeguards. Norway also wished to stress that, like in any other sector, concerns which any WTO Member had with respect to the economic conditions in its steel and aluminium industries had to be addressed through measures compatible with the WTO Agreements. At the 29 October 2018 DSB meeting, the United States had stated that because Article XXI of the GATT 1994 had been invoked, "there is no basis for a WTO panel to review the claims of breach raised by Norway [n]or is there any basis for a WTO panel to review the invocation of Article XXI by the United States". Norway wished to explain why such arguments had to be rejected. The US position was not supported by the DSU. Article 1.1 of the DSU provided that all the multilateral agreements on trade in goods were included as "covered agreements". No provision – including Article XXI of the GATT 1994 – was "carved-out" from the compulsory jurisdiction to which the Members had agreed. Article 3.2 of the DSU provided that the dispute settlement system was "a central element in providing security and predictability to the multilateral trading system". Article 3.3 of the DSU provided that the prompt settlement of disputes was "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". The United States could not, consistent with these principles, unilaterally exclude disputes from a WTO panel's jurisdiction. A Member's mere invocation of a "national security" defence could not render a claim non-justiciable without allowing for the easy circumvention of WTO obligations. Such an approach would mean that a responding party could, in theory, allege justification of a variety of protectionist interests under the guise of national security, and thereby avoid scrutiny of its measures based on its WTO obligations altogether. An interpretation of Article XXI of the GATT 1994 to this effect would render all obligations therein effectively unenforceable. Excluding this dispute from WTO review simply because the United States had invoked GATT1994 Article XXI would, therefore, impermissibly "diminish" Norway's right under Article 23.1 of the DSU to "seek the redress of a violation". Norway said that Article XXI of the GATT 1994 was an affirmative defence to a claim of WTO-inconsistency, which the United States could invoke in dispute settlement proceedings, before a WTO panel. If the United States chose to do so, it bore the burden of demonstrating that its measures were, indeed, justified under this provision. While Norway appreciated that matters of national security were sensitive, Norway was confident that, using the usual procedures set out in the DSU and other covered agreements, WTO panels were well-equipped to assess whether the United States had adequately demonstrated that its measures were justified under GATT 1994 Article XXI. This was not, after all, the first sensitive dispute to come to the WTO. Indeed, Norway valued the WTO dispute settlement system precisely because of its tried and tested ability to handle sensitive disputes. Norway, therefore, requested once again that a panel be established in this dispute, with standard terms of reference. Like other co-complainants and regarding Article 9.1 of the DSU, Norway wished to refer to the fact that nine requests for the establishment of a panel, seven of these for the second time, had been brought at the present meeting in relation to the same US measures on imports of steel and aluminium. As all of these requests were related to the same matter, Norway requested the establishment of a single panel to examine these disputes.

10.3. The representative of the United States said that the United States was disappointed that Norway had submitted a second panel request in this dispute. As the United States had explained in its statement at the DSB meeting of 29 October 2018 addressing Norway's panel request in this dispute, because the United States had invoked Article XXI of the GATT 1994, there was no basis for a panel to review Norway's claims of WTO-inconsistency. As there was no finding a panel could make other than to note that the United States had invoked Article XXI, the United States did not see any point to this request. If the WTO were to undertake to review a Member's invocation of Article XXI, and its assessment of its own essential security interests, this would undermine the

legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. Norway had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. The United States therefore did not agree to establish a single panel under Article 9.1 of the DSU.

10.4. 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.

10.5. The representatives of Canada, China, Colombia, the European Union, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

11 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

11.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the Russian Federation contained in document WT/DS554/17, and invited the representative of the Russian Federation to speak.

11.2. The representative of the Russian Federation said that Russia wished to refer to its statement made at the 29 October 2018 DSB meeting under this Agenda item. At the present meeting, Russia requested for the second time that the DSB establish a panel to examine this matter with standard terms of reference, as set forth in Article 7.1 of the DSU. Taking into account that there were nine similar requests for the establishment of a panel against US measures on steel and aluminium on the Agenda, Russia requested the establishment of a single panel under Article 9.1 of the DSU for these disputes. Under the previous Agenda items at the present meeting, the United States had disagreed with the establishment of a single panel to examine those matters. Russia wished to note that in accordance with the provisions of Article 9.1 of the DSU: "[a] single panel should be established to examine such complaints whenever feasible". Russia believed that in the current situation establishing a single panel was feasible. At the present meeting, there were nine requests for the establishment of a panel against the United States in relation to its measures on steel and aluminium. The measures at issue in these requests related to the same matter. Russia had failed to hear from the United States any reason that would explain why a single panel could not be considered feasible in the current situation. Therefore, and in accordance with the provisions of Article 9.1 of the DSU, Russia did not see any obstacle that would prevent the establishment of a single panel.

11.3. The representative of the United States said that Russia's second panel request in this dispute regrettably showed its own disregard for WTO rules. As the United States had explained in its statement at the DSB meeting of 29 October 2018 addressing Russia's panel request, because the United States had invoked Article XXI of the GATT 1994, there was no basis for a panel to review Russia's claims of WTO-inconsistency. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[18] As there was no finding a panel could make other than to note that the United States had invoked Article XXI, the United States did not see any point to this request. The position of the United States on Article XXI went back more than 70 years, and remained the same in 2018 as it had been in

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

1982[19], 1949[20], and indeed during the negotiation of the GATT itself.[21] As the United States had noted previously, in 1982, when certain European actions had been before the GATT Council, the European Economic Community and its member States had stated that Article XXI was a reflection of a Member's "inherent rights". They had stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement ... [since] every contracting party was – in the last resort – the judge of its exercise of these rights."[22] In that same meeting, the United States, Singapore, New Zealand, Canada, Norway, the United Kingdom, and Australia had supported the European view.[23] In requesting this panel, however, Russia did not even act consistently with the view it expressed in 2017, *less than one year ago*. In another dispute, Russia had expressed its understanding of Article XXI that a determination that an action was necessary for the protection of a Member's essential security interests, and a determination of what those essential security interests were, was at the sole discretion of that Member. The United States had agreed with Russia's perspective on Article XXI.[24] The text of Article XXI had not changed in the past year – only Russia's interests had. That was not a sound basis for understanding WTO rules, and Russia's wholly contradictory legal positions did not contribute to the legitimacy of the WTO's dispute settlement system. If Russia maintained its misguided request for a panel to make findings that the United States had not acted consistently with WTO rules in this dispute, there was no finding a panel could make other than to note that the United States had invoked Article XXI. Russia had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must *decide* to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. The United States therefore did not agree to establish a single panel under Article 9.1 of the DSU.

11.4. The representative of the Russian Federation said that Russia wished to refer to its statement made during its second intervention at the 29 October 2018 DSB meeting regarding the same Agenda item. In the event that no single panel was established, Russia requested that Article 9.3 of the DSU be applied.

11.5. The representative of the Brazil said that Brazil's statement applied to items 6-11 and 16-18 of the Agenda of the present meeting. From a multilateral perspective, Brazil had on many occasions stressed its concern about the systemic impact of restrictive measures under Section 232, in particular the consequences of a broad interpretation of the concept of national security interests, which could be used to accommodate protectionist measures. With regard to the present discussion about the nature of GATT 1994 Article XXI and in light of previous statements made at the present meeting, it was important to keep in mind the distinction between exceptions and derogations in the legal framework of the GATT/WTO. When a provision established an exception to an obligation, it meant that if there was a violation it could be justified if certain conditions were met. An exception to an obligation was an affirmative defence conditioned upon the respondent demonstrating that the measure at issue fell within the scope of the exception. An exception therefore did not exclude its subject matter from the jurisdiction of the WTO dispute settlement system, but only provided a means, through affirmative defence, for a respondent to justify a measure which otherwise would breach the rules. If a subject matter were to be excluded from certain obligations contained in the WTO rules that provision would establish a derogation of such issue. This was the case, for instance, of Article III:8(a) of the GATT1994, which excluded government procurement from the national treatment obligation set out in Article III. In this case, there was no need for the respondent to present an affirmative defence and demonstrate that its measure was justified. This was because

[19] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 8.

[20] Contracting Parties, Summary Record of the Twenty-Second Meeting Held on 8 June 1949, GATT/CP.3/SR.22, p. 3.

[21] See U.S. Answers Questions from the Panel and the Russian Federation, Russia – Measures Concerning Traffic in Transit (WT/DS512), paras. 1-15 (explaining negotiating history, including statements by U.S. delegate; available at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf).

[22] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

[23] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 7-11.

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

under a derogation, the obligations did not apply to the issue. Measures taken under Article XXI of the GATT 1994 had been framed as possible exceptions, not as derogations.

11.6. The representative of the United States said that as the United States had previously stated, it saw no basis for this dispute as there were no findings a panel could make on Russia's claims. Therefore, as there was nothing to examine, Article 9.3 of the DSU did not apply. In response to Russia's reference to Article 9.3 of the DSU, that provision did not contain any reference to DSB action, and therefore did not authorize the DSB to make a decision on the matter of choosing panelists or on the harmonization of timetables. Therefore, the DSB needed not and could not consider this issue at all.

11.7. 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.

11.8. The representatives of Canada, China, Colombia, the European Union, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, Qatar, the Kingdom of Saudi Arabia, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

12 CANADA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

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

12.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS557/2, and invited the representative of the United States to speak.

12.2. The representative of the United States said that as discussed at the last DSB meeting of 29 October 2018, and as noted at the present meeting, the actions the United States had taken on imports of steel and aluminium pursuant to Section 232 were to address a threat to its national security. Every sovereign had the right to take action it considered necessary for the protection of its essential security. This inherent right had not been forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right had been enshrined in Article XXI of the GATT 1994. The actions of the United States were taken pursuant to and justified by this Article. What remained inconsistent with the WTO Agreement, however, was the unilateral retaliation against the United States by various Members, including Canada. These Members pretended that the US actions under Section 232 were so-called "safeguards", and claimed that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. The United States could not abide this level of hypocrisy. Just as these Members appeared to be ready to undermine the WTO dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregarded them. This was all too apparent, not only to the United States, but to the Members themselves. Canada did not seriously believe that the US actions under Section 232 were safeguard measures. If it did, Canada would have notified the Council for Trade in Goods of its suspension of concessions and other obligations, as would have been required under the Safeguards Agreement if its retaliatory duties had been in response to a US safeguard action. Of course, Canada had not followed the WTO rules for safeguards because it did not actually believe the US measures were safeguards. There was no doubt that Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions and had not even utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of Canada's WTO commitments and were applied only to the United States, contrary to Canada's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons,

the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

12.3. The representative of Canada said that Canada regretted that the United States had submitted a second panel request in this dispute. Canada's countermeasures, imposed on 1 July 2018 against certain products from the United States, were fully consistent with Canada's international trade obligations. Canada would vigorously defend its countermeasures in this dispute. Canada's countermeasures were in direct response to the unwarranted restrictions imposed by the United States against Canadian steel and aluminium exports. Canada would immediately remove its countermeasures as soon as the United States would remove its unwarranted tariffs against Canadian steel and aluminium.

12.4. The representative of Japan said that Japan's statement was in relation to items 12-15 of the Agenda of the present meeting. Japan wished to refer to its statement made at the 29 October 2018 DSB meeting. As Members might recall, in that statement, Japan had expressed its views on the nature of the specific measures at issue in these disputes, as well as on certain procedural actions taken by Japan in response to the underlying US measures in order to reserve its rights under the Agreement on Safeguards.

12.5. 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.

12.6. The representatives of China, the European Union, Guatemala, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, the Russian Federation, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

13 CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

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

13.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS558/2, and invited the representative of the United States to speak.

13.2. The representative of the United States said that as discussed at the 29 October 2018 DSB meeting, and as noted at the present meeting, the actions the United States had taken on imports of steel and aluminium pursuant to Section 232 were to address a threat to its national security. Every sovereign had the right to take action it considered necessary for the protection of its essential security. This inherent right had not been forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right had been enshrined in Article XXI of the GATT 1994. The actions of the United States were taken pursuant to and justified by this Article. What remained inconsistent with the WTO Agreement, however, was the unilateral retaliation against the United States by various Members, including China. These Members pretended that the US actions under Section 232 were so-called "safeguards", and claimed that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. The United States could not abide this level of hypocrisy. Just as these Members appeared to be ready to undermine the WTO dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregarded them. This was all too apparent, not only to the United States, but to the Members themselves. Clearly, China did not seriously believe that the US actions under Section 232 were safeguard measures since it failed to comply with the most basic elements of the Safeguards Agreement that would be necessary to take the action it did. Suspension of concessions and other obligations under the Safeguards Agreement required a multi-step process that had to take place within 90 days from the application of a safeguard measure. That process entailed certain procedures and considerations that China had not satisfied. If China had truly considered the US actions under Section 232 to be safeguards, it would certainly have respected an obligation to allow 30 days for consultations and to wait 30 days to implement its suspension of concessions. But China did not comply with either of these obligations. Moreover, China had not even attempted to address whether its retaliation was in response to an alleged "safeguard" taken

as a result of an absolute increase in imports. If there had been an absolute increase in imports, the right to suspend substantially equivalent concessions under the Safeguard Agreement could not have been exercised for the first three years of the safeguard measure. China's blatant disregard for these provisions of the Safeguards Agreement proved that China was not serious about its contention that the US actions under Section 232 were safeguard measures or that China was exercising a right under the Safeguards Agreement. There was no doubt that Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions and had not even utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of China's WTO commitments and were applied only to the United States, contrary to China's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

13.3. The representative of China said that China wished to express its strong disappointment with the US decision to request the establishment of a panel to examine the subject matter of this dispute. It was well known that, on 23 March 2018, the United States had imposed 25 percent and 10 percent of additional import duties respectively on certain steel products and aluminium products from China and other Members. China wished to refer to its statement made at the present meeting under Agenda item 6. China wished to reiterate that the US measures at issue were in essence safeguard measures. Since the United States had refused to hold consultations with China for trade compensation under the Agreement on Safeguards and the GATT 1994, China had little choice but to exercise its legitimate right to introduce appropriate suspension measures according to the relevant provisions thereunder. China stood ready to safeguard its legitimate interests in the related dispute settlement proceedings.

13.4. 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.

13.5. The representatives of Canada, the European Union, Guatemala, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, the Russian Federation, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

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

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

14.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS559/2, and invited the representative of the United States to speak.

14.2. The representative of the United States said that as discussed at the last DSB meeting of 29 October 2018, and as noted at the present meeting, the actions the United States had taken on imports of steel and aluminium pursuant to Section 232 were to address a threat to its national security. Every sovereign had the right to take action it considered necessary for the protection of its essential security. This inherent right had not been forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right had been enshrined in Article XXI of the GATT 1994. The actions of the United States were completely justified under this Article. What remained inconsistent with the WTO Agreement, however, was the unilateral retaliation against the United States by various Members, including the European Union. These Members pretended that the US actions under Section 232 were so-called "safeguards", and claimed that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. The United States could not abide this level of hypocrisy. Just as these Members appeared to be ready to undermine the WTO dispute settlement system by ignoring the plain

meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregarded them. The European Union's willingness to disregard WTO rules was apparent in its characterization of the US actions under Section 232 as safeguard measures. This fiction required the European Union to ignore the facts that contradicted its narrative. As noted, the US actions on steel and aluminium had been taken under Section 232, a national security statute that expressly related to imports that threatened to impair the national security of the United States. The President of the United States had made his determinations on the basis of lengthy and detailed reports by the government department responsible for this national security purpose. The US actions had not been taken pursuant to Section 201 of the Trade Act of 1974 that authorized the imposition of a safeguard measure under US domestic law. There was no doubt that Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions and had not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of the European Union's WTO commitments and were applied only to the United States, contrary to the European Union's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

14.3. The representative of the European Union said that as it had done at the 29 October 2018 DSB meeting, the EU would speak only under this Agenda item. The EU had not and would not take the floor under the two preceding and the subsequent Agenda items that all concerned panel requests filed by the United States against measures by various Members in response to the same US steel and aluminium measures. This was, again, to avoid repetition. However, the spirit of the statement which the EU would make also applied to the aforementioned other Agenda items. As the EU had said at the 29 October 2018 DSB meeting, the EU respected the right of the United States to bring this matter to WTO dispute settlement. However, the EU firmly believed that its measures were justified. The EU would not repeat the entire explanation it had given at the 29 October 2018 DSB meeting. Instead, the EU wished to refer to those statements, which remained fully valid as of the present meeting. Some of the things the EU had heard at the 29 October 2018 DSB meeting warranted a response at the present meeting. Notably, the EU had heard from the United States at the 29 October 2018 DSB meeting that Article XIX of the GATT and the Safeguards Agreement should be considered irrelevant because the United States was not invoking these as a basis for its Section 232 measures on steel and aluminium. This approach would be fine if Article XIX and the Safeguards Agreement had been nothing other than exceptions which a Member could choose to invoke or not invoke when departing from its obligations. The fact of the matter however was that the multilateral rules in question were not just exceptions. Not only did they specify procedures that had to be followed when taking a safeguard, but they also gave important rights to other Members. Among these rights was, importantly, the right to suspend equivalent obligations against the Member taking a safeguard. This was one of the reasons why the existence of a safeguard measure was and had to be an objective question and not depend entirely on whether the safeguard-taking Member also characterized its measure as such, invoked Article XIX of the GATT 1994 or accordingly notified the WTO. That the United States had characterized its measures differently and had respected none of the prescribed procedures and requirements for the legal imposition of safeguard measures could not possibly place the US in the advantageous position of escaping the permitted response to a safeguard. At the 29 October 2018 DSB meeting, the United States had said nothing that had called into question the fact that its Section 232 measures on steel and aluminium had all the essential elements of what the WTO Agreement considered a safeguard measure. Instead, at the 29 October 2018 DSB meeting the United States had called the actions of the EU and other Members "hypocritical". The United States also contended that these Members "eagerly seek to undermine the dispute settlement system by throwing out the plain meaning of Article XXI and 70 years of practice" and that they "are prepared to undermine the WTO by taking measures blatantly against WTO rules". This dispute would provide the perfect opportunity to demonstrate that the EU actions were a permitted and proportionate response to the US Section 232 measures on steel and aluminium. Regardless, the EU failed to see how the EU could undermine the WTO by resorting to a right under the WTO Agreement and by following the procedure for its exercise. As for "throwing out the plain meaning of Article XXI and 70 years of practice", the EU struggled to understand what the US had in mind, except that these 70 years had presented few, if any cases of abuse like at present.

In any event, the EU welcomed US interest in the plain meaning of Article XXI, which would be important in the separate disputes discussed previously at the present meeting. Finally, the EU preferred to let the facts respond to the accusation coming from the United States that the EU and other Members were seeking to undermine the WTO dispute settlement system. The EU believed that its statements at the present meeting and at the 29 October 2018 DSB meeting also sufficiently addressed Brazil's remark at the 29 October 2018 DSB meeting, to the effect that unilateral measures undermined the proper procedures set out in the covered agreements. The EU had adopted its measures under Article 8 of the Safeguards Agreement and followed its procedures in every detail.

14.4. 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.

14.5. The representatives of Canada, China, Guatemala, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, the Russian Federation, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

15 MEXICO – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

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

15.1. The Chairperson recalled that the DSB had considered this matter at its meeting of 29 October 2018, and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS560/2, and invited the representative of the United States to speak.

15.2. The representative of the United States said that as discussed at the last DSB meeting of 29 October 2018, and as noted at the present meeting, the actions the United States had taken on imports of steel and aluminium pursuant to Section 232 were to address a threat to its national security. Every sovereign had the right to take action it considered necessary for the protection of its essential security. This inherent right had not been forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right had been enshrined in Article XXI of the GATT 1994. The actions of the United States were completely justified under this Article. What remained inconsistent with the WTO Agreement, however, was the unilateral retaliation against the United States by various Members including Mexico. These Members pretended that the US actions under Section 232 were so-called "safeguards", and claimed that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. The United States could not abide this level of hypocrisy. Just as these Members appeared to be ready to undermine the WTO dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregarded them. This was all too apparent, not only to the United States, but to the Members themselves. Clearly, Mexico did not seriously believe that the US actions under Section 232 were safeguard measures since it had not even notified the Council for Trade in Goods of its suspension of concessions and other obligations, as would have been required under the Safeguards Agreement if its retaliatory duties had been in response to a US safeguard action. Of course, Mexico had not followed the WTO rules that would apply in the safeguards context because it did not in reality consider the US measures to be safeguards. There was no doubt that Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions and had not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The increased, retaliatory duties were nothing other than duties applied only to the United States, contrary to Mexico's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

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

15.4. The representative of Brazil said that Brazil's statement applied to items 12 - 15 of the Agenda of the present meeting. Brazil considered that, in general, unilateral measures taken by Members on any grounds undermined the proper procedures set out by the covered agreements to deal with trade disputes and the WTO rules-based system. In that sense, Brazil wished to recall that Article 23 of the DSU provided that Members wishing to seek the redress of a violation or other nullification or impairment of benefits "shall have recourse to, and abide by, the rules and procedures of" the DSU. Article 23 of the DSU had been a critical provision in the negotiations that had led to the new DSU and had been meant to curb unilateral measures. Brazil nevertheless wished to highlight the exceptional circumstances under which panels under these Agenda items had been established at the present meeting. Notably, the actions that gave rise to the measures at issue were devoid of any legal justification and reflected a clear protectionist intention. Therefore, Brazil wished to stress that reactions to those illegal measures had to be seen in a different light than in normal situations.

15.5. 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.

15.6. The representatives of Canada, China, the European Union, Guatemala, India, Indonesia, Japan, Kazakhstan, Norway, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

16 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

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

16.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 29 October 2018, and had agreed to revert to it. She drew attention to the communication from Turkey contained in document WT/DS564/15, and invited the representative of Turkey to speak.

16.2. The representative of Turkey said that as Turkey had stated at the 29 October 2018 DSB meeting, Turkey regretted that it had to request the establishment of a panel in this dispute. However, the United States had left Turkey no other choice. Turkey therefore requested, at the present meeting and for the second time, that the DSB establish a panel to examine this matter with standard terms of reference. Turkey did not wish to repeat the statement it had made at the 29 October 2018 DSB meeting, in which Turkey had clearly made its position known. The US measures in this dispute were WTO-inconsistent, and the national security justification that the United States had put forward for these measures was based on an incorrect reading of Article XXI. Turkey's disagreement with the US interpretation of the national security provision within Article XXI was compounded by the fact that Turkey's exports to the United States were twice as high as duties imposed on exports of other Members to the United States. The entire structure of international trade law risked being eroded if Members were authorized to use Article XXI in this manner. Turkey furthermore firmly rejected the US contention that a WTO panel did not have jurisdiction over this dispute because the responding Member had chosen to invoke Article XXI. Rather, a WTO panel would have to conduct an objective assessment of the matter, and to examine the claims by the complaining party. Should a WTO panel reach the conclusion that it was appropriate to consider the US defence under Article XXI, that panel had to determine whether the terms of that provision had been satisfied. It would be unacceptable for such panel to abdicate its duty to exercise its jurisdiction simply because the responding Member had chosen to invoke an exceptions provision. As Turkey had previously stated, and as other Members had also stated, the United States had effectively taken

safeguard measures, but without observing the requirements of Article XIX of the GATT 1994 and of the Agreement on Safeguards. Turkey therefore requested the establishment of a panel pursuant to Article 6 of the DSU. Turkey requested the establishment of a single panel, pursuant to Article 9.1 of the DSU, for this dispute and the related disputes on the same US measures on imports of steel and aluminium in respect of which requests for the establishment of a panel had been placed on the Agenda of the present meeting.

16.3. The representative of the United States said that the United States regretted that Turkey had moved forward with this second request for the establishment of a panel. As the United States had explained in its statement made at the last DSB meeting of 29 October 2018 addressing Turkey's panel request, because the United States had invoked Article XXI of the GATT 1994, there was no basis for a panel to review Turkey's claims of WTO-inconsistency. There was no finding a panel could make other than to note that the United States has invoked Article XXI. If the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. Turkey had requested that a single panel be established under Article 9.1 of the DSU to examine various matters on the Agenda of the present meeting. The United States did not agree. For a single panel to be established to examine multiple complaints, the DSB must decide to establish a single panel. This would be a decision taken by the DSB by consensus. Because the challenged actions had been taken on the basis of US national security interests, the United States continued to see no basis for this dispute. Therefore, the United States did not agree to establish a single panel under Article 9.1 of the DSU.

16.4. 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.

16.5. The representatives of Canada, China, Colombia, the European Union, Guatemala, Hong Kong, China; Iceland, India, Indonesia, Japan, Kazakhstan, Mexico, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Switzerland, Chinese Taipei, Thailand, Ukraine and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

17 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. Request for the establishment of a panel by India (WT/DS547/8)

17.1. The Chairperson drew attention to the communication from India contained in document WT/DS547/8, and invited the representative of India to speak.

17.2. The representative of India said that on 11 November 2018, India had submitted its request for the establishment of a panel in this dispute regarding the US additional tariffs on certain steel and aluminium products of 25% and 10% respectively. With its request, India joined eight other co-complainants who sought to bring the US steel and aluminium tariffs before a WTO panel. This collective resort to dispute settlement reflected the serious concern of the Membership over US actions. It also reflected trust and confidence in the WTO as a forum for resolving international trade disputes. The nine panel requests reflected a shared conviction among the co-complainants that the additional US steel and aluminium tariffs were inconsistent with the WTO obligations of the United States. The additional US duties were, in essence, safeguard measures because they departed from US obligations under the GATT 1994 and were designed to protect, in an emergency action, domestic industries alleged to have suffered injury at the hands of competing imports. The US steel and aluminium tariffs also violated fundamental principles of the GATT 1994. The United States had imposed duties on imports at levels higher than those provided for in the US Schedule of Concessions. Moreover, the United States had granted select Members exemptions to its steel and aluminium tariffs. No such exemptions had been extended to the nine co-complainants. The US measures, therefore, involved a material difference in the treatment of imports from different Members. At the 29 October 2018 DSB Meeting, the United States had asserted that measures taken pursuant to the national security exceptions were non-justiciable within the WTO dispute settlement system, and that "if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO

as a whole". On the contrary, India shared the widely held view, that the credibility of the WTO would be severely undermined if it failed to provide a system of legal review of unilateral and protectionist measures by Members. Article XXI of the GATT 1994 was an affirmative defence and therefore, like other exceptions, could be an integral part of the legal evaluation of a domestic measure under the WTO Agreement. Article XXI was in no way a provision limiting the jurisdiction of WTO panels and the Appellate Body. India had requested WTO consultations with the United States in this dispute on 18 May 2018, and had held such consultations with the United States on 20 July 2018. Unfortunately, these consultations had failed to resolve this dispute. Accordingly, India requested that a panel be established with standard terms of reference. Like other co-complainants, and in reference to Article 9.1 of the DSU, India requested the establishment of a single panel to examine all nine complaints brought at the present meeting in relation to the same US measures on imports of steel and aluminium, as all nine panel requests were related to the same matter. As other Members had previously said, the text of Article 9.1 of the DSU clearly provided that: "a single panel should be established to examine [multiple] complaints [related to the same matter] whenever feasible". There was, therefore, no legal basis not to establish a single panel under Article 9.1 of the DSU with respect to the panel requests tabled at the present meeting under Agenda items 6 to 11 and 16 to 18.

17.3. The representative of the United States said that the United States was disappointed that India had submitted a panel request in this dispute. This action was misdirected. It did not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminium sectors. In fact, rather than support the international trading system by taking action to resolve the underlying concerns, India was undermining the trading system by asking the WTO to do what it was never intended to do. It was simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium articles posed to US national security. In the US reply to the consultation requests that had challenged the 232 measures, the United States had clearly stated that: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."[25] The United States therefore did not understand the purpose of this request for panel establishment that sought WTO findings that the United States had breached certain WTO provisions. The WTO could not, consistent with Article XXI, consider those claims or make the requested findings. The clear and unequivocal US position, for over 70 years, was that issues of national security were not matters appropriate for adjudication in the WTO dispute settlement system. No Member could be surprised by this view. For decades, the United States, as well as other Members, had consistently held the position that actions taken pursuant to Article XXI were not subject to review in GATT or WTO dispute settlement. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[26] For example, in 1982, when certain European actions had been before the GATT Council, the European Economic Community and its member States had stated that Article XXI was a reflection of a Member's "inherent rights". They had stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement ... [since] every contracting party was – in the last resort – the judge of its exercise of these rights."[27] The United States in the same meeting had supported the European position and stated that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis."[28] The position of the United States remained the same in 2018 as it had been in 1982, 1949, and indeed during the negotiation of the GATT itself. Because the United States has invoked Article XXI, there was no basis for a WTO panel to review the claims of breach raised by India. Nor was there any basis for a WTO panel to review the invocation of Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. The United States wished to be clear: if the WTO were to undertake to review an invocation of Article XXI, this would undermine the

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

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

[27] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

[28] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. For these reasons, the United States did not agree to the establishment of the panel requested by India at the present meeting.

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

18 UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

A. Request for the establishment of a panel by Switzerland (WT/DS556/15)

18.1. The Chairperson drew attention to the communication from Switzerland contained in document WT/DS556/15, and invited the representative of Switzerland to speak.

18.2. The representative of Switzerland said that on 9 July 2018, Switzerland had requested consultations with the United States concerning measures adopted to adjust imports of steel and aluminium into the United States. The consultations had taken place on 30 August 2018 in Geneva. Unfortunately, they had not made it possible to achieve a satisfactory solution. As a result, and like eight other Members, Switzerland was requesting the establishment of a panel to examine this matter, with standard terms of reference. The measures imposed by the United States since 23 March 2018 on certain steel and aluminium products had a direct impact on Swiss exports to the United States. Switzerland was especially concerned by the fact that these trade restrictions, which were of an eminently economic nature, were being imposed unilaterally under the guise of national security. These measures were damaging to the multilateral trading system as a whole. The system's integrity and predictability were at stake. Moreover, Switzerland feared a spiral of restrictive measures, which could only harm global value chains – and, ultimately, all Members of this Organization. The global problem of overcapacity in the steel and aluminium sectors was a real and serious one. Nonetheless, dialogue among the key stakeholders concerned was of vital importance in seeking solutions consistent with the spirit and the letter of the WTO Agreements. Like the other co-complainants, Switzerland was convinced that the additional duties imposed by the United States on certain steel and aluminium products were not consistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. In particular, Switzerland considered the measures to constitute safeguard measures, regardless of how they were characterized by the United States. For this reason, the measures should comply with the requirements established in Article XIX of the GATT 1994 and the Agreement on Safeguards. In view of the commercial nature and scope of the measures concerned, Switzerland believed that it was not only expedient but also important that the measures be examined by a panel, in accordance with the rules and procedures of the DSU. Given that a total of nine similar panel requests had been submitted with respect to the same matter, Switzerland considered that a single panel should be established in accordance with Article 9.1 of the DSU. Switzerland noted that, in its previous statements, the United States had refused to accept that a single panel should be established to examine the complaints, and regretted the US position.

18.3. The representative of the United States said that the United States was disappointed that Switzerland had submitted a panel request in this dispute. This action was misdirected. It did not address the damage to the international trading system posed by the creation and maintenance of non-market economic conditions in the steel and aluminium sectors. In fact, rather than support the international trading system by taking action to resolve the underlying concerns, Switzerland was undermining the trading system by asking the WTO to do what it was never intended to do. It was simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests. The United States had explained that it considered the Section 232 measures necessary for the protection of its essential security interests, and they were therefore justified under Article XXI of the GATT 1994. In particular, the United States had explained that the President of the United States had determined that these measures were necessary to address the threatened impairment that imports of steel and aluminium articles posed to US national security. In the US reply to the consultation requests that had challenged the 232 measures, the United States had clearly stated that: "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."[29] The United States therefore did not understand the purpose of this request for panel establishment that sought WTO findings that the

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

United States had breached certain WTO provisions. The WTO could not, consistent with Article XXI, consider those claims or make the requested findings. The clear and unequivocal US position, for over 70 years, was that issues of national security were not matters appropriate for adjudication in the WTO dispute settlement system. No Member could be surprised by this view. For decades, the United States, as well as other Members, had consistently held the position that actions taken pursuant to Article XXI were not subject to review in GATT or WTO dispute settlement. Each sovereign had the power to decide, for itself, what actions were essential to its security, as was reflected in the text of GATT 1994 Article XXI.[30] As the United States had noted previously, in 1982, when certain European actions had been before the GATT Council, the European Economic Community and its member States had stated that Article XXI was a reflection of a Member's "inherent rights". They had stressed that "the exercise of these rights constituted a general exception, and required neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement ... [since] every contracting party was – in the last resort – the judge of its exercise of these rights."[31] That European statement had been correct in 1982, and the United States in the same meeting had supported the European position.[32] So, too, had New Zealand, Singapore, Norway, Canada, the United Kingdom, and Australia.[33] The position of the United States remained the same in 2018 as it had been in 1982, 1949, and indeed during the negotiation of the GATT itself. Because the United States has invoked Article XXI, there was no basis for a WTO panel to review the claims of breach raised by Switzerland. Nor was there any basis for a WTO panel to review the invocation of Article XXI by the United States. The United States therefore did not see any reason for this matter to proceed further. The United States wished to be clear: if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole. Infringing on a sovereign's right to determine, for itself, what was in its own essential security interests would run exactly contrary to the WTO reforms that were necessary in order for this organization to maintain any relevancy. For these reasons, the United States did not agree to the establishment of the panel requested by Switzerland at the present meeting.

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

19 ADOPTION OF THE 2018 DRAFT ANNUAL REPORT OF THE DISPUTE SETTLEMENT BODY (WT/DSB/W/630)

19.1. The Chairperson said that, under this Agenda item, she was submitting for adoption the draft text of the 2018 Annual Report of the DSB contained in document WT/DSB/W/630. She did so pursuant to the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO, contained in document WT/L/105. This Report covered the work of the DSB since the previous Annual Report contained in document WT/DSB/74. In other words, it covered meetings of the DSB from 22 November 2017 through 29 October 2018. The Report contained a factual summary of DSB meetings during the period under review. As in the past, following the adoption of the Annual Report at the present meeting, the Secretariat would update the Report under its own responsibility in order to include the actions taken by the DSB at the present meeting. Subsequently, the updated Annual Report would be submitted for consideration by the General Council at its meeting scheduled for 12 December 2018. Consequently, the Chairperson proposed that the DSB adopt the draft Annual Report of the DSB contained in document WT/DSB/W/630 on the understanding that it would be further updated by the Secretariat.

19.2. The DSB took note of the statement and agreed to adopt the draft Annual Report contained in document WT/DSB/W/630 on the understanding that it would be further updated by the Secretariat.[34]

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

[31] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10.

[32] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, p. 10 (the United States stated that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis").

[33] GATT Council, Minutes of Meeting Held on 7 May 1982, C/M/157, pp. 7-11.

[34] Subsequently, the Annual Report was circulated in document WT/DSB/76.

20 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/633)

20.1. The Chairperson drew attention to document WT/DSB/W/633, which contained one additional name proposed by Egypt for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the name contained in document WT/DSB/W/633.

20.2. The DSB so agreed.

21 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; LIECHTENSTEIN; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA; TURKEY; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA AND VIET NAM (WT/DSB/W/609/REV.6)

21.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. She then drew attention to the proposal contained in document WT/DSB/W/609/Rev.6 and then invited the representative of Mexico to speak.

21.2. The representative of Mexico, speaking on behalf of the delegations referred to in document WT/DSB/W/609/Rev.6, said that the delegations in question had agreed to submit the joint proposal dated 8 November 2018 to launch the selection processes to fill the vacancies in the Appellate Body. Mexico, on behalf of these 70 Members plus Cuba who had expressed its intention to co-sponsor this proposal, wished to make a joint statement at the present meeting. The considerable number of Members that had submitted the joint proposal shared the concern about the current situation in the Appellate Body, which was seriously affecting its functioning and the overall dispute settlement system, against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and multilateral trading systems. It was therefore Members' obligation to launch the selection processes to appoint new Appellate Body members. As stated in document WT/DSB/W/609/Rev.6, this proposal sought to: (i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; a second process to fill the vacancy that had occurred with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term had expired on 11 December, 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office had expired on 30 September 2018; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates. The proponents were flexible in the determination of the deadlines for the selection processes, but Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading and the dispute settlement systems.

21.3. The representative of Mexico said that, at this point, Mexico wished to make a separate statement on behalf of Mexico only. As had been stated on several occasions, the Appellate Body was a key part of the dispute settlement system, which was why it should be a priority for all Members to ensure its proper functioning. To do so, it was fundamental for the Appellate Body to have a full contingent. According to the DSU, the dispute settlement system was "a central element in providing security and predictability to the multilateral trading system", and it had been of benefit to all Members. However, despite the many attempts made by various delegations, there currently were only three members in the Appellate Body instead of the seven members that the Appellate Body should comprise. Mexico still had grave concerns, which were becoming increasingly pressing. Mexico called, once again, for Members to address, in a responsible manner, the current situation in which, for over a year and a half, Members had been unable to launch the AB selection processes. By failing to do this, Members were disregarding the obligation, set out in Article 17.2 of the DSU, to fill such vacancies as they arose. This situation was unacceptable and would have a serious systemic impact on this Organization. At present, there were 11 ongoing appeals and, if the situation

did not change, there would be a major delay in the circulation of reports. Members had to stop the practice of raising concerns without proposing solutions, and bring an end to this deadlock for which there was no legal basis, especially given the current crisis faced by the multilateral dispute settlement system. Mexico wished to reiterate its call for Members to ensure that the AB selection processes were initiated as a matter of urgency, and for the Member that had raised concerns to take into consideration the willingness demonstrated by the other Members to engage in discussions and seek a solution to these concerns. Nevertheless, Mexico wished to emphasize that the achievement of such a solution could not prevent compliance with the legal obligations of WTO Members. There should be no link between the AB selection processes and any systemic concerns.

21.4. The representative of the United States said that the United States thanked the Chairperson for the continued work on these issues. As the United States had explained in prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at recent DSB meetings, for more than 15 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members. Through persistent overreaching, the WTO Appellate Body had been adding obligations that were never agreed by the United States and other WTO Members. The 2018 US Trade Policy Agenda had outlined several longstanding US concerns.[35] The United States had raised repeated concerns that appellate reports had gone far beyond the text setting out WTO rules in varied areas, such as subsidies, anti-dumping duties, anti-subsidy duties, standards and technical barriers to trade and safeguards, restricting the ability of the United States to regulate in the public interest or protect US workers and businesses against unfair trading practices. And as the United States had explained at recent meetings of the DSB, the Appellate Body had issued advisory opinions on issues not necessary to resolve a dispute and reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body had asserted that panels must follow its reports although Members had not agreed to a system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules. And for more than a year, the United States had been calling for WTO Members to correct the situation where the Appellate Body acted as if it had the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – had expired. This so-called "Rule 15" was, on its face, another example of the Appellate Body's disregard for the WTO's rules. The concerns of the United States had not been addressed. When the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system, and would continue its efforts and its discussions with Members and with the Chairperson to seek a solution on these important issues.

21.5. The representative of Brazil said that, for a long period of time, Members had not succeeded in achieving progress in what was arguably the most pressing current issue at the WTO. Only at the present meeting, 13 new panels had been established. On the one hand, the majority of Members called for the preservation of the rules-based WTO dispute settlement system and a fully operational Appellate Body, and the proposal reintroduced again today by 71 Members was evidence of that. On the other hand, however, one Member claimed that its "systemic concerns remain unaddressed", as if this claim, in and of itself, could provide a legal foundation for its arguments. In fact, those concerns remained anything but unaddressed, as the whole Organization was publicly, even frantically, engaged in a discussion of those concerns. And if Members had not gone from addressing such concerns to making progress, it was because one element of the puzzle was missing: the palpable, active and good faith engagement of that same Member. Addressing these concerns was a collective duty for all Members and not something that one Member could delegate to other Members. The DSB, however, had to act according to the rules set out in the DSU. And absent solid legal reasons by that Member to justify its position, it was unlikely that the DSB could justify its own inaction in respect of the prescriptions in the DSU. Notwithstanding Brazil's willingness to discuss systemic concerns, Brazil wished to reiterate that these concerns did not qualify as legal justification for blocking the AB selection processes and the appointment of Appellate Body members. Above all, they did not qualify as legal justifications for exempting the DSB from its collective responsibility to comply with the mandatory rules of the DSU. Members could easily grasp the implications of that line of argument for the work of this Organization. Brazil wished to focus on the legal framework

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

relevant to this discussion and on the mandatory nature of the very first provision of the section of the DSU dedicated to appellate review. Article 17 of the DSU was not entitled "appellate review", as it could have been. Article 17 bore the title "Standing Appellate Body". Article 17.1 of the DSU began with the following sentence: "[a] standing Appellate Body shall be established by the DSB". Thus, a standing, i.e., a permanent Appellate Body had been firmly established in Article 17.1 of the DSU by consensus of all Members as a result of the Marrakesh Agreement, to which document WTO/DSB/1, of June 1995, subsequently referred to. A close reading of Article 17.1 of the DSU suggested similarly that only by consensus of all Members could the Appellate Body be "disestablished" or transformed into something else. This could not be achieved through unilateral action. There was also no doubt that the Appellate Body was being disestablished, as it was being deprived of its essential feature: its members. All arguments or concerns were limited by this mandatory provision. Other provisions in Article 17 of the DSU were also very clear. They did not require that the DSB take a decision on whether it would appoint persons to serve on the Appellate Body. Fundamentally, the provisions of Article 17 of the DSU required that the DSB take a decision on who to appoint to the Appellate Body. The DSB was not required to take action in order to launch a selection process or to set a selection committee. These were routine procedures to be followed by the DSB Chair. There was no legal basis in the DSU for blocking a selection process that aimed to provide the DSB with a recommendation that would help it to fulfil its duties to appoint persons to serve on the Appellate Body. Arguably, the only DSU provision regarding the composition of the Appellate Body that called for a decision of the DSB was Article 17.2 of the DSU, which read: "[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term". Although not using the term "decision", as foreseen in Article 2.4 of the DSU, it seemed the DSB had to decide by consensus on who to appoint as Appellate Body member. Article 17.3 of the DSU set mandatory guidelines for the decision-making process regarding the appointment of Appellate Body members: "[t]he Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO". It was thus clear that the requirements that would legally justify an objection to the appointment of an Appellate Body member related solely to the qualifications of a candidate. Therefore, unaddressed systemic concerns could not qualify as legal justification for preventing consensus even in respect of the decision to appoint individuals as Appellate Body members. In view of these remarks, it was Brazil's understanding that in no case should the actions of one Member prevent all Members from complying with three specific mandatory commands set out in Article 17 of the DSU. The verb "shall" had indeed been chosen by the drafters to prescribe that: (i) "[a] standing Appellate Body shall be established by the DSB" (Article 17.1 of the DSU); (ii) "[the Appellate Body] shall be composed of seven persons" (also Article 17.1 of the DSU); and (iii) "[v]acancies shall be filled as they arise" (Article 17.2 of the DSU). Clearly, none of these three mandatory provisions of the DSU regarding the establishment and composition of the Appellate Body provided for the DSB to take a decision. On the contrary, the decision to create a second level of jurisdiction, in the form of an Appellate Body composed of seven persons without any vacancies allowed, had already been taken by positive consensus with the signature of the Marrakesh Agreement. Those three provisions within Articles 17.1 and 17.2 of the DSU imposed inescapable obligations on the DSB itself. This meant that not even the DSB, through positive consensus, could dismantle or "disestablish" the Appellate Body. The DSB was not entitled to decide on the existence of the Appellate Body, but only to guarantee that it functioned uninterruptedly in accordance with DSU provisions. The Appellate Body had now been reduced to three members, a condition not envisaged in and not allowed by the text of the DSU. As a result, the Appellate Body membership was already in breach of the expected geographical representativeness and variety of legal traditions. In addition, due to this highly precarious situation, the Appellate Body was unable to perform its duties in the way foreseen by the DSU, and its work had to incur constant delays, which affected all Members. The breadth and scope of the consequences caused by the current deadlock could not be underestimated. The current deadlock was causing nullification and impairment of benefits under the WTO Agreement to all Members that wished to make use of the WTO dispute settlement system. As Brazil had already mentioned, Brazil had counted approximately 50 ongoing disputes, at consultation and panel phases, that might not benefit from an appeal or might not even be adopted absent agreement between the disputing parties. Members affected by this abnormal state of affairs included Brazil, the EU, China, Canada, Japan, India, Vietnam, Korea, Mexico, Turkey, Ukraine, Switzerland, the United Arab Emirates and others, in addition to the United States. It was quite striking that one Member was causing all this disruption to the legal rights of so many other Members without a solid legal justification. Brazil asked whether these Members were to be deprived of their rights without a solution within sight. Without a well-functioned dispute settlement system, there could be no rules-based multilateral trading system. Brazil asked whether Members could consider negotiating new rules for a reformed

WTO when they did not know how existing rules would be interpreted and if these rules would be enforced equally for all. Brazil, therefore, wished to urge the DSB to follow the text of the DSU and to launch the process of establishing a selection committee and appointing new members of the Appellate Body. Brazil invited all Members, including the United States, to share their collective responsibility to comply with the obligations that Members had voluntarily undertaken pursuant to Article 17 of the DSU.

21.6. For many years now, Brazil had been insisting on some basic principles that should guide the work of the WTO dispute settlement system and Appellate Body: independence, professional competence, efficiency, high-quality reports. The WTO dispute settlement system had delivered, year after year, reasoned decisions that had helped Members to either settle their disputes or justify their compensatory or retaliatory measures. Future developments might carry unavoidable and unforeseen consequences for all Members. Brazil had deployed significant efforts with respect to this matter. These efforts had seemingly come to nothing or nearly nothing. Brazil referred to Mr. Dag Hammarskjöld who said that all institutions were based on a working hypothesis. The working hypothesis that sustained the DSU and the Appellate Body was the common perception that Members were better served by a neutral, independent dispute settlement body that would settle unavoidable disputes based on rules agreed by all Members, than by being left to fend for themselves in a Hobbesian environment. This working hypothesis was now being challenged. Instead of complaining about the current situation, Members should try to identify as many areas of common ground among Members as possible and to broaden these areas until an acceptable solution emerged. Brazil said that Members could get either very cynical or very serious.

21.7. The representative of Canada said that Canada deeply regretted that the DSB had been unable to fulfil its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the four current vacancies, taking into account the recent departure of Mr. Servansing. Canada noted that the serious effect of these vacancies on the ability of the Appellate Body to function could not be overstated. Canada was pleased to join the proposal contained in document WT/DSB/W/609/Rev.6 and urged the DSB to adopt it without further delay. The failure to launch the AB selection processes would only prolong the delays that necessitated recourse to Rule 15 of the Working Procedures for Appellate Review, about which the United States had expressed concerns. Like other Members, Canada was disappointed that the United States had linked the start of the AB selection processes to the resolution of certain procedural concerns it had shared with the Membership. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that the United States had raised. Canada remained committed to working with other interested Members – including the United States – with a view to finding a way to address those concerns in order to allow the AB selection processes to start and be completed as soon as possible.

21.8. The representative of Costa Rica said that Costa Rica, on behalf of the GRULAC, reiterated its concerns about the blockage of the AB selection processes. This situation had an impact on the functioning of most important body of the WTO and resulted in the lack of compliance with WTO rules. Costa Rica was aware of the concerns that related to the functioning of the Appellate Body and to the decision-making process to justify the inability to launch the AB selection processes. Nevertheless, seeking a solution to these concerns should not be an obstacle to the functioning of the WTO dispute settlement system. Article 17 of the DSU, along with Article 2 of the DSU, did not require a positive consensus to launch the AB selection processes. Costa Rica wished to ask, once again, that the Chairperson of the DSB continue her efforts aimed at finding a solution to the current impasse.

21.9. The representative of the Russian Federation said that Russia was deeply concerned with the current situation in the Appellate Body which affected the dispute settlement mechanism and the functioning of the WTO. The United States still had provided no legal grounds to justify prolonging the impasse over the launch of the AB selection processes. Russia was open to constructive discussions aimed at finding solutions to this matter with interested Members. The United States, however, continued to keep other Members in the dark. The United States had voiced various concerns, but had not expressed views on how to proceed with these issues. A logical conclusion would be that the problems alleged by the United States did not exist. The United States liked to present itself as the guardian of WTO rules. However, the United States seemed to be acting in a manner that nullified and impaired Members' benefits under the WTO Agreement. The United States forced the establishment of nine different panels regarding the same matter at the present meeting.

Although, it would have been logical to agree to establish a single panel, which was feasible. In doing so, the United States did not contribute to an effective management of the workload of the Appellate Body and also of the WTO dispute settlement system more generally.

21.10. The representative of Korea said that Korea supported the statement made by Mexico on behalf of the proponents of the proposal contained in document WT/DSB/W/609/Rev.6. Korea wished to refer to its statements made at previous DSB meetings on this matter.

21.11. The representative of Switzerland said that Switzerland wished to refer to its statements made on this matter at previous DSB meetings. Switzerland regretted that the DSB continued to be unable to launch the AB selection processes. Once again, Switzerland urged all Members to engage constructively in order to find a way forward and to overcome this impasse without further delay.

21.12. The representative of Norway said that Norway regretted once again that the United States still could not join the consensus and support the proposal contained in document WT/DSB/W/609/Rev.6 to launch the AB selection processes. Norway wished to refer to its statements made at previous DSB meetings regarding this Agenda item, and to reiterate its willingness to engage in discussions in order to find solutions to the procedural issues raised by the United States. However, Norway still could not agree to these issues being linked to the AB selection processes. It was now high time for Members to surpass this deadlock.

21.13. The representative of Singapore said that Singapore wished to refer to its statements made at previous DSB meetings, and to reiterate its serious systemic concerns over the failure to launch the AB selection processes. It was an opportune moment to recall that the joint proposal contained in document WT/DSB/W/609/Rev.6 and put forward by Mexico had been first introduced at the 22 November 2017 DSB meeting. Exactly one year later, this joint proposal was now at its sixth version with 70 co-sponsors. However, the impasse had remained. With the numerous panels established at the present meeting, the workload of the WTO dispute settlement system continued to increase even as the number of AB members decreased by attrition. Given the strain that the AB was facing, Singapore called on Members to bear this in mind when deciding to appeal. Systemic issues which had been raised could be discussed in a separate process. In this regard, Singapore stood ready to engage constructively and collaboratively with other Members as well as with the Chairperson to help to resolve this impasse.

21.14. The representative of Chinese Taipei said that Chinese Taipei wished to refer to its statements made at previous DSB meetings. Chinese Taipei supported the launch of the AB selection processes as soon as possible. Chinese Taipei remained committed to working with other interested Members in order to find a way to address the relevant concerns.

21.15. The representative of Hong Kong, China said that Hong Kong, China wished to refer to its statements made at previous DSB meetings on this matter. Hong Kong, China wished to reiterate its deep concerns with the prolonged impasse over the AB selection processes and urged for the launch of the AB selection processes without delay. Hong Kong, China stood ready to engage in proactive discussions on resolving the deadlock and the systemic issues identified.

21.16. 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.6 and emphasized the importance of commencing the AB selection processes as soon as possible. New Zealand wished to refer to its statements made at previous DSB meetings on the importance of the multilateral dispute settlement system and on finding solutions to issues among Members.

21.17. The representative of China said that China wished to echo the statement made by Mexico on behalf of 70 Members. China was disappointed that the efforts of these Members to initiate the AB selection processes were, once again, frustrated by the self-interested, illegitimate and persistent US blockage. The Appellate Body was the irreplaceable component of the WTO dispute settlement mechanism. It greatly contributed to the effective resolution of disputes and to the stability and predictability of the rules-based multilateral trading system. Ensuring the integrity and functioning of the Appellate Body therefore served the common interests of all Members. Article 17.2 of the DSU clearly stated that: "[v]acancies shall be filled as they arise". The prompt initiation of the AB selection processes was a responsibility and an obligation of all Members. China recalled that the United States was very keen to distinguish between the legal effects of the respective words "shall" and "should"

and to point to the mandatory nature of the former. China wished to encourage the United States to make use of the same treaty interpretation methodology when it came to Article 17.2 of the DSU. The word "shall" was more than adequate to suggest the automatic nature of the AB selection processes. While the appointment of any particular Appellate Body member did require positive consensus among Members, such consensus was not necessary for the launch of the AB selection processes. China believed that when Members had different views on any specific concern, discussion and negotiation was the only way to move forward. Nevertheless, it was unjustified for any Member to attach its own preconditions to the initiation of the AB selection processes at the expense of the entire Membership. The Appellate Body was already in crisis. As all Members knew, there were only three Appellate Body members left. If nothing changed, even the status quo could not be sustained after the end of 2019. There was no doubt that the standstill in the AB selection processes had already jeopardized the appellate mechanism and the functioning of the multilateral trading system. Given that the aftermath of such crisis would be borne by all Members, Members needed to launch the AB selection processes as soon as possible so that the well-functioning of the Appellate Body could be restored. It was regrettable that the United States had persistently refused to engage in meaningful discussions after having raised multiple concerns with respect to the functioning of the Appellate Body. Again, China urged the United States to faithfully carry out its commitments under the WTO Agreements and to interpret all WTO rules in a consistent manner.

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

21.19. The representative of Thailand said that Thailand wished to refer to its statements made at previous DSB meetings on this matter. Thailand appreciated the continued efforts under this Agenda item of Mexico and all co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.6 in an attempt to fill the vacancies in the Appellate Body. Thailand wished to reiterate its grave systemic concern over the current impasse to ensure the proper functioning of the WTO's rules-based system. Thailand supported the launching of the AB selection processes as soon as possible. Thailand remained committed to working constructively with all Members to resolve this matter as a priority.

21.20. The representative of India said that India wished to refer to its statements made at previous DSB meetings on this matter. India wished to reiterate its serious concerns about the current impasse in filling vacancies in the Appellate Body and its effect on the credibility of the WTO. India stood ready to constructively engage with other WTO Members in order to find an expeditious resolution to the impasse.

21.21. The representative of Turkey said that Turkey wished to refer to its statements made at previous DSB meetings on this matter. Turkey wished to reiterate its deep concerns with the current impasse. As a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.6 and put forward by Mexico, Turkey urged the concerned Member to lift the current blockage and to initiate the AB selection processes in accordance with Article 17.2 of the DSU. Considering the urgency of the matter, any proposal to address concerns regarding the Appellate Body should be discussed separately, without a link to the launch of the AB selection processes, and should not prevent the Appellate Body from performing its functions fully. Turkey stood ready to engage constructively and to help overcome this deadlock.

21.22. The representative of Japan said that Japan supported the proposal contained in document WT/DSB/W/609/Rev.6. Japan wished to refer to its statements made at previous DSB meetings.

21.23. The representative of Ukraine said that Ukraine wished to thank Mexico and to reiterate its support for the co-sponsored proposal contained in document WT/DSB/W/609/Rev.6. Ukraine emphasized the importance of the Appellate Body in the dispute settlement mechanism and considered that it was crucial to discuss issues related to Appellate Body appointments. Ukraine called for a constructive dialogue and cooperation between Members. It was essential to find a mutually acceptable solution to deal with the crisis, which affected the functioning of the WTO dispute settlement mechanism, in particular by launching the AB selection processes as soon as possible.

21.24. The representative of Mexico, speaking on behalf of the 71 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.6, said that Mexico regretted that, once again

(18 times), Members had still not been able to agree to start the AB selection processes and therefore they continued to fail to fulfil their duties as WTO Members. The fact that Members might have concerns about certain aspects of the functioning of the Appellate Body could not serve as a pretext to impair and disrupt the work of the Appellate Body. There was no legal justification to block the AB selection processes. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". By failing to act, Members would maintain the current situation, which was seriously affecting the functioning of the Appellate Body and was against the best interests of all Members.

21.25. The representative of the European Union said that the European Union wished to refer to its statements made on this issue at previous DSB meetings, starting in February 2017. With each passing month, the gravity and urgency of the situation increased. The EU said that Members had a shared responsibility to resolve this issue as soon as possible. The EU wished to thank all Members who co-sponsored the proposal contained in document WT/DSB/W/609/Rev.6. The EU invited all other Members to endorse this proposal so that AB appointments could be made as soon as possible.

21.26. The Chairperson thanked all delegations for their statements. She said that as all Members were well aware, this matter required political engagement on the part of all Members. She reiterated that her door was open to any delegation wishing to share ideas or views on this matter.

21.27. The DSB took note of the statements.

22 RIGHT OF A MEMBER TO DECIDE THE COMPOSITION OF ITS DELEGATION FOR CONSULTATIONS: STATEMENT BY CHINA

22.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of China, and invited the representative of China to speak.

22.2. The representative of China said that China wished to draw attention to a recent practice of the United States during consultations in WTO dispute settlement proceedings. In this regard, China noted that during consultations in the following disputes: "US – Certain Measures on Steel and Aluminium Products" (DS544); "US – Safeguard Measure on Imports of CSPV Products" (DS562); and "US – Certain Measures Related to Renewable Energy" (DS563), the United States had persistently forced China to excuse its "legal counsel"[36] from delegations on the grounds that consultations were inter-governmental and confidential. The egregious behaviour of the United States was of systemic importance to the entire Membership. China noted at the outset that it respected and upheld the confidentiality requirement under Article 4.6 of the DSU. Its remarks under this Agenda item would not disclose any of the substantive issues discussed in the relevant consultations with the United States. The practice of engaging legal counsel to assist with participation in WTO dispute settlement proceedings was long-standing and widespread, and facilitated the efficient resolution of disputes. The US opposition to the presence of legal counsel in consultations was, therefore, an issue of systemic importance. As China would elaborate further in its statement, the US objections to this practice were legally and practically unfounded for three reasons: (i) the right of Members to invite legal counsel to participate at all stages of dispute settlement proceedings was enshrined in WTO law and customary international law; (ii) the governmental character of a Member's delegation was not impacted by the presence of legal counsel, nor did the presence of legal counsel compromise confidentiality; and (iii) preventing Members from relying on legal counsel during consultations unfairly disadvantaged developing country Members that might require assistance in order to present their cases effectively.

22.3. In China's view, the right of a Member to determine its representation at all stages of dispute settlement proceedings was well-established under WTO law and customary international law. The right of a Member to select its own counsel and determine the extent to which that counsel participated in dispute settlement proceedings was rooted in WTO law and customary international law. The right of a Member to invite counsel of its own choosing to participate in all stages of dispute settlement proceedings derived from the fundamental principle of due process. Due process was the cornerstone of the dispute settlement mechanism. Due process required that Members be able to participate effectively in dispute settlement proceedings. For some Members such as China, the legal expertise of legal counsel could be necessary to ensure that the Members' claims were fully presented and/or its rights and interests were effectively defended. Due process thus required that

[36] The expression "legal counsel" referred to legal experts from a law firm retained by a Member to provide legal services during WTO dispute settlement proceedings.

Members could choose to have legal counsel participate during all stages of dispute settlement proceedings. The Appellate Body had consistently recognized that due process rights included the right to be represented by legal counsel in dispute settlement proceedings. In the "EC – Bananas III" dispute (DS27), the Appellate Body had confirmed that the Government of Saint Lucia had the right to invite two legal counsel to the Appellate Body hearing because it had considered representation by counsel to be particularly important for developing country Members in order to "participate fully in dispute settlement proceedings".[37] Similarly, in the "Korea – Alcoholic Beverages" dispute (DS75), the Panel allowed the presence of legal counsel in panel proceedings on behalf of Korea because in its view, the participation of legal counsel was necessary to ensure that the responding Member "has every opportunity to fully defend its interests in a case".[38] China believed that these findings applied equally to the consultation stage of dispute settlement proceedings. Article 3.7 of the DSU provided that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Engaging in consultations was an important first step in achieving this objective. It allowed disputing parties to exchange information, assess the strengths and weaknesses of their cases, delimit the scope of the dispute, and sometimes reach a mutually agreed solution.[39] Given the importance of the consultation process to securing a positive solution to a dispute, the right of a Member to seek assistance from legal counsel during consultations could not be impaired. It was also the right of a Member to decide the composition of its government delegation as a matter of customary international law. Absent an explicit limitation in its constitutive treaties, no international organization could interfere with a Member's decision as to whom to accredit as a member of its delegation to an organization. No such limitation was provided for in WTO rules. China noted in this respect that the Appellate Body and panels had repeatedly stated that "nothing in the WTO Agreement, the DSU, or the Working Procedures of the Appellate Body specifies who can represent a government in an oral hearing".[40] In other words, when China decided to invite legal counsel to join its delegation and participate in dispute settlement proceedings, it was exercising its rights as a Member. These rights could not be restricted by the WTO as an institution or by any Member with whom China was holding consultations under the DSU. In addition to being deeply rooted in law, the right to invite legal counsel to participate in all stages of proceedings was well-established in practice. As a matter of fact, Members had always permitted legal counsel to participate in consultations as part of a Member's delegation. In the 38 disputes between China and the United States to date, China had appointed legal counsel to its consultation delegations on most occasions. The United States had never obstructed these appointments. On the contrary, the United States had always accepted this practice, aside from in the three previously mentioned disputes. Other Members had held consultations with China in the presence of legal counsel without objection. The recent US objections to the presence of legal counsel in consultations thus impaired the rights of Members and ignored long-standing practice.

22.4. In China's view, the US objections to China's exercise of its right to determine the composition of its delegation in consultations had not been raised in good faith. China believed that the US objections to the presence of legal counsel during consultations fell short of the requirement in the DSU to conduct consultations in good faith. Article 4.3 of the DSU required that a Member to whom a request for consultations was made had to "enter into consultations in good faith". The obligation of good faith applied to the Member's conduct throughout the consultations phase. Good faith was not just an abstract concept. It required that Members enter into consultations with a genuine interest in resolving the dispute. Disrupting consultations by objecting to the presence of legal counsel on untenable grounds did not demonstrate good faith. The United States had offered two reasons for objecting to the presence of legal counsel: (i) consultations had to be conducted on a government-to-government basis; and (ii) the presence of legal counsel could threaten the confidential nature of consultations. These reasons were nothing more than excuses for the disruptive conduct of the United States, which served only to obstruct the purpose of consultations. With respect to the first reason offered by the United States, China disagreed that a Member's delegation was somehow rendered non-governmental once it included legal counsel retained by that Member. As China had just explained, every Member had the right under WTO rules and customary international law to designate representatives of its government and decide the composition of its delegation. Nothing in the DSU suggested that consultations had to take place between delegations comprised only of full-time government employees. With respect to the second reason offered by the United States, China agreed that consultations were to be kept confidential under Article 4.6 of

[37] Appellate Body Report, EC – Bananas III, para. 12.
[38] Panel Report, Korea – Alcohol, para. 10.31.
[39] Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 54.
[40] Appellate Body Report, EC – Bananas III, para. 12. See also Panel Report, Indonesia – Autos, para. 14.1.

the DSU. However, China considered that the obligation of confidentiality applied irrespective of whether a Member's delegation to consultations included legal counsel. A Member was always obliged to ensure that its entire delegation, including legal counsel, observed the confidentiality requirement.[41] China, like all other Members, required every Member of its delegation, including legal counsel, to observe this requirement. China ensured that legal counsel observed the confidentiality requirement by having them execute a confidentiality agreement for each engagement. In light of the mechanisms already established to address confidentiality concerns, China saw no reason for such concerns to be grounds for eroding the right of Members to decide the composition of their delegations for consultations.

22.5. In China's view, acquiescing to the US practice would disadvantage developing Members and further compromise the WTO dispute settlement system. China believed that the continued US objections to having legal counsel participate in consultations would be to the disadvantage of developing Members and would further compromise the WTO dispute settlement mechanism. The WTO dispute settlement mechanism had evolved into a highly complex process in the years since it had been founded. Unfortunately, participating Members did not always stand on equal ground. As the DSB was aware, Members were at vastly different levels of development. Many did not use any of the three WTO working languages as their official language, which further strained their limited resources. To put this issue in perspective, China asked Members how many, among the WTO's 164 Members, had an entire government department devoted to litigating WTO disputes and staffed with international trade lawyers who had decades of experience, as did the United States. The answer was obvious: not many. Thus, the ability to seek assistance from legal counsel at all stages of dispute settlement proceedings, including during consultations, was necessary to ensure a level playing field for all Members.

22.6. In closing, China asked Members to consider this issue in context. The WTO dispute settlement mechanism was under serious strain and faced considerable uncertainty. The efficient resolution of disputes had already been compromised. Preventing Members from exercising their right to retain and rely on legal counsel in consultations would only increase hurdles when attempting to resolve disputes efficiently. The unjustified US objections to the participation of legal counsel was thus of systemic concern. China wished to thank Members for their careful attention to its remarks. China urged the United States to eliminate an unnecessary source of tension within the system by ceasing its practice of raising objections to the participation of legal counsel in the WTO dispute settlement proceedings, and by complying with its obligation to conduct consultations in good faith. If the United States were to continue its practice, China would reserve its right to seek a systemic resolution of this issue as part of reforming the WTO. China also looked forward to engaging further on this issue with Members whose interests were at stake.

22.7. The representative of the United States said that the United States took note of China's statement. The United States understood that China had asserted a so-called "right" for one Member to decide unilaterally to include persons other than government officials in meetings between parties consulting pursuant to Article 4 of the DSU. Consultations played an important role in helping to resolve a dispute. Article 4.2 of the DSU provided that: "[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."[42] And Article 4.5 of the DSU provided that: "[i]n the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter". Thus, consultations were not simply a box-checking exercise. Rather, they "serve the purpose of, inter alia, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them."[43] The DSU text did not specify the right asserted by China to insist that a non-governmental person be permitted to attend consultations between two WTO Members. The "right" asserted by China would therefore encompass the ability to force another Member to make statements in the presence of that person. In addition to not seeing such a right expressed in the DSU, the United States did not see how insisting on the ability to bring non-governmental persons to consultations, over the objections of the other consulting Members, would serve the aim of consultations. For instance, if a party to consultations were to indicate they did not

[41] Panel Report, Korea – Alcohol, para. 10.32. See also Panel Report, Indonesia – Autos, para. 14.1.
[42] Article 4.2 of the DSU.
[43] US – Shrimp (Thailand) / US – Customs Bond Directive (AB), para. 293.

think it was helpful or appropriate to include persons other than government officials, insisting on the presence of such non-government persons would not assist in reaching a positive solution to that dispute. Moreover, what China attempted to frame as a Member's "right" was essentially a view that its preference concerning the participation of non-governmental persons in consultations meetings must dominate over the preferences of the other consulting Member. This hardly seemed to reflect the cooperative spirit in which consultations should be held. The United States would consider this to be an issue – not unlike venue or timing – that the consulting parties in a given dispute should discuss and work out among themselves. The United States also noted that China had framed the issue as concerning the inclusion of outside counsel, or lawyers. However, an implication of China's position would be that Members would also be free to include, as part of their own government delegation, other members of the private sector, including non-governmental organizations – despite the preference of the other consulting Member. The United States asked China whether it could confirm that this understanding was correct. If not, the United States asked on what basis in the text of the DSU China could distinguish between one category of non-governmental persons – lawyers – and other categories of non-governmental persons.

22.8. The United States also noted China's suggestion that the Appellate Body had somehow already decided this issue. Putting aside the question of what weight should be accorded to the Appellate Body's statement in the "EC – Bananas III" dispute (DS27)[44], which had been made in the context of that particular dispute, the United States noted that it was simply inapplicable to the issue China had raised. In particular, in the "EC – Bananas III" dispute (DS27), the Appellate Body had allowed the participation of two legal counsel, who had not been government employees of a party, at the oral hearing in that appeal.[45] The issue, therefore, had not concerned consultations between two Members under Article 4 of the DSU. Finally, the United States noted with concern that China had made several representations about certain consultations held with the United States. The United States reminded China of its obligations, including in Article 4.6 of the DSU, which provided that: "[c]onsultations shall be confidential". In its statement made at the present meeting, China had indicated it understood that obligation, but then proceeded to ignore that obligation by making several representations with respect to consultations with the United States. Given this requirement of confidentiality, it would not be appropriate for the United States to engage on China's specific assertions concerning consultations with the United States. The United States noted, however, that it would undermine the purposes served by consultations if a Member could not expect the other party to honour WTO rules to maintain the confidentiality of those consultations. At best, China's representations concerning consultations with the United States at this meeting represented a lapse in judgment by China. The United States expected that it would not be repeated.

22.9. The representative of the European Union said that the EU wished to recall that, pursuant to Article 3.10 of the DSU, if a dispute arose, all Members had to engage in the dispute settlement procedures in good faith and in an effort to resolve the dispute. More specifically, Article 4.3 of the DSU stipulated that the Member to which the request for consultations had been made had to enter into consultations in good faith, with a view to reaching a mutually agreed solution. At the same time, pursuant to Article 4.6 of the DSU, the consultations had to be confidential. The EU believed that this specific provision reflected the fact that information exchanged during consultations could be of a particularly sensitive nature. The EU believed that this was also one of the reasons why, subject to the provisions of Article 4.11 of the DSU and unlike in the case of panel and Appellate Body proceedings, the parties to the dispute had a say on whether to allow the participation of other Members in the consultations. The EU believed that while each Member had the right, in principle, to determine the composition of its delegation, if an issue arose in a specific dispute as regarded the participation of certain persons in the consultations, both parties should strive, in keeping with the principle of good faith, to reach an agreement that would allow for orderly and constructive discussions in the consultations, and that would take into account the confidential character thereof. In that regard, the EU noted that it would not be consistent with these principles for a party to object to the presence of the other party's government officials in the consultations. Likewise, the EU generally did not consider that the presence of outside lawyers, representing the party for the purposes of a specific dispute, should give rise to objections. The EU wished to note, in that regard, that lawyers were generally subject to professional and ethical requirements such as to ensure the confidentiality of consultations. Based on past experience, the EU believed that the presence of such lawyers at consultations was not infrequent and had not been problematic. If a responding Member to which a request for consultations was addressed refused to engage in consultations on the sole

[44] WT/DS27.
[45] WT/DS27/AB/R, paras. 10-12.

ground that such external lawyers were part of the requesting Member's delegation, that responding Member failed to enter into consultations in the manner mandated by Article 4.3 of the DSU. This also meant that, once 30 days from the receipt of the consultations request had passed, the requesting Member had the right to proceed directly to request the establishment of a panel, in accordance with Article 4.3 of the DSU.

22.10. The representative of India said that India wished to thank China for including this serious systemic issue on the Agenda of the present meeting. India wished to take this opportunity to comment on this important matter. Like several other Members, India had recently been at the receiving end of US intransigence in the matter of allowing the participation of private counsel as part of its delegation during consultations with the United States. The US attempted to justify its position by alluding to the 'government-to-government' nature of consultations, and to confidentiality concerns arising out of the presence of private counsel. India believed that the presence of private counsel, retained a party for its legal expertise, did not alter the government-to-government nature of consultations. Furthermore, nothing in the text of the DSU limited a Member's right to determine the composition of its own delegation at any stage of WTO dispute settlement proceedings. In fact, Article 4.10 of the DSU clearly provided that: "[d]uring consultations Members should give special attention to the particular problems and interests of developing country Members". Exchanging and processing complex technical information, asking follow-up questions, and assessing the strength of legal claims in light of the information exchanged were all important components of the consultations phase. In the absence of retained private counsel, Members who did not have in-house legal expertise were put to a severe disadvantage when faced with a battery of experienced in-house legal counsel during dispute consultations. Most developing country Members, like India, did not have an in-house legal team, and therefore, needed to retain private counsel to help them fully present their claims and defend their rights and interests during all stages of WTO dispute settlement proceedings, including consultations. This was critical to ensuring that Members were able to effectively participate in dispute settlement proceedings, and formed a fundamental part of a Member's due process rights. The US contention that the presence of private counsel could undermine the confidential nature of consultations was completely unfounded. All Members were obliged to ensure that their delegations, including retained private counsel, observed the confidentiality requirement stipulated in Article 4.6 of the DSU. To this end, Members who retained private counsel for a specific matter had them sign a confidentiality clause to prevent any breach of confidentiality. In conclusion, India wished to reiterate that nothing in the text of the DSU limited a Member's sovereign right to determine the composition of its delegation at any stage of the dispute settlement proceedings. Any attempt to place an artificial limit on this right was unjustified and gravely prejudiced due process rights of Members to participate meaningfully at all stages of dispute settlement proceedings. India looked forward to engaging with Members on this important issue.

22.11. The representative of Norway said that there was long-settled case-law that a Member had an absolute right to compose its delegation for all matters relating to WTO dispute settlement as it wished.[46] Confidentiality issues could not preclude this right. On the contrary, all members of a delegation had to respect the obligation of confidentiality regarding a dispute, regardless of whether that person was permanently employed by a government or hired to assist that government on specific matters. This would apply at consultation stage as well as at a later stage in dispute settlement proceedings.

22.12. The representative of Turkey said that Turkey wished to thank China for placing this item on the Agenda of the present meeting. Turkey shared the concerns expressed at the present meeting. Like some other Members, Turkey had experienced on more than one occasion a US refusal to engage in consultations at a meeting on the ground that Turkey's delegation had included external legal counsel. Turkey had been concerned about this conduct for two main reasons. First, this conduct was inconsistent with the important principle that a Member was free to compose its delegation as it saw fit and to decide who should represent it as members of its delegation in a WTO dispute. This principle had been reiterated multiple times by panels and the Appellate Body, and it applied throughout the dispute settlement process, including at hearings and for the preparation of written submissions. This principle therefore obviously had to apply at the consultations stage. A Member should not be able to deny another Member this important right by making its participation in consultations dependent on that other Member renouncing its right. Second, just as importantly,

[46] See Appellate Body Report, EC – Bananas III, paras 10-12; Panel Report, Korea – Certain Paper, para. 7.15.

all Members, and in particular developing countries, LDCs and countries that had dealt with little or no WTO disputes, could require external legal counsel to ensure a level playing field in terms of legal expertise in a given dispute. This was a simple matter of justice and due process. To refuse to hold consultations with another Member's external legal counsel meant that Members with more experience in the WTO dispute settlement mechanism would always have an inherent advantage over other Members. Members should reflect on this issue.

22.13. The representative of Switzerland said that the purpose of consultations was to arrive at a mutually agreed solution to a dispute. Consultations enabled parties to gather relevant information for that purpose or, if the consultations failed to settle the dispute, to define the scope of the dispute for the next stages of dispute settlement. Switzerland shared the view expressed by other delegations that it was for each Member to decide who was in its delegation for consultations. Indeed, pursuant to Article 4.6. of the DSU, the confidentiality of consultations had to be maintained. Switzerland considered in particular that the participation of external counsel in consultations was compatible with both the purpose and the confidential nature of consultations.

22.14. The representative of Ukraine said that Ukraine wished to thank China for raising this matter at the present meeting. Ukraine said that Members were obliged to comply with the requirements of the DSU, particularly with Article 4.6 thereof which provided that consultations had to be confidential. This obligation required parties to ensure that the matters discussed during consultations be kept confidential. At the same time, nothing in the WTO Agreements or in international law prevented a Member from determining for itself the composition of its delegation in WTO dispute settlement proceedings.[47] Ukraine therefore believed that each Member could at its discretion decide on the composition of its delegation to participate in consultations.

22.15. The representative of Canada said that Canada wished to reiterate its long-standing position regarding the participation of outside counsel in WTO dispute settlement proceedings. Canada considered that a Member was free to compose its delegation as it saw fit, including by calling upon outside counsel, provided that the Member complied with its confidentiality obligations set out in the DSU. In this respect, Canada saw no distinction between consultations, on the one hand, and proceedings before a panel or the Appellate Body, on the other hand. Over the years, the participation of outside counsel in WTO dispute settlement proceedings had become quite common. Members that had recourse to outside counsel considered that their participation enabled them to better defend their interests in dispute settlement. That said, the discussion at the present meeting was not about the pros and cons of outside counsel participating in dispute settlement. It was about whether an objection to the participation of outside counsel in consultations could be justified under the DSU. Ultimately, if consultations did not take place as a result of an objection from a responding party to the participation of outside counsel to assist a complaining party, the complaining party could seek to proceed directly to request the establishment of a panel.

22.16. The representative of Brazil said that Brazil had some preliminary views on this matter in line with the principle of good faith, which should guide consultations. Brazil believed that, unless there was agreement between the parties, preventing Members from having outside advisors in consultations would only work in favour of Members with large dispute settlement resources and sufficient in-house government lawyers. However, this would be to the disadvantage of other Members, in particular developing countries, who could not afford such resources. Brazil was ready to engage in discussions on this matter.

22.17. The representative of South Africa said that South Africa wished to thank China for placing this item on the Agenda. China raised fundamental systemic issues in its statement made at the present meeting, especially in the context of developing countries that often lacked necessary resources to develop in-house legal expertise. A Member should be able to determine the composition of its delegation. Article 4.6 of the DSU should be taken into account. The issue of private legal representatives assisting or acting on behalf of Members was not addressed in any WTO agreement, including the DSU and its Working Procedures. In addition, the issue of the composition of a Member's delegation in consultations had never been examined by any panel or the Appellate Body. However, the issue of private legal representation at the appellate stage had been raised in the Appellate Body report in the "EC – Bananas III" dispute (DS27). Saint Lucia (a third party in the dispute) had requested the Appellate Body to allow the participation of two legal counsel, who were not government employees, at the oral hearing of that appeal. The Appellate Body had recognized

[47] Appellate Body Report, EC — Bananas III, para. 10.

that there was no legal provision in WTO law specifying who can represent a government in an oral hearing of the Appellate Body. Nevertheless, the Appellate Body had concluded that representation "by counsel of a government's own choice may well be a matter of particular significance – especially for developing country Members – to enable them to participate fully in dispute settlement proceedings".[48] In a letter addressed to the parties and third parties on this issue, the Appellate Body ruled that "it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body".[49] Since the adoption of the Appellate Body report in the "EC – Bananas III" dispute (DS27), it seemed to be generally accepted that Members could include non-governmental lawyers in their delegations at all stages of dispute settlement proceedings, including consultations, even though that report had specifically addressed the right of Members to be represented by private legal representatives at the appellate stage and not during consultations. There was some textual support in the DSU for the proposition that developing countries in particular should be free to include outside lawyers in their delegations for consultations. According to Article 4.10 of the DSU, "[d]uring consultations, Members should give special attention to the particular problems and interests of developing country Members". This would seem to apply to the need of these Members for technical capacity to participate fully in the consultations meetings. Excluding private legal representatives or, where applicable, institutions such as the ACWL, that specifically sought to level the playing field for lesser-developed Members, would, arguably, fail to consider the specific needs of developing countries and would deprive lesser developed Members from resources that would have allowed them to participate effectively in the dispute settlement system.

22.18. The representative of China said that China wished to note that the statement made at the present meeting by the United States on this matter had not provided compelling reasons to justify its interference in the composition of other Members' delegations when the United States was the responding party. China wished to recall that the United States had frequently urged all Members as well as WTO adjudicators to comply with the "clear text of the DSU". However, the United States did not advocate compliance with the text of the DSU with as much enthusiasm when its text did not support US overreach. That was hypocritical. The right to determine the composition of one's delegation was an inherent right of every Member, including the United States. Interference with such right could give rise to a breach of due process which was the cornerstone of any dispute settlement system. What China asked was nothing more and nothing less than the consistent respect by the United States of such inherent right. With respect to the question that the United States had raised, China wished to emphasize that the term "legal counsel" as used in China's statement referred to legal experts from a law firm retained by a Member to provide legal services during WTO dispute settlement proceedings. In China's view, consultations formed part of dispute settlement proceedings, and were not distinguishable from other dispute settlement proceeding phases. In this regard, private sector individuals other than legal professionals, who might have a conflict of interest in a given dispute did not fall within the scope of China's statement made at the present meeting. By directly interfering with other Members' inherent rights to decide participants in consultations, the United States had deliberately disregarded not only the basic principle of due process, but had also undermined other Members' abilities to make the best use of the dispute settlement system. This issue simply represented the latest outrageous action of the United States aimed at placing itself above the rules agreed to by all Members. China's message was loud and clear. Every Member had the inherent right to decide the composition of its delegation for WTO dispute settlement proceedings, including consultations. Forced forfeiture of such right would amount to a denial of the right to counsel, which would run afoul of the due process principle. None of the covered agreements and no international norm gave the United States the legitimacy to interfere with the exercise of such right by other Members. The issue that China had raised at the present meeting was the US practice of objecting to the presence of outside counsel in consultations. China believed that nothing in Article 4.6 of the DSU prevented it from raising or discussing this issue at the present meeting. The United States had tried to raise the issue of confidentiality. However, the confidentiality requirement imposed by Article 4.6 of the DSU only applied to consultations as such held between Members. In other words, it was intended to protect the information that Members had exchanged during consultations regarding a given dispute, and to prevent its disclosure to unauthorized third parties. Article 4.6 of the DSU did not prevent China from requesting that the DSB consider a Member's practice in conducting consultations that China believed hindered the fulfilment of the purpose of consultations contemplated in the DSU. A discussion among Members of US objections to the participation of legal counsel in consultations did not prejudice US interests under Article 4.6

[48] Appellate Body Report, EC – Bananas III, para. 12.
[49] Appellate Body Report, EC – Bananas III, para. 10.

of the DSU. The US practice had raised China's concerns over the right of a Member to determine its representation in dispute settlement proceedings. This discussion fell squarely within the authority of the DSB. Under Article 2.1 of the DSU, the DSB had the authority to "administer [the] rules and procedures [of the DSU]". As consultations were a critical step in the dispute settlement process, this authority of the DSB naturally extended to consideration of any matter that could systematically affect the way consultations were conducted. As China had stated at the present meeting, the repeated US objections to the participation of outside counsel had deprived Members of their right to due process in consultations, and had compromised the fairness of the entire dispute settlement system. Given the systematic negative impact of this practice, China was entitled to raise this issue with the entire Membership. It was within the DSB's authority to take this matter into consideration. China also wished to emphasize that the lack of good faith demonstrated by the United States in putting forward groundless arguments in support of its objections had been further compounded by the manner in which it had raised these objections. It was particularly upsetting to China that the United States had chosen not to raise its objections before every member of the Chinese delegation had been seated in the meeting room, only minutes before the start of the consultations. To ambush a Member in such a manner fell far short of the requirements to "accord sympathetic consideration … to consultation" (Article 4.2 of the DSU) and to "enter into consultations in good faith" (Article 4.3 of the DSU). China wished to extend its appreciation for the statements made at the present meeting by other Members including the EU, India, Norway, Switzerland, Turkey, Ukraine, Brazil, Canada, South Africa and Guatemala. China stood ready to further engage in the discussion of this important issue with the entire Membership.

22.19. The representative of Guatemala said that Guatemala wished to thank China for raising this issue at the present meeting. Guatemala believed that Members were free to decide on the issue of the composition of their delegations in consultations. From a practical perspective, Guatemala saw no reason why a Member was free to decide the composition of its delegation for panel and Appellate Body proceedings, but that it should not be free to decide the composition of its delegation for purposes of consultations under Article 4 of the DSU. Excluding representatives from delegations posed several problems. To mention a few: (i) excluding private counsel from delegations would create an unequal level-playing field for small developing countries that lacked legal capacity when compared with larger delegations such as that of the United States, with specialized in-house lawyers; (ii) there would always be the question of who decided the exclusion of a representative of a Member; and (iii) the discussion about whether a Member of a delegation could participate in consultations would certainly create a distraction from the subject-matter of consultations. From a legal perspective, an answer to this issue could be found by analogy in past disputes. China had mentioned several of those cases. For example, in the "EC – Bananas III" dispute (DS27), the Appellate Body had concluded that WTO Members could bring private counsel to oral hearings as part of their delegations. In the same vein, the panels in the "Korea – Alcoholic Beverages" dispute (DS75) and in the "Indonesia – Autos" dispute (DS54) had concluded that private counsel were permitted to attend panel meetings. In addition, the sovereign rights of States to designate their representatives to international meetings was a long-standing principle of international law that was codified in Article 43 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The DSU was to be interpreted in accordance with customary rules of interpretation of public international law. In light of this, Guatemala wished to reiterate that Members were free to decide on the issue of the composition of their delegations at any stage of the dispute settlement proceedings.

22.20. The DSB took note of the statements.

23 INDONESIA - SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

A. Statement by Indonesia

23.1. The representative of Indonesia, speaking under "Other Business", said that Indonesia wished to inform the DSB that it had agreed with Chinese Taipei and Viet Nam, under Article 21.3(b) of the DSU, that the reasonable period of time (RPT) for Indonesia to implement the DSB's recommendations and rulings in the "Indonesia – Safeguard on Certain Iron or Steel Products" (Chinese Taipei) dispute (DS490) and in the "Indonesia – Safeguard on Certain Iron or Steel Products" (Viet Nam) dispute (DS496) would be seven months starting from 27 August 2018, namely, the date of adoption of the relevant Reports in these disputes. The RPT would, therefore, expire on 27 March 2019. Indonesia wished to express its appreciation to Chinese Taipei and Viet Nam for their cooperation during the RPT negotiations. Indonesia looked forward to having further

discussions on these matters so as to implement the DSB's recommendations and rulings in these disputes in due course.

23.2. The representative of Viet Nam said that Viet Nam was equally pleased to report that the parties to these disputes had completed their discussions under Article 21.3(b) of the DSU. All three parties had agreed to an RPT of seven months, during which Indonesia would implement the recommendations and rulings of the DSB. This meant that Indonesia's RPT would expire on 27 March 2019. Viet Nam wished to thank Indonesia and Chinese Taipei for the cooperative and amicable spirit that had characterized these important discussions. Viet Nam looked forward to Indonesia's full compliance with the DSB's rulings and recommendations of in these disputes by 27 March 2019.

23.3. The representative of Chinese Taipei said that Chinese Taipei wished to thank Indonesia for its statement. Chinese Taipei simply wished to confirm the agreement on the RPT which would last seven months. Chinese Taipei wished to thank Indonesia for its cooperation in reaching this agreement. Chinese Taipei would work closely with Viet Nam and Indonesia for a prompt settlement of these disputes.

23.4. The DSB took note of the statements.