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Dispute Settlement Body
18 December 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 18 DECEMBER 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: "India – Certain Measures on Imports of Iron and Steel Products" (DS518) was removed from the proposed Agenda following India's decision to appeal the Panel Report.

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1.1. The Chairperson noted that there were seven 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.190)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.190, 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 6 December 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.165)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.165, 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 6 December 2018, 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 and 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 166th status report for the present meeting. This most recent status report, as was the case for the status reports submitted by the United States ahead of previous DSB meetings, was not different from the very first status report submitted in this dispute 14 years ago. As time passed, this dispute remained unresolved. Section 110(5) of the US Copyright Act, which long ago had been found inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. 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". Regrettably, without further concrete actions, the United States continued to fail to accord to intellectual property right holders the minimum standard of protection required by the TRIPS Agreement. China therefore urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute.

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. The United States referred delegations to its statements made at prior DSB meetings on China's purported interest in protecting intellectual property rights, as well as to its statement under Agenda item 8 of the present meeting.

1.11. The representative of China said that his delegation took note of the US statements under this Agenda item. Protection of intellectual property rights would benefit all Members. As always, China welcomed and was willing to engage in good faith and objective discussions with other Members on any intellectual property issues. 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.128)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.128, 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 December 2018, four draft authorizations – one for a renewal of genetically-modified oilseed rape[1], two for new genetically-modified maize[2] and one for new cotton[3] – had been presented for a vote in a Member States Committee with a "no opinion" result. These measures would be submitted for a vote in the Appeal Committee in January 2019. On 7 December 2018, one draft authorization for a cut flower[4] had been 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. While the United States noted and welcomed the approval of authorizations for three products in December 2018, the United States also noted that these products had been subject to significant delays. The United States further noted its concern that even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. 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. The United States continued to stress that 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 again noted a recent public statement issued by the European Union's Group of Chief Scientific Advisors on 13 November 2018, in response to the ruling dated 25 July 2018 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. This Directive was a central issue in dispute in these WTO proceedings, and concerned the Deliberate Release into the Environment of Genetically Modified Organisms, or 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

[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.

EU to finally act in a manner that would bring into compliance the measures at issue in this dispute. The United States further 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 the United States had touched upon a number of issues in its statement under this Agenda item. The EU wished to provide clarifications on some of these issues. The delays asserted by the United States were simply the result of an in-depth investigation aimed at making sure that all the relevant new goods were scientifically safe for the environment and for consumers. Accordingly, there was no delay, only the passage of the amount of time necessary to confirm that the relevant goods were safe. On the issue of the "Opt-out" Directive, the EU wished to note that no EU member State had imposed any ban thus far. The EU also wished to note that an EU 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. The United States had not asserted that any such measure failed to meet those criteria. In any event, and as the EU had mentioned previously at the present meeting, the "opt-out" Directive was not covered by the DSB's recommendations and rulings. The United States had referred to a judgment of the European Court of Justice (ECJ) from July 2018. That judgment had provided important clarifications on the scope of application of the GMO legislation in relation to organisms obtained by mutagenesis techniques. The ECJ found that organisms obtained by means of new techniques or methods of mutagenesis, which had appeared or had been mostly developed since the adoption of Directive 2001/18, fell within the scope of that Directive. The judgment of the ECJ had not extended the scope of the legislation. It had simply clarified how the legislation should be read. The European Commission was working together with EU member States to ensure the proper application of the ECJ judgment. EU member States were responsible at the national level for the relevant control activities regarding the placing on the market of both products produced in the EU and imported products. To this effect, the Joint Research Centre was helping national laboratories to develop relevant detections methods. The United States had also referred to the Group of Chief Scientific Advisors. The EU wished to clarify that this Group provided independent scientific advice to the European Commission. The recent statement on gene editing made by the Group of Chief Scientific Advisors provided a scientific perspective on the most recent developments on the use of directed mutagenesis, and in particular on their regulatory status. This was an element for discussions with all stakeholders.

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.12)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.12, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning 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 6 December 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 DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

E. United States – Certain Methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.4)

1.23. The Chairperson drew attention to document WT/DS471/17/Add.4, 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.

1.24. The representative of the United States said that the United States had provided a status report in this dispute on 6 December 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.

1.25. 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. 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. Thus far, the United States had submitted five 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 very disappointed and deeply concerned with the US failure to implement the DSB's recommendations and rulings. The WTO-inconsistent measures taken by the United States 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. China, once again, urged the United States to take concrete actions, to fully respect WTO rules, and faithfully implement the DSB's recommendations and rulings in this dispute.

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

F. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WT/DS484/18/Add.3)

1.27. The Chairperson drew attention to document WT/DS484/18/Add.3, 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.

1.28. The representative of Indonesia said that Indonesia wished to refer to its statement made at the 21 November 2018 DSB meeting on this matter. His delegation wished to indicate that Indonesia had undertaken the necessary steps to adjust the relevant measures by amending its regulations, namely: (i) Ministry of Agriculture Regulation No. 23/2018, which entered into force on 24 May 2018; and (ii) Ministry of Trade Regulation No. 65/2018, which entered into force on 31 May 2018. The essence of the amendments to these regulations was that products covered in this dispute could be imported, either included or excluded in the Annex. It was confirmed that importers were allowed to modify information contained in the import licenses. Hence, there would be no sanction for such modifications. With regard to the distribution plan, Indonesia's domestic producers also had a plan for their products to be distributed. With respect to the submitted questionnaire, it was currently under rigorous internal examination by the Ministry of Agriculture. Indonesia stood ready to continue to consult and would remain in constant communication with Brazil with respect to any matter relating thereto.

1.29. The representative of Brazil said that his country wished to thank Indonesia for its status report of 7 December 2018, which it was currently in the process of reviewing. As in previous DSB meetings, Brazil wished to share with Members some concerns regarding Indonesia's implementation of the DSB's recommendations and rulings in the present dispute. 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. Indonesia's status report contained the following sentence: "the essence of modification is that products covered in this dispute may be imported, either included or excluded in the Annex". This sentence seemed to indicate that Indonesia had not completely eliminated the positive list approach. 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 wished to note that in its status report, Indonesia said that: "hence, there would be no sanction for such modification". 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 believed that Indonesia continued to cause undue delays prior to the approval of Brazil's veterinary health certificate. Brazil, once again, asked Indonesia to include in its future status reports the status of the analysis and approval of this certificate, 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.

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

G. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.3)

1.31. The Chairperson drew attention to document WT/DS488/12/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 anti-dumping measures on certain oil country tubular goods from Korea.

1.32. The representative of the United States said that the United States had provided a status report in this dispute on 6 December 2018, in accordance with Article 21.6 of the DSU. As explained

in that report, the US Department of Commerce had published a notice in the Federal Register indicating that it "is commencing a proceeding to gather information, analyze record evidence, and consider the determinations which would be necessary to bring its measures into conformity with the recommendations and rulings of the Dispute Settlement Body … in United States – Antidumping Measures in Certain Oil Country Tubular Goods from Korea".[5]

1.33. 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, including recent developments, such as the notice on this matter published by the US Department of Commerce in November 2018. However, Korea was still concerned about the uncertainty surrounding the implementation of the DSB's recommendations and rulings. Korea strongly requested that the United States resolve the uncertainty surrounding implementation without delay.

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

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

A. Statement by the European Union

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

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

2.3. The representative of 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 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

[5] "Notice of Commencement of a Compliance Proceeding Pursuant to Section 129 of the Uruguay Round Agreements Act", 83 Fed. Reg. 59,359 (23 November 2018).

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 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 the DS316 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 this dispute about the situation of compliance.

2.6. The representative of the European Union said that the United States had mentioned that the EU had failed to provide status reports in one or more disputes in which the EU was involved. The EU disagreed with that statement. The EU had provided status reports for all disputes that involved the EU. For purposes of the present meeting, there was only one such dispute: the "EC – Approval and Marketing of Biotech Products" (DS291) dispute. The United States had referred to the "EC – Large Civil Aircraft" dispute (DS316) at the present meeting. As the EU had indicated in previous DSB meetings, there was a difference between the "EC – Large Civil Aircraft" dispute (DS316) and the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes. In the "US — Offset Act (Byrd Amendment)" (DS217, DS234) disputes, the disputes had been adjudicated and there were no further compliance proceedings pending. In any event, in relation to the "EC – Large Civil Aircraft" dispute (DS316), the United States had requested a separate Agenda item on this matter. The EU would respond to US comments regarding that dispute under that Agenda item.

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). 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 recommendations and rulings", "the issue remains unresolved for the purposes of Article 21.6 DSU". This stated EU position simply contradicted the EU's actions in this dispute. The EU had admitted that there remained a disagreement as to whether the EU had complied in this dispute. Under the EU's own view, therefore, the EU should have been providing status reports. Yet it had once again failed to do so. At the present meeting, the EU should have welcomed the opportunity that the United States had afforded it to update the DSB 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. As a result, the issue remained unresolved for purposes of Article 21.6 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, submitted 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 pursuant to Articles 4 and 21.5 of the DSU. After the consultations had failed to resolve the disagreement, the EU had asked for the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. Therefore, compliance proceedings in this dispute were still ongoing and 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 require the implementing Member to notify the status of implementation while litigation on this matter 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 further to 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 STATEMENT BY THE UNITED STATES ON THE PRECEDENTIAL VALUE OF PANEL OR APPELLATE BODY REPORTS UNDER THE WTO AGREEMENT AND DSU

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

4.2. The representative of the United States said that for more than 15 years, the United States had sounded the alarm about the Appellate Body exceeding its authority and straying from the role agreed for it by WTO Members. More recently, over the course of 2018, the United States had delivered detailed interventions here at the DSB that had comprehensively outlined specific concerns. At several DSB meetings, including at the 28 February 2018 DSB meeting, the United States had explained that the Appellate Body simply did not have the authority to deem someone who was not an Appellate Body member to be a member.6 At the 22 June 2018 DSB meeting, the United States had highlighted how the Appellate Body had repeatedly issued its reports beyond the 90-day deadline mandated by the DSU.7 At the 27 August 2018 DSB meeting, the United States had outlined how the Appellate Body had consistently engaged in review of panel fact-finding, including the meaning of a Member's municipal law, despite lacking the authority to do so.8 At the 29 October 2018 DSB meeting, the United States had explained that the Appellate Body's issuing advisory opinions by making findings that were not necessary to resolve a dispute was contrary to the DSU.9 At the present meeting, the United States would focus on the Appellate Body's misguided insistence that its reports had to serve as precedent "absent cogent reasons". Before moving to the detailed interpretive discussion under this Agenda item, the United States wished to repeat the US position expressed at the 12 December 2018 General Council meeting: the United States was ready to engage with other Members on these and other important issues related to the proper functioning of the dispute settlement system. As part of this process, it would be critical for Members to consider why the Appellate Body had felt free to depart from the clear rules Members had agreed to. Through

[6] See, e.g., US Statement at the 31 August 2017, Meeting of the DSB, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf and US Statement at the 28 February 2018, Meeting of the DSB, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf.

[7] Statement by the United States Concerning Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Meeting of the DSB on 22 June 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

[8] Statement by the United States Concerning Article 17.6 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the DSB on 27 August 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[9] Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on 29 October 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

such a discussion, Members could consider how best to ensure that the dispute settlement system adhered to WTO rules as written.

4.3. By way of introduction, the United States addressed the following issue: "WTO Members have the exclusive authority to adopt authoritative interpretations in the Ministerial Conference, and the DSU does not assign precedential value to panel or Appellate Body reports." The United States said that it had requested this Agenda item to draw Members' attention to an important systemic issue, the concern that the Appellate Body had sought to change the nature of WTO dispute settlement reports from ones that assisted in resolving a dispute, and may be considered for persuasive value in the future, to ones that carried precedential weight, as if WTO Members had agreed in the DSU to a common law-like system of precedent. This was an issue of fundamental importance to the WTO. It was not for WTO adjudicators to seek to change the nature of the WTO dispute settlement system as agreed by Members in the text of the DSU. A failure by WTO adjudicators to follow the agreed rules, including those rules that defined the adjudicators' role and authority, undermined Members' support for the WTO dispute settlement system. In short, the DSU did not assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports. Instead, it reserved such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but by positive consensus and under different procedures that promoted awareness and participation by Members.[10] The DSU explicitly noted that the dispute settlement system operated without prejudice to this interpretative authority.[11] The DSU stated that it existed to resolve disputes arising under the covered agreements, not under panel or Appellate Body interpretations of those agreements, and that a panel or the Appellate Body was to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure was inconsistent with a Member's commitments under the covered agreements. Those rules of interpretation did not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. In this, the DSU presented no change from the dispute settlement system under the "General Agreement on Tariffs and Trade" (1947) (GATT), a point which the Appellate Body had understood and expressed clearly in its early years. Remarkably, the Appellate Body had more recently suggested that a panel had to follow a prior Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation. The Appellate Body's statement was wrong under the DSU and the WTO Agreement, as the United States would explain in detail. WTO Members had not established a common law system or a system of precedent, but rather they had reserved to themselves, in the Ministerial Conference, the authority to establish precedent through an "authoritative interpretation".[12] It was not for WTO adjudicators, through their reports, which were adopted by negative consensus, to change the nature of the WTO dispute settlement system, and certainly WTO adjudicators may not and must not alter the rights and obligations of Members under the covered agreements.[13] What was more, the United States would not agree, as a matter of the design of an adjudicatory system, that assigning precedential weight (or a "cogent reasons" approach) was appropriate or positive for the WTO. The Appellate Body's assertion diminished the value of the work of panels. It inhibited the engagement of panels with the text of the covered agreements, contrary to a panel's function to make an objective assessment of the applicability of and conformity with the covered agreements. The result of diminishing the role of each panel was that errors would become locked in, and persuasive interpretations were less likely to arise from the dispute settlement system. To think otherwise would require one to consider that *the first time* the Appellate Body considered an interpretive issue, it would necessarily render not only a *correct* interpretation, but the best interpretation. The United States considered that proposition to be contrary to experience and human nature. Through its statement at the present meeting, the United States again attempted to facilitate a broader discussion on whether Members shared a common understanding of, and respect for, the rules they had written and agreed to. To advance this discussion, in its statement the United States would highlight the relevant text of the WTO Agreement and the DSU. The United States would then explain why recent Appellate Body reports did not provide a justification or legitimate basis for a panel or the Appellate Body to disregard the pertinent provisions of the WTO Agreement or the DSU that did not accord precedential value to adopted dispute settlement reports.

[10] WTO Agreement, Article IX:2.
[11] Article 3.9 of the DSU.
[12] WTO Agreement, Article IX:2.
[13] Article 3.2 and 19.2 of the DSU.

4.4. With regard to the issue that the DSU did not require, or even permit, a panel to apply as law or controlling "precedent" a prior Appellate Body interpretation, the United States said that the DSU did not assign precedential value to panel or Appellate Body reports adopted by the DSB, or interpretations contained in those reports. Instead, it reserved such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but under different procedures. The DSU explicitly noted that the dispute settlement system operated without prejudice to this interpretative authority. The DSU stated that a panel or the Appellate Body was to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure was inconsistent with a Member's commitments under the covered agreements. Those rules of interpretation did not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. A panel was not required – nor was it permitted – to ignore this task and instead simply treat prior panel or Appellate Body reports as binding "precedent".

4.5. With regard to the function of panels and the Appellate Body under the DSU, the United States said that, fundamentally, the purpose of the WTO dispute settlement system was to resolve trade disputes between Members. In Article 3.7 of the DSU, Members had agreed that: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". To achieve this focused aim, Members had established in the DSU particular processes for resolving disputes promptly, including panels, and the Appellate Body where appropriate, assisting the DSB for this purpose. When a Member had not been able to resolve a dispute with another Member through consultations, it could request the DSB to establish a panel to examine a matter. Through the standard terms of reference for panels in Article 7 of the DSU, the DSB charged the panel with two tasks: to "examine … the matter referred to the DSB" in a panel request and "to make such findings as will assist the DSB in making the recommendations" provided for in the DSU.[14] Article 19.1 of the DSU was explicit in what the recommendation was: "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". Thus, it was through such a finding of WTO-inconsistency and through such a recommendation "to bring the measure into conformity" that panels carried out the terms of reference "to make such findings as will assist the DSB in making the recommendations" provided for in the covered agreements.[15] Members had reinforced in Article 11 of the DSU that the "function of panels is to assist the DSB in discharging its responsibilities under [the DSU]". In exercising this function, Article 11 of the DSU stated that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". That objective assessment called on the panel to weigh the evidence and make factual findings based on the totality of the evidence. That objective assessment also called on the panel to interpret the relevant provisions of the covered agreements to determine how they applied to the measures at issue and whether those measures conformed with a Member's commitments.[16] Article 3.2 of the DSU further informed the function of a panel established by the DSB to assist it. Article 3.2 of the DSU explained that "Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Thus, it was "the rights and obligations of Members under th[ose] covered agreements" that were fundamental. And for purposes of understanding the "existing provisions" of the covered agreements – namely, their text – the DSU directed WTO adjudicators to apply "customary rules of interpretation of public international law", reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. Thus, a panel's task was straightforward and also limited. The Appellate Body's task under the DSU was similarly limited to assisting the DSB in discharging its functions under the DSU, albeit more so than panels. Under Article 17.6 of the DSU, an appeal was "limited to issues of law covered in the panel report and legal interpretations developed by the panel". Further, under Article 17.13 of the DSU, the Appellate Body was only authorized to "uphold, modify or reverse the legal findings and conclusions of the panel". Since a panel's function under Article 11 of the DSU was "to assist the DSB in discharging its responsibilities" under the DSU, the Appellate Body, in reviewing a panel's legal conclusion or interpretation, was thus also assisting the

[14] Article 7.1 of the DSU.

[15] Article 7.1 of the DSU.

[16] Article 11 of the DSU ("[a]ccordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...").

DSB in discharging its responsibilities to find whether the responding Member's measure was consistent with WTO rules.

4.6. With regard to the issue that the DSU did not establish a system of precedent, the United States said that as was clear from the foregoing, there was no provision in the DSU that established a system of "case-law" or "precedent", or otherwise required that a panel apply the provisions of the covered agreements consistently with the adopted findings of previous panels or the Appellate Body. Nor was there any provision that referred to "cogent reasons" or suggested that a panel had to justify legal findings not consistent with the reasoning set out in prior reports. Indeed, were a panel to decide to simply apply the reasoning in prior Appellate Body reports alone, it would fail to carry out its function, as established by the DSB, under Articles 7.1, 11, and 3.2 of the DSU to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation. In so doing, the panel would risk creating additional obligations for Members that were beyond what had been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU. To say that an Appellate Body interpretation in one dispute was precedent or controlling for later disputes would effectively convert that interpretation into an authoritative interpretation of a covered agreement. But such an approach would directly contradict the agreed text of the WTO Agreement. In Article IX:2, the WTO Agreement provided that: "[t]he Ministerial Conference and the General Council shall have the *exclusive authority to adopt interpretations* of this Agreement and of the Multilateral Trade Agreements" [italics added]. Through this provision, Members had reserved the "exclusive authority" to adopt interpretations to themselves acting in the Ministerial Conference (or General Council), not the DSB. The specification that the authority of the Ministerial Conference or General Council to adopt an authoritative interpretation was "exclusive", and the requirements in the WTO Agreement for exercising this authority, made clear that such authority was not exercised by the DSB when it adopted a panel or Appellate Body report. The WTO Agreement specified the process for adopting such an authoritative interpretation. It provided that "[i]n the case of an interpretation of a Multilateral Trade Agreement in Annex 1, [the Ministerial Conference or General Council] shall exercise their authority on the basis of a recommendation by the Council overseeing the function of that Agreement". Proceeding in such a manner would provide for transparency, participation, and consent of all Members. It would permit all Members to become aware of the issue, to discuss the issue with other Members, and to participate – first in the relevant Council and then at the Ministerial Conference or in the General Council – based on instructions from capital reflecting input from all relevant stakeholders. And, critically, in light of the relevant decision-making rules and practice in the WTO, the recommendation by the relevant Council and the subsequent adoption by the Ministerial Conference or General Council would normally proceed based on the consensus of WTO Members. This would thereby ensure that Members consent to an interpretation that could serve as precedent in future disputes. The level of transparency, participation, and consent by Members in the process of adopting an authoritative interpretation did not resemble the process for adopting reports under the DSU. One obvious difference concerned the participation by Members. Whereas the process for adopting an authoritative interpretation would involve all Members, a report adopted by the DSB might reflect varying degrees of participation by only a handful of Members.

4.7. The United States said that as discussed, Members had set out a special decision-making rule for adopting an authoritative interpretation, which was different from the negative consensus adoption that applied to reports under the DSU. Given the important implications that flowed from an authoritative interpretation, it made sense that Members would have agreed to the process set out in Article IX:2 of the WTO Agreement, which envisioned participation by the full Membership and informed consent. At the same time, it made little sense to suggest, given these provisions and the structure described, that a particular interpretation contained within a report that reflected input from only a limited subset of Members, and that had been adopted by negative consensus, could similarly be regarded as setting out an authoritative interpretation for all disputes and all Members. That Article IX:2 of the WTO Agreement reserved to WTO Members in the Ministerial Conference the critical authority to adopt authoritative interpretations had been emphasized by Members. In the discussion on "amicus procedures" promulgated by the Appellate Body, for example, numerous Members had spoken in the General Council to argue that it was for Members to exercise their exclusive authority to adopt an authoritative interpretation under Article IX:2 of the WTO Agreement should Members consider it appropriate to permit amicus submissions in disputes generally.[17] Article

[17] See Minutes of Meeting of the General Council on 22 November 2000, WT/GC/M/60.

IX:2 of the WTO Agreement was conclusive that there was but one means in the WTO to obtain an authoritative interpretation. But if this had not been enough, the DSU also expressly confirmed that panel and Appellate Body reports did not set out authoritative interpretations. Article 3.9 of the DSU stated that: "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement". Thus, WTO Members had again expressed that the adoption by negative consensus of an interpretation contained in a panel or Appellate Body report did not make that interpretation authoritative, which could only be adopted by the Ministerial Conference (or General Council) acting according to different decision-making rules. Put differently, if the DSB did not have the authority under the DSU to adopt an authoritative interpretation, then a panel or the Appellate Body assisting the DSB did not have this authority either. This did not mean that the United States considered a prior panel or Appellate Body interpretation to be without any value. For example, to the extent that a panel found prior Appellate Body or panel reasoning to be persuasive, a panel could refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning would likely add to the persuasiveness of the panel's own analysis, whether or not the panel agreed with the prior reasoning. But considering an interpretation in a prior Appellate Body report was very different from a statement that the interpretation was controlling or "precedent" in a later dispute.

4.8. With regard to the issue that panel reports were not treated as precedent under the GATT dispute settlement rules and procedures, the United States noted that not treating an interpretation in an adopted report as controlling or a precedent was consistent with the treatment of reports under the GATT dispute settlement rules and procedures. There had been no question that GATT dispute settlement had not treated reports as binding precedent. For example, a Report by the Chairman of the GATT Negotiating Group on Dispute Settlement had noted that: "[s]everal delegations express the view than an appeals procedure might lead to the dilution of the importance of panels and, unless the appellate decisions were submitted for adoption by the Council, of the authority of the CONTRACTING PARTIES". But the Chairman had gone on to record that: "[o]ther delegations note that despite the creation of an appellate body, the CONTRACTING PARTIES would retain their authority to interpret the General Agreement pursuant to Article XXV [of the GATT]".[18] A draft text on dispute settlement prepared by the GATT Secretariat at the request of the Negotiating Group had recorded the same view: "[t]he CONTRACTING PARTIES retain their authority to interpret the General Agreement pursuant to Article XXV".[19] Provisions of the GATT dispute settlement rules and procedures – provisions nearly identical to analogous provisions of the DSU – confirmed that GATT panels had functioned to assist the Contracting Parties in making the recommendations or in giving the rulings provided for in the GATT – not to provide authoritative interpretations. Paragraph F(b)(1) of the Montreal Rules had provided that GATT panels would have standard terms of reference.[20] Just like Article 7.1 of the DSU, this text had made explicit that GATT panels had functioned to assist the Contracting Parties in making the recommendations to bring a measure found inconsistent with the GATT into conformity with those rules. The terms of reference of GATT panels, like WTO panels today, had not empowered them to make interpretations that would be considered precedent for future panels. Paragraph A1 of the Montreal Rules[21] had included language identical in relevant part to the language in Article 3.2 of the DSU on the WTO dispute settlement system preserving the rights and obligations of Members and serving to clarify the existing provisions of the covered agreements. The use of "clarify" in this text had not authorized GATT panels to provide interpretations that would constitute precedent. Rather, it had simply been a statement of what Contracting Parties had agreed flowed from the GATT dispute settlement system when it operated in accordance with the agreed provisions. The DSU had also carried forward the GATT's

[18] Negotiating Group on Dispute Settlement: Report by the Chairman, MTN.GNG/NG13/W/43, para. 7 (18 July 1990).

[19] Negotiating Group on Dispute Settlement: Draft Text on Dispute Settlement, MTN.GNG/NG13/W/45 (General Provisions, para. 5) (21 September 1990).

[20] "Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures" ("Montreal Rules"), para. F(b)(1) ("To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) in document L/... and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.").

[21] Montreal Rules, para. A1 ("Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system.").

understanding that the "aim of the CONTRACTING PARTIES [in dispute settlement] has always been to secure a positive solution to the dispute"[22] – not to render authoritative interpretations. The approach to dispute settlement under the GATT had never been understood as giving adjudicators the authority to make interpretations that would constitute precedent for the Contracting Parties and future adjudicators. That authority had been understood to reside in the CONTRACTING PARTIES acting under Article XXV. The GATT dispute settlement language carried forward into the DSU did not provide panels and the Appellate Body such authority. And as noted previously, Members had agreed to provisions in both the WTO Agreement (in Article IX:2) and the DSU (in Article 3.9) that had made explicit what had been understood and practiced in the GATT.

4.9. With regard to the issue that the Appellate Body's own reports did not support a proposed "cogent reasons" approach, the United States said that with increasing frequency, the Appellate Body had summarily suggested that, absent cogent reasons, an adjudicatory body should "resolve the same legal question in the same way in a subsequent case".[23] In doing so, the Appellate Body would seem to consider the interpretation found in Appellate Body reports to be authoritative. Yet, in claiming this authority, the Appellate Body had not grappled with the relevant legal text, discussed above, or even with the Appellate Body's own prior reports. As the United States would discuss, these reports did not provide a basis for a panel to disregard pertinent provisions of a panel's function under the DSU. The Appellate Body, in its report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), properly understood the value the DSU assigns to prior reports. However, several years later, and without any change in the relevant text of the DSU or the WTO Agreement, the Appellate Body asserted a very different approach in the "US – Stainless Steel (Mexico)" dispute (DS344), without explaining the basis for that changed approach. The statements in that report, in addition to constituting *obiter dicta*, are fundamentally flawed and provide no support for a "cogent reasons" approach. Ironically, if the Appellate Body actually believed that any prior interpretation in an adopted report must be followed absent cogent reasons, it would not have, without any explanation, departed from its understanding in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11).

4.10. With regard to the issue that the Appellate Body report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) had explicitly recognized that adopted panel and Appellate Body reports did not create binding precedent, the United States said that in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), the Appellate Body had explicitly found that adoption of reports under the WTO did not create "precedent" or assign a special status for interpretations reached in reports. Rather, the Appellate Body had noted that that status had been reserved for authoritative interpretations reached by the Ministerial Conference. The Appellate Body's report in that appeal directly contradicted the Appellate Body's later statements concerning "cogent reasons". In the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), the Appellate Body had been confronted with a question concerning the status of panel reports adopted by the GATT Contracting Parties and the WTO DSB.[24] Looking first to the GATT, the Appellate Body had expressed the view that the GATT Contracting Parties, in deciding to adopt a panel report, had not intended that their decision would constitute a definitive interpretation of the relevant provisions of the GATT.[25] It had then added the following: "[n]or do we believe that this is contemplated under GATT 1994".[26] The Appellate Body had stated that the "specific cause for this conclusion" was Article IX:2 of the WTO Agreement. The Appellate Body had stated the following with regard to this provision: "[t]he fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or inadvertence elsewhere".[27] The United States agreed. It was remarkable that the Appellate Body had later contradicted this statement in the "US – Stainless Steel (Mexico)" dispute (DS344), without explaining any basis for so doing, such as that it had considered that it had wrongly decided the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11). In the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), the Appellate Body had also explained that the decisions to adopt panel reports under Article XXIII of the GATT had been different from joint action of the Contracting

[22] Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, L/4907, para. 4.
[23] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 160.
[24] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 12.
[25] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 13.
[26] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 13.
[27] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 13.

Parties under Article XXV of the GATT. The Appellate Body had considered that under the WTO Agreement the nature of adopted panel reports continued to differ from interpretations made under the WTO Agreement by the Ministerial Conference or the General Council.[28] According to the Appellate Body, "[t]his is clear from a reading of Article 3.9 of the DSU". The United States agreed, as Article 3.9 of the DSU confirmed that panel and Appellate Body reports did not set out authoritative interpretations. Thus, the Appellate Body in an early report shortly after conclusion of the Uruguay Round had made clear that the DSB could not supplant the "exclusive authority" of the Ministerial Conference and the General Council to adopt, by positive consensus,[29] an "authoritative interpretation" of a covered agreement, as explicitly established in Article 3.9 of the DSU[30] and WTO Agreement Article IX:2.[31] The Appellate Body Report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) had also made clear that adopted panel reports were often considered by subsequent panels, and could be taken into account where they are relevant, but "they are not binding".[32] As stated earlier, the United States considered that a panel could take into account the reasoning in prior reports and, to the extent a panel finds the reasoning persuasive, rely on that reasoning in conducting its own objective assessment of the matter. To be clear, the United States would encourage this and expected prior reports could have valuable insight. This was why parties to a dispute often cited to prior reports for their persuasive value. But this was very different than saying panels were bound to follow prior Appellate Body reports, or that they could rely on those reports instead of conducting their own objective assessment.

4.11. With regard to the issue that the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344) did not support the "cogent reasons" approach, the United States said that the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344) contained the Appellate Body's first effort to introduce the concept of "cogent reasons". The Appellate Body's articulation of the "cogent reasons" approach had comprised several disparate statements; key among them was the contention that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[33] The United States explained how this report did not support a "cogent reasons" approach for several reasons. The Appellate Body's statement was, by definition, an "advisory opinion" or *obiter dicta* that, even under the Appellate Body's logic, could not serve as a precedent. More importantly, the "cogent reasons" approach was fundamentally flawed and at odds with the text of the DSU and WTO Agreement.

4.12. With regard to the issue that the Appellate Body's statements concerning cogent reasons in the "US – Stainless Steel (Mexico)" dispute (DS344) were *obiter dicta*, the United States said that as an initial matter, and even setting aside for a moment the fundamental flaws under the DSU with the "cogent reasons" approach, the United States would see no basis to cite and follow Appellate Body statements that had appeared in the "US – Stainless Steel (Mexico)" dispute (DS344). In the "US – Stainless Steel (Mexico)" dispute (DS344), the discussion of "cogent reasons" appeared in the context of Mexico's appeal under Article 11 of the DSU.[34] Mexico had argued on appeal that the Panel had acted inconsistently with Article 11 of the DSU by failing to follow what it had considered to be "well-established Appellate Body jurisprudence".[35] The Appellate Body had *not*, however, made a finding on Mexico's appeal under Article 11 of the DSU. Rather, it had exercised judicial economy on Mexico's claim.[36] Thus, there had been *no* "legal finding" on Mexico's claim of error, and the Appellate Body's discussion was *not* reasoning "resolv[ing a] legal question". The "cogent reasons" approach (as explained by the Appellate Body) would thus *not even apply* to the Appellate Body's own statement on "cogent reasons". That the Appellate Body had made no legal finding on Mexico's appeal was made explicit by the Appellate Body's conclusion at paragraph 162 of its report, where it had stated the following: "[s]ince we have [elsewhere in the report] corrected the Panel's

[28] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), pp. 13-14.

[29] WTO Agreement, Article IX:1.

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

[31] WTO Agreement, Article IX:2 ("[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

[32] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14.

[33] "US – Stainless Steel (Mexico)" (DS344), para. 160

[34] "US – Stainless Steel (Mexico)" (DS344), para. 154.

[35] "US – Stainless Steel (Mexico)" (DS344), para. 154.

[36] "US – Stainless Steel (Mexico)" (DS344), para. 162.

erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU".[37] Therefore, the entire discussion of "cogent reasons" and any reasoning leading up to the conclusion *not* to make a finding on Mexico's appeal was, by definition, an "advisory opinion" or *obiter dicta*. As the United States had explained in its statement made at the 29 October 2018 DSB meeting, "advisory opinions" were commonly defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation".[38] *Obiter dictum* had been defined as "an opinion not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect".[39] Given that the Appellate Body had expressly declined to make any finding on Mexico's Article 11 appeal, the preceding discussion – including on "cogent reasons" – was, by definition, merely advisory, or dicta. In this regard, the United States noted that the Appellate Body itself elsewhere confirmed that, on its approach, statements that were not necessary to "resolve [a] legal question" would not be subject to its approach. At paragraph 158 of its report, the Appellate Body itself stated the following: "[i]t is well settled that the Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB".[40] The implication of this statement, particularly the second sentence, was that the Appellate Body in this report considered panels could not disregard the "ratio decidendi" contained in previous reports adopted by the DSB. Given that the Appellate Body had not made findings on Mexico's claim under Article 11 of the DSU, the Appellate Body's "cogent reasons" analysis had not formed and could not form part of the "ratio decidendi" of the Report in the "US – Stainless Steel (Mexico)" dispute (DS344). Therefore, even under the Appellate Body's own approach, its discussion of "cogent reasons" was "not binding" on a subsequent panel, and a panel was "free to disregard" it.

4.13. The United States said that more fundamentally, however, the Appellate Body's statement concerning "cogent reasons" in the "US – Stainless Steel (Mexico)" dispute (DS344) were profoundly flawed in several respects. These included: (i) a failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system; (ii) an erroneous interpretation of Article 3.2 of the DSU that did not reflect the text of that provision; (iii) a reliance on reports that did not support a "cogent reasons" approach; (iv) a misunderstanding (or misstatement) of why parties cited prior reports; (v) inappropriate and incomplete analogies to other international adjudicative fora; and (vi) incorrect assumptions concerning the existence of a hierarchical structure that did not reflect the limited task assigned to the Appellate Body in the DSU. The United States would discuss each of these in turn.

4.14. The United States said that a first error concerned the Appellate Body's failure to properly appreciate the functions of panels and the Appellate Body within the WTO dispute settlement system, including Article 11 of the DSU. The Appellate Body's statements concerning "cogent reasons" reflected a failure to properly appreciate the tasks assigned to panels and the Appellate Body by the relevant provisions of the DSU. Although the Appellate Body purported to "begin [its] consideration with the text of Article 11 of the DSU", the Appellate Body subsequently ignored the limitations of this text. As discussed, Article 11 of the DSU stipulated that: "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. In exercising this function, Article 11 of the DSU stated that a panel was to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". An objective assessment called for the panel to weigh the evidence and make factual findings based on the totality of the evidence. An objective assessment also called for a panel to interpret the relevant provisions of the covered agreements to determine how they applied to the measures at issue and whether those measures

[37] "US – Stainless Steel (Mexico)" (DS344), para. 162.

[38] See, e.g., Oxford Dictionaries, "advisory opinion" (https://en.oxforddictionaries.com/definition/advisory_opinion); Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on 29 October 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[39] Wharton's Law Lexicon (14th Ed. 1993).

[40] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 158.

conformed with a Member's commitments. As the United States had noted previously, nowhere in this Article was a panel's objective assessment linked to prior Appellate Body interpretations. Nor did the context of Article 3.2 of the DSU (which the United States would discuss next) or the structure of WTO Agreement Article IX:2 or Article 3.9 of the DSU, support reading into Article 11 of the DSU a requirement for panels to establish "cogent reasons" to depart from findings by the Appellate Body in a separate dispute. The Appellate Body made no real attempt to ground such a requirement in the text of Article 11 of the DSU.

4.15. The United States said that a second error concerned the Appellate Body's erroneous interpretation of Article 3.2 of the DSU. The Appellate Body relied on an interpretation of Article 3.2 of the DSU that failed to reflect the plain reading of that provision. At paragraph 160 of its report, the Appellate Body stated that: "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated by Article 3.2 of the DSU, *implies that*, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[41] There were a number of evident flaws in this assertion. The statement that Article 3.2 of the DSU "implies" an approach revealed the weakness of the Appellate Body's argument. The Appellate Body through this language conceded that Article 3.2 of the DSU did not require or even set out a "cogent reasons" approach. Also, the statement that Article 3.2 of the DSU implied a "cogent reasons" approach to past Appellate Body interpretations plainly contradicted the Appellate Body's own understanding of the DSU in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11). In that report, after examining Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, the Appellate Body had correctly concluded that "[t]he fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does *not exist by implication* or inadvertence elsewhere".[42] Apparently, what the DSU "implies" could and had changed for the Appellate Body. Moreover, the Appellate Body statement that Article 3.2 of the DSU "implie[d]" a "cogent reasons" approach also rested on a misunderstanding of the text of Article 3.2 of the DSU. Article 3.2 of the DSU provided in relevant part: "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The "it" in the second sentence of Article 3.2 of the DSU referred to the subject of the first sentence, "the dispute settlement system of the WTO". In other words, Members had recognized that the dispute settlement system of the WTO – as set out in the DSU – served to preserve the rights and obligations of Members under the covered agreements, and the dispute settlement system of the WTO – as set out in the DSU – served to clarify the existing provisions of those agreements. This text of Article 3.2 of the DSU was neither a directive to panels or the Appellate Body nor an authorization for them. There was no "shall" or "may" in this text. Instead, it was a statement of what Members had agreed flowed from the system when it operated in accordance with the provisions agreed by Members in the DSU. Moreover, the text of Article 3.2 of the DSU did not contain any mention of precedent or cogent reasons, and immediate context in Article 3.9 of the DSU (and WTO Agreement Article IX:2) reinforced that these concepts could not be inserted through implication in Article 3.2 of the DSU. The United States also noted that the Appellate Body did not appear to take seriously its own statement on "cogent reasons". Aside from the Appellate Body's own failure to resolve the issue of the value of prior adopted reports the same way it had resolved that question in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), the Appellate Body statement confused the "adjudicatory body" at issue. The relevant passage read: "Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case". This statement described "*an* adjudicatory body" – for example, the Appellate Body. But it did not address a different adjudicatory body, such as a panel. Thus, whether or not the Appellate Body statement could be correct as applied to "an adjudicatory body" said nothing about the approach of a different "adjudicatory body", like a panel. On the other hand, if the Appellate Body had considered the DSB to be "an adjudicatory body", the Appellate Body's logic would suggest that, once a panel had given a legal interpretation adopted by the DSB, then the *Appellate Body* would need to follow that adopted *panel* interpretation "absent cogent reasons". But the Appellate Body had *never* suggested it would accept that outcome. The Appellate Body report thus did not address or explain the discrepancy in using the phrase "an adjudicatory body" to imply something about a panel's relationship to a prior

[41] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 160.
[42] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 13. (Emphasis added.)

Appellate Body interpretation. For all these reasons, the Appellate Body's reasoning on Article 3.2 of the DSU did not support a "cogent reasons" approach to dispute settlement.

4.16. The United States said that a third error concerned the Appellate Body's reliance on prior Appellate Body reports that did not support a "cogent reasons" approach. The Appellate Body, in its discussion of cogent reasons, also cited to its reports in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), in the "US – Shrimp" dispute (Article 21.5 of the DSU – Malaysia) (DS58), and in the "US – Oil Country Tubular Goods Sunset Reviews" dispute (DS268). However, these reports provided no basis for a "cogent reasons" approach. The United States said that the Appellate Body report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), in particular, was contrary to such an approach. In fact, the Appellate Body provided no "cogent reasons" for departing from the reasoning in that prior report. This obvious failure to follow its own approach supposedly based on a systemic understanding of the DSU rather suggested the "cogent reasons" approach was directed towards an outcome of ensuring panels follow Appellate Body statements, regardless of the lack of basis in the DSU for that approach. Rather than focus on the thrust of its decision in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11), the Appellate Body drew attention to its statement in that report that adopted panel reports were "an important part of the GATT acquis".[43] The United States had heard some Members quote this statement, without any explanation, as if its mere recitation provided the answer to the question of precedent. But what did it actually mean to say a report formed part of the GATT acquis? Very little in isolation. Given the way it had been misunderstood and misused, it was important to recall the context in which it had been made, which made clear it contradicted, rather than supported, the assertion for which it was often cited – and for which the Appellate Body appeared to cite it in the "US – Stainless Steel (Mexico)" dispute (DS344) (AB). The statement appeared in a paragraph of the Report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) where the Appellate Body was discussing the coming into force of the WTO Agreement and whether this had changed the character and legal status of adopted reports. The Appellate Body began this paragraph by stating that Article XVI:1 of the WTO Agreement had brought forward the experience and legal history under the GATT into the WTO.[44] The Appellate Body had considered this to "affirm the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO".[45] The Appellate Body had then stated that "[a]dopted panel reports are an important part of the GATT *acquis*".[46] Read in context with the preceding statements, this reflected the view that the reports adopted under the GATT were an important part of the experience acquired by the Contracting Parties to the GATT. It said nothing about the precedential weight, if any, to be accorded to such reports. Continuing on, however, the Appellate Body made the statements quoted in the "US – Stainless Steel (Mexico)" dispute (DS344), and then immediately stated: "[h]owever, *they are not binding*, except with respect to resolving the particular dispute between the parties to that dispute. In short, *their character and their legal status have not been changed* by the coming into force of the WTO Agreement".[47] It was unfortunate, and perhaps telling, that the Appellate Body in the "US – Stainless Steel (Mexico)" dispute (DS344) omitted this key text from its selective quotation of the Appellate Body Report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11). This full text made abundantly clear that the Appellate Body in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) had considered that adopted reports, notwithstanding their status as part of the "GATT acquis", were not binding on future panels. To suggest now that adopted reports were precedent precisely because they were part of the "GATT acquis" was to turn the original statement in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) on its head.

4.17. The United States said that the second report cited by the Appellate Body – "US – Shrimp" (Article 21.5 of the DSU – Malaysia) (DS58) – similarly did not support a "cogent reasons" approach. The Appellate Body cited to paragraph 109 of that Report, which followed a quotation from the Report in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) concerning the status of adopted panel reports. Paragraph 109 of the report in the "US – Shrimp" dispute (Article 21.5 of the DSU – Malaysia) (DS58) provided in part: "[t]his reasoning applies to adopted Appellate Body

[43] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 158 (citing "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14).
[44] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14.
[45] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14.
[46] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14.
[47] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11) (AB), p. 14. (Emphasis added.)

Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool *for its own reasoning*".[48] With regard to the first sentence of this paragraph, the United States would agree that the Appellate Body's reasoning in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) concerning the status of adopted panel reports also "applies to adopted Appellate Body Reports as well".[49] In other words, a panel could rely on them, but they were not binding and should not be understood as supplanting the "exclusive authority" of the Ministerial Conference (or General Council) to provide authoritative interpretations of the covered agreements. In the second and third sentences of the paragraph, the Appellate Body pointed out that the panel in that dispute had not erred by "taking into account" the reasoning of an adopted Appellate Body report. Here too, the United States would agree for the reasons explained. Moreover, it was critical to note that the Appellate Body had explained the Panel had been correct in relying on prior findings "as a tool *for its own reasoning*". In other words, the Panel had not used those prior findings as a substitute for its own reasoning or in place of conducting its own objective assessment, and the Appellate Body had not suggested it would be appropriate or permissible under the DSU for the Panel to do so. Thus, rather than support the Appellate Body's statement concerning "cogent reasons", this report too contradicted it.

4.18. The third report cited by the Appellate Body in the "US – Stainless Steel (Mexico)" dispute (DS344) was no more helpful. In the "US – Oil Country Tubular Goods Sunset Reviews" dispute (DS268), the Appellate Body had found that it had been appropriate for the Panel to rely on a conclusion made by the Appellate Body in a prior dispute in determining whether a particular policy bulletin was a measure.[50] In particular, the Appellate Body had stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[51] This assertion, which was not explained or supported in the text of the Appellate Body report, would seem to itself contradict earlier statements by the Appellate Body, including in the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11). There was a significant difference between stating that one would expect panels to reach similar conclusions where the issues were similar (i.e., conducting their own objective examination, they may reach a similar outcome), on the one hand, and saying that one would expect a panel to simply follow a prior decision without conducting an objective examination of its own, on the other. There was no support in the DSU for the latter approach. This statement by the Appellate Body was also problematic in its use of the phrase "*especially* where the issues are the same". The report thus implied that following a prior conclusion "is not only appropriate" but was also "what would be expected" from a panel even "where the issues are [*not*] the same". There was no explanation given for this implication of the statement in the report. Further, the Appellate Body report's use of the passive voice – "is what *would be expected* from panels" – avoided expressing *who* expected this from a panel. It was understood that the Appellate Body expected this as the author of the passage. But this Appellate Body expectation was irrelevant. What mattered in the dispute settlement system was the expectations of *WTO Members* as specifically expressed through their agreement in the DSU. The Appellate Body cited to no language in the DSU that suggested that WTO Members expected panels to disregard the text and structure of the DSU, as elaborated earlier in this statement. Thus, the United States considered that none of the reports cited provided any legal basis for the Appellate Body to depart from the text of the WTO Agreement and the DSU in adopting a "cogent reasons" approach.

4.19. The United States said that a fourth error concerned the Appellate Body's misunderstanding (or misstatement) on why parties cited to prior reports. In its discussion of cogent reasons, the Appellate Body also misunderstood or misrepresented why parties often cited to adopted panel and Appellate Body reports in dispute settlement proceedings.[52] There was nothing surprising about the fact that parties in WTO disputes cited to reports to the extent they might consider them persuasive. As mentioned, the United States would expect this, and expected panels to do the same. But there was no support for the proposition that parties cited to reports because they considered them somehow binding on or precedential for subsequent panels and the Appellate Body, which was what the Appellate Body appeared to imply. Here again, the Appellate Body ignored that there was a

[48] "US – Shrimp" (Article 21.5 of the DSU – Malaysia) (DS58) (AB), para. 109. (Emphasis added.)
[49] "US – Shrimp" (Article 21.5 of the DSU – Malaysia) (DS58) (AB), para. 109.
[50] "US – Oil Country Tubular Goods Sunset Reviews" (DS268) (AB), para. 188.
[51] "US – Oil Country Tubular Goods Sunset Reviews" (DS268) (AB), para. 188.
[52] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 158.

significant difference between citing a report for its persuasive value, on the one hand, and arguing that the report was binding or precedential for future panels, on the other. The Appellate Body also asserted that "when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports".[53] The report cited no evidence for this proposition. To the extent the Appellate Body statement had intended to refer to compliance actions taken by Members, those Members would be looking to the recommendations of the DSB in a particular dispute. More generally, the United States would expect Members to look first to the text of the covered agreements in enacting or modifying their national measures. And Members were entitled to act according to the text of those agreements embodying their commitments, as understood through customary rules of interpretation, rather than according to an interpretation rendered in a dispute settlement report. This was particularly so given the probability that some interpretations might be in error, and panel or Appellate Body findings could not add to or diminish the rights or obligations of Members under the covered agreements.

4.20. The United States said that a fifth error concerned the Appellate Body's inappropriate and incomplete analogies to other international adjudicative fora. To support its statement that Article 3.2 of the DSU implied that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case", the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344) included a lengthy footnote that attempted to draw significance from how consistency of disputes could be regarded in other international fora for dispute settlement. This attempt was incomplete, at best, and misguided. In footnote 313 of its report, the Appellate Body had cited tribunal decisions from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Tribunal, apparently as support for why precedent should be adopted in WTO dispute settlement. These examples, however, were of no relevance. First, the Appellate Body provided no explanation as to whether or how the relevant rules and structures of these fora were relevant for understanding the WTO dispute settlement system. The United States noted, for example, that the Tribunal for the former Yugoslavia was, just that, a tribunal, and therefore structured differently from the DSB administering the DSU and making recommendations based on panel and Appellate Body reports. Thus, the grounds for treating prior tribunal interpretations as precedent that might apply to an entity like the Tribunal were not applicable to the DSB.[54] In stating that the Tribunal should follow its prior legal interpretations absent cogent reasons for departing from that interpretation, the Tribunal had reasoned that the Security Council envisaged a tribunal comprising three trial chambers and one appeals chamber.[55] In other words, while the Appeals Chamber had a particular function, the different "Chambers" were all part of one "Tribunal", which should resolve a legal question in one way. As explained, this structure did not exist in the DSU; there was no one tribunal with trial and appellate chambers. The Appellate Body had also cited to a decision by the ICSID Arbitration Tribunal, in which the Tribunal had stated that "[i]t believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases".[56] But the Appellate Body report provided no explanation for the basis on which the ICSID Tribunal considered "it has a duty" to follow prior interpretations. The Tribunal had also gone on to state that "[i]t also believes that, *subject to the specifics of a given treaty* and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law". Whatever the reasons for that belief, this statement revealed that this Tribunal would consider that the "specifics of a given treaty" should prevail for its interpretive approach and outcome. As the United States had shown, the DSU did not support an approach in which prior Appellate Body interpretations were treated as binding, or precedent. To the extent the Appellate Body had intended to suggest "precedent" had been reflective of customary international law, the United States would note that the statement of two tribunals would not establish the existence of such a rule.[57] Moreover, under

[53] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 160.

[54] The ICTY is the first international war crimes tribunal since Nuremberg. It was established by the UN Security Council as a result of a 1993 resolution finding the existence of widespread humanitarian law violations in the former Yugoslavia and directing the creation of the Tribunal as a means to contribute to the restoration of peace and stability in the region.

[55] See "Prosecutor v. Aleksovski", Case No. IT-95-14/1-A, at para. 113 (24 March 2000).

[56] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 160 n. 313 (citing the Decision of 21 March 2007 of the ICSID (International Centre for Settlement of Investment Disputes) Arbitration Tribunal, Case No. ARB/05/07, "Saipem S.p.A. v. The People's Republic of Bangladesh", ICSID IIC 280 (2007), p. 20, para. 67).

[57] A rule of customary law is understood to comprise widespread and consistent State practice and "opinio juris" (or "a belief in legal obligation"). See, e.g., North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44.

international law, treaty text would prevail over customary law as between parties to the treaty. Customary law could not override clear treaty text as to rights and obligations between parties to the treaty. The view that a "cogent reasons" approach was justified based on customary international law would conflict with the text of Articles 3.2, 3.9, 11 and other relevant provisions of the DSU and the WTO Agreement. The approach of the DSU – that prior reports were not binding or precedent – would therefore prevail.

4.21. Finally, the United States said that a sixth error concerned the Appellate Body's incorrect assumptions concerning the existence of a hierarchical structure that did not reflect the limited task assigned to the Appellate Body in the DSU. The Appellate Body's discussion of "cogent reasons" was based on an asserted "hierarchical structure contemplated in the DSU" that failed to accurately reflect the important, but limited, role assigned to the Appellate Body, and was divorced from the text of the DSU. At paragraph 161 of its report in the "US – Stainless Steel (Mexico)" dispute (DS344), the Appellate Body suggested that it had been created by Members and "vested with authority" pursuant to Articles 17.6 and 17.13 of the DSU so as to promote security and predictability in the dispute settlement system.[58] And so, according to the Appellate Body, a panel's "failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predicable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated by the DSU".[59] Articles 17.6 and 17.13 of the DSU did not "vest" the Appellate Body with broad authority to develop "a coherent and predictable body of jurisprudence". The latter phrase did not appear in those provisions – nor was there any hint of them. In fact, those articles were *limitations* on the parameters of appellate review and on the permissible actions of the Appellate Body. For example, Article 17.6 of the DSU provided that: "[a]n appeal shall be *limited* to issues of law covered in the panel report and legal interpretations".[60] And Article 17.13 of the DSU limited the Appellate Body's functions by saying it "may uphold, modify or reverse the legal findings and conclusions of the panel". Of course, this list of authorized actions did not include issuing authoritative interpretations that had to be followed by subsequent panels. Given these limitations, it was not consistent with these texts to read them to provide the Appellate Body with the authority to render an interpretation in one dispute that would relieve a panel of the responsibility it had toward the DSB to conduct an objective assessment of the applicability of a covered agreement, using customary rules of interpretation, in a separate dispute. Rather, as discussed, authoritative interpretations of the covered agreements were reserved exclusively to WTO Members acting in the Ministerial Conference (or General Council). The notion of a "hierarchical structure" in the dispute settlement system also failed to acknowledge the role of the DSB. It was the DSB that established a panel and charged it with making those findings necessary for the DSB to provide a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.[61] It was the DSB that panels and the Appellate Body assisted by carrying out their functions as set out in the DSU. As noted above, panel findings adopted by the DSB were of equal legal status as findings by the Appellate Body that were adopted by the DSB. The Appellate Body had never suggested that it would accept that it was bound to follow adopted panel findings as a consequence of the "hierarchical structure" of the DSU – likely because this would restrict its influence in the dispute settlement system. But the United States viewed the notion of a hierarchical structure in the DSU to be misguided, in any event. DSB recommendations resulting from panel or Appellate Body findings, or arbitration awards under Article 25 of the DSU, were of equal value and directed at resolving a dispute between Members. Should a Member wish to obtain an authoritative interpretation that would serve as precedent in a future dispute, it had to have recourse to the different process set out in Article IX:2 of the WTO Agreement for the hierarchically superior body, the Ministerial Conference.

4.22. With regard to Members' reactions to the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344), the United States said that when the report in the "US – Stainless Steel (Mexico)" dispute (DS344) had been considered by the DSB, the United States had expressed that

[58] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 161.
[59] "US – Stainless Steel (Mexico)" (DS344) (AB), para. 161.
[60] Article 17.6 of the DSU (emphasis added).
[61] Article 7.1 of the DSU ("Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).").

its "systemic concern was of … enormous institutional significance for the dispute settlement system". The United States had elaborated its concerns that the approach of the Appellate Body would transform the WTO dispute settlement system, contrary to the structure set out in the DSU and WTO Agreement.[62] Some Members, while agreeing with the Appellate Body's substantive findings in that dispute, had expressed concern that the Appellate Body's statements regarding "cogent reasons" not be understood as "crossing the line" of suggesting prior reports were binding on panels. For example, the minutes of the relevant DSB meeting reflected the following statement by Chile: "[i]n keeping with Chile's line of thought, the Appellate Body had confirmed that its reports created legitimate expectations among Members and should, therefore, be taken into consideration, although they were not – he reiterated not – binding. Chile thanked the Appellate Body for its confirmation in this regard and for refraining from crossing the 'obligation' line … By crossing the line in stating that previous reports would provide a mandatory framework in subsequent disputes, according to the wish of some Members, the Panel would have not only prejudged future disputes and even tied the hands of future panels, but it would have also created rights and obligations when the Membership alone could do so. That being said, certain phrases in the Report gave Chile some cause for concern. According to paragraph 160, '[e]nsuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implied that, absent cogent reasons, an adjudicatory body would resolve the same legal question in the same way as had been done in previous cases.' Paragraph 162 likewise stated as follows: '[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.' Such phrases could lead to unfortunate conclusions regarding the nature of the dispute settlement system, and Chile hoped that this would not become a trend likely to constrain panels in future disputes, and above all, that this would not alter the nature of the rights and obligations negotiated by the Membership".[63]

4.23. The United States said that in a similar vein, Colombia had welcomed the Appellate Body's substantive findings but had expressed its disagreement with the "cogent reasons" approach on systemic grounds: "Colombia wished to express its views on the systemic issue as to whether … panels were required to follow the Appellate Body's findings. In this connection, Colombia agreed with the reasoning of the Panel that there was no provision in the DSU that required WTO panels to follow the findings of previous panels or of the Appellate Body on the same issues brought before them. In fact, a panel or Appellate Body decision bound only the parties to the relevant dispute [and] the Ministerial Conference and the General Council alone were empowered to adopt authoritative interpretations".[64] The complaining party in the "US – Stainless Steel (Mexico)" dispute (DS344), while minimizing the concerns being raised, had not endorsed the "cogent reasons" approach (that it had not even argued for), but had merely stated that a panel "must pay attention to" prior Appellate Body interpretations.[65] Unfortunately, the Member that had held an expectation at the time of the adoption of the report in the "US – Stainless Steel (Mexico)" dispute (DS344) that the Appellate Body would not "cross the line" of suggesting an adopted Appellate Body report was binding misunderstood the meaning of that report. Although the Appellate Body had avoided using the word "binding", the meaning of its *dicta* and phrases such as "the panel's *failure to follow*" had been clear – Appellate Body reports should be treated as precedent. But neither wishing Appellate Body reports to have a different status, nor repeating the Appellate Body's *dicta*, made the analysis and statement of the Appellate Body any less erroneous. It was simply inconsistent with the text and structure of the DSU and the WTO Agreement for a panel to treat prior interpretations in Appellate Body reports as binding, or precedent.

4.24. With regard to the issue that certain panels had followed a "cogent reasons" approach without considering the basis for such an approach, the United States would note with concern that, in several recent panel reports, certain panels had simply applied the Appellate Body's dicta on "cogent reasons" as the Appellate Body had intended. In those reports, the panels had failed to engage with

[62] Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), paras. 50-55.

[63] Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), paras. 67-68 (statement of Argentina).

[64] Minutes of the Meeting of the DSB on May 20, 2008 (WT/DSB/M/250), para. 72 (statement of Colombia).

[65] Minutes of the Meeting of the DSB on 20 May 2008 (WT/DSB/M/250), para. 73 (statement of Mexico) ("With regard to certain comments made by some delegations at the present meeting, Mexico pointed out that the decision by the Appellate Body should not be quoted out of its context. Panels must pay attention to the Appellate Body's findings particularly when dealing with the same legal questions.").

the legal text of the DSU and WTO Agreement that the United States had discussed in this statement.[66] This raised grave concerns for the dispute settlement system as it suggested that serious, systemic errors were increasingly being made without any consideration of the actual text that WTO Members had agreed to. If these errors were being made by panels at the urging of a party to the dispute, then certain WTO Members bore responsibility for promoting this breaking of WTO rules. These panel errors also reinforced the danger to the WTO and the dispute settlement system from the issuance of advisory opinions by the Appellate Body – an issue the United States had discussed at length at previous DSB meetings[67] – as this "cogent reasons" approach contradicted the clear text of the DSU and the WTO Agreement.

4.25. In conclusion, with regard to the issue that the Appellate Body's "cogent reasons" approach usurped authority expressly reserved to Members, the United States recalled the role of WTO Members, on the one hand, and WTO adjudicators, on the other. The text of the WTO Agreement and the DSU made clear that only Members, acting in the Ministerial Conference or the General Council – and not the DSB – had the right to issue authoritative interpretations. The role of WTO adjudicators was different. The Appellate Body and panels were only to issue those findings necessary to resolve a dispute, and specifically, findings that would assist the DSB in making a recommendation to bring a measure into conformity with a WTO agreement. Those findings were to be based on the text of the covered agreements, not the text of prior appellate reports. While DSB recommendations resulting from reports "cannot add to or diminish the rights and obligations provided in the covered agreements",[68] the Appellate Body's approach would set the system on a path of departing from the agreed rights and obligations of Members under the WTO Agreement. Where the Appellate Body had not made a correct interpretation, panels would nonetheless be required to follow it. Those errors would accumulate over time, and where the Appellate Body in a subsequent appeal built its interpretation on a flawed interpretation, the interpretations and resulting findings would become more and more removed from what Members had agreed. This was exactly the opposite of the system that Members had agreed to. The United States had long been concerned with actions by the Appellate Body that sought to usurp the authority expressly reserved to Members. In claiming the authority to issue authoritative interpretations through its "cogent reasons" approach, the Appellate Body upset the careful balance of rights and obligations that existed within the WTO agreements. This was yet another example of a failure by the Appellate Body to follow the rules agreed by Members, undermining support for a rules-based trading system.

4.26. The representative of Colombia said that Colombia wished to thank the United States for including this issue on the Agenda of the present meeting. He noted that it was an issue of historical interest for his delegation. Colombia believed that the discussion and any concerns regarding this issue did not justify the existing deadlock in the AB selection processes, or the failure of Members to fulfil their obligations in this respect. Colombia, in accordance with the statement made by seven Latin American countries at the 12 December 2018 General Council meeting, wished to reiterate its interest in finding a prompt solution to this matter. Regarding this Agenda item, Colombia agreed with other Members that Article 3 of the DSU did not imply the establishment of a system of

[66] See, e.g., Panel Report, "European Union and its Member States – Certain Measures Relating to the Energy Sector", WT/DS476/R and Add. 1, circulated 10 August 2018, para. 7.1350 ("[w]e find no cogent reason to disagree with the legal interpretation of the panel in 'India – Solar Cells'"); Panel Report, "United States – Countervailing Measures on Supercalendered Paper from Canada", WT/DS505/R and Add. 1, circulated 5 July 2018, para. 7.306 ("we do not see any 'cogent reasons' to depart from the Appellate Body's approach to 'ongoing conduct' expressed in 'US – Continued Zeroing'"); Panel Report, "European Union – Anti-Dumping Measures on Biodiesel from Indonesia", WT/DS480/R and Add. 1, adopted 28 February 2018, para. 7.26 ("we see no basis to deviate from the findings by the panel in 'EU – Biodiesel' (Argentina) in respect of Indonesia's claim concerning Article 2.2.1.1 of the Anti-Dumping Agreement. Nor has the European Union identified any cogent reasons for us to do so"); Panel Report, "Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu", WT/DS482/R and WT/DS482/R/Add.1, adopted 25 January 2017, para. 7.37 ("[f]or the reasons explained above, we find that Canada has failed to establish that there are cogent reasons for us to depart from those decisions"); and Panel Report, "European Union – Anti-Dumping Measures on Biodiesel from Argentina", WT/DS473/R and Add. 1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, para. 7.276 ("[i]n the absence of cogent reasons for departing from the approach of the Appellate Body in prior cases, we adopt the same approach").

[67] Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

[68] Article 3.2 of the DSU.

precedent as construed within common law systems. Colombia wished to note that the Appellate Body had established the theory of "cogens rationae" or "causa cogens" (cogent reasons or very strong reasons) for panels and the Appellate Body itself in the absence of which neither panels nor the Appellate Body could deviate from the reasoning previously established by the Appellate Body. Colombia believed that the predictability requirement, provided for in Article 3.2 of the DSU, did not necessarily make it possible to infer the existence of the aforementioned theory. In 2008, Colombia had expressed its position in this regard: "(…) Colombia wished to express its views on the systemic issue as to whether a panel may rely on the findings of previous panel reports that the Appellate Body had reversed, and in particular whether panels were required to follow the Appellate Body's findings. In this connection, Colombia agreed with the reasoning of the Panel that there was no provision in the DSU that required WTO panels to follow the findings of previous panels or of the Appellate Body on the same issues brought before them. In fact, a panel or Appellate Body decision bound only the parties to the relevant dispute. On the other hand, in compliance with the last sentence of Article 3.2 of the DSU: 'recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. While recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence, Colombia wished to recall that the Ministerial Conference and the General Council alone were empowered to adopt authoritative interpretations".[69] Colombia believed that Members had greatly contributed to this "jurisprudential" approach. In their submissions and statements before the DSB, panels and the Appellate Body, Members had often argued by citing precedents, and had discussed those precedents as if they had been *an extension of the provisions of the covered agreements*. This practice by Members, panels and the Appellate Body meant that issues discussed in previous WTO dispute settlement cases contribute to settling subsequent cases, or cases currently before the DSB. Colombia believed that there was simply no support for this practice in the provisions of the DSU. Colombia asked what was the value of such panel and Appellate Body rulings if they did not constitute "precedent" within the meaning of Anglo-Saxon law. Colombia believed that prior appellate and panel reports constituted important doctrine for clarifying and interpreting the legal standards established in WTO agreements. Nevertheless, their value was purely indicative and referential, and could not be considered as binding jurisprudence. The system was therefore designed so that disputes would be resolved through the application of the covered agreements and the rules of interpretation provided for in customary international law, without any obligation to take into account prior appellate and panel reports. Without prejudice to the foregoing, Colombia did not preclude the establishment of a rule of precedent in the WTO context. Colombia did, however, believe that this rule should be expressly negotiated and set out in the covered agreements. In practical terms, Colombia understood that an adjudicator who was exposed for the first time to a complex and substantial legal discussion concerning a multilateral rule might not be in a position to comprehensively interpret the rule in question and properly rule on the facts before them. Setting in stone every DSB decision as a means of resolving future cases was not something that Colombia believed should be provided for in the DSU. Furthermore, specialized literature had shown the possible contradictions that derived from cases in which the Appellate Body had had to correct itself, thereby affecting the application of its "causa cogens" doctrine.[70] Colombia therefore preferred the civil law approach, which prescribed that only after more than two cases, in which an adjudicator had been exposed to similar matters, which had been settled in the same manner, was it possible to consider the establishment of a line of doctrine that would be a case-law precedent. Colombia wished to reiterate that it understood and shared the concerns regarding the use of precedent at the WTO. However, Colombia believed that these concerns, while valid, were not enough to justify blocking of the appointments of the AB members.

4.27. The representative of Chile said that Chile wished to thank the United States for placing this item on the Agenda of the present meeting. He wished to reiterate Chile's position regarding the precedential value of panel and Appellate Body reports, which Chile had previously shared with the Membership at the 20 May 2008 DSB meeting. At the 20 May 2008 DSB meeting, when adopting the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344), Chile had expressed concern about the Appellate Body's statements in paragraphs 160 and 162 of its report, where it had held that "absent cogent reasons, an adjudicatory body will resolve the same legal

[69] Minutes of the WTO Dispute Settlement Body meeting held on 20 May 2008 (WT/DSB/M/250), para. 72.

[70] Frieder Roessler; "Changes in The Jurisprudence of The WTO Appellate Body during The Past Twenty Years" Journal of International Trade Law and Policy as part of the Selected Proceedings of the WTO 20 Conference hosted by the European University Institute in Florence on 15 May 2015.

question in the same way in a subsequent case", and had stated that it was "deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues". In Chile's view, statements such as these could lead to unfortunate conclusions regarding the nature of the WTO dispute settlement system, which was covered by, and operated within, an inter-governmental, rules-based and Member-driven system, and not a system under which individuals instituted proceedings before a domestic tribunal. Indeed, Article IX:2 of the WTO Agreement provided that it was exclusively up to Members to adopt interpretations of that Agreement and of the Multilateral Trade Agreements. At the 20 May 2008 DSB meeting, Chile had noted with satisfaction that the Appellate Body had previously been clear as to the effect of prior panel and Appellate Body reports, in the sense that panels were not obliged to follow previous reports, which, nevertheless, created legitimate expectations among Members and should, therefore, be taken into account.

4.28. The representative of Canada said that Canada wished to thank the United States for placing this important systemic issue on the Agenda of the present meeting. Canada welcomed this opportunity to provide its views. It was well established that the DSU did not provide for *stare decisis* in a strict sense. What had been agreed to by Members, however, was that "the dispute settlement system of the WTO is a central element in *providing security and predictability* to the multilateral trading system" and that dispute settlement serves, *inter alia*, to *clarify* the provisions of the covered agreements. This was articulated in Article 3.2 of the DSU. This security and predictability arose notably as a result of the hierarchical dispute settlement system in the DSU, in which the Appellate Body reviewed issues of law and legal interpretations developed by panels, and upheld, modified or reversed the legal findings and conclusions of panels. It followed that the clarification of the covered agreements provided in adopted Appellate Body reports could not simply be ignored when subsequent panels dealt with the same issues. Were panels to ignore Appellate Body guidance, uncertainty and instability would be introduced into the dispute settlement and multilateral trading systems. The Appellate Body had rightly determined that ensuring "security and predictability", as contemplated in Article 3.2 of the DSU, implied that, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case". This approach ensured that meaningful value was given to previous findings and analysis of WTO adjudicators, while acknowledging that there was no formal *stare decisis*. At the same time, the "absent cogent reasons" approach did not, and should not, prevent WTO adjudicators from analysing issues on a case-by-case basis. Canada believed that WTO adjudicators should first consider the specific facts at issue and the specific legal arguments raised by the parties and third parties in a given dispute. However, reliable and consistent interpretation of the covered agreements was necessary to maintain the legitimacy of the rules-based multilateral trading system. Adopted Appellate Body reports enabled WTO Members of all sizes and at all levels of development to better assess their rights and obligations under the covered agreements. These reports gave rise to legitimate expectations amongst the Membership. Consequently, where there was express Appellate Body guidance with respect to the interpretation of the provisions in question or findings with respect to the exact same legal issue, a subsequent panel was expected to follow this guidance, absent cogent reasons. Canada wished to thank the Chairperson and other Members for their engagement on this important issue.

4.29. The representative of Brazil said that Brazil wished to thank the United States for having shared its views on this important matter for the Membership. Brazil also wished to share its views on this matter at the present meeting. Brazil agreed with the US assertion that panel and Appellate Body reports were not binding precedents for subsequent cases. In other words, there was no rule of *stare decisis* in WTO dispute settlement. This understanding derived from a number of provisions in the DSU, such as Articles 3.2 and 17.14, and from the Marrakesh Agreement – Article IX:2. One of the issues related to whether the Appellate Body had made statements about the reach of its decisions, which were incongruent with the relevant legal texts. Another related issue concerned the assumption apparently held by the United States that, if prior rulings by the Appellate Body were not legally binding, then panels should disregard them. Regarding the first issue, the United States seemed concerned with specific instances in which the Appellate Body would have stated that, unless there were "cogent reasons" to depart from a previous interpretation where similar circumstances were present, panels and the Appellate Body should abide by the same previous understanding. To the United States, such statement would be akin to the Appellate Body applying a rule of precedent in the WTO's dispute settlement mechanism. Brazil wished to note that there were other cases in which the Appellate Body had expressly acknowledged that its reports were not binding, except with respect to resolving the particular dispute between the parties ("US – Stainless Steel (Mexico)"

(DS344)).[71] In other examples (the "Japan – Alcoholic Beverages II" disputes (DS8, DS10, DS11) and the "US – Shrimp" dispute (Article 21.5 of the DSU – Malaysia) (DS58)), the Appellate Body had stated that panel reports and Appellate Body reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute". To "take into account" was not the same as "to be bound by" the report or legal interpretation developed by the Appellate Body. Brazil was therefore inclined to read the Appellate Body's statement in a more generous light. In Brazil's view, the different wordings used by the Appellate Body conveyed, in essence, the same message that the Appellate Body was mindful of its role in the overall objective of the dispute settlement system to ensure security and predictability in the multilateral trading system, contained in Article 3.2 of the DSU. The same provision conferred an additional purpose to the dispute settlement system, which was to provide "clarity" to the existing provisions of the WTO Agreements. Brazil was sceptical that *security, predictability and clarity* could result from a system in which previous rulings were constantly disregarded or in which there was an incentive for panels to do so. Regarding the second point under discussion (whether prior rulings were a valid source of interpretation for panels and the Appellate Body), Brazil believed that the consideration of previous cases by WTO adjudicators was desirable from a systemic perspective, in order to provide coherence to the dispute settlement mechanism. This consideration of past rulings was also welcome from a "judicial and administrative economy" perspective. Article 3.3 of the DSU, for example, called for the "prompt settlement" of disputes. Article 17.5 of the DSU established a 90-day deadline for the conclusion of appellate review procedures. It seemed clear to Brazil that the panels and the Appellate Body would be not only more coherent but also more efficient if they looked to previous reports for background and guidance. From the perspective of Members, as potential parties to a dispute, the reasonable expectation that prior interpretations of the same provision would carry weight in deciding subsequent cases should also be viewed positively and encourage parties to think through the issues and arguments more carefully when deciding to litigate them before a panel and/or the Appellate Body. Of course, Members retained the right to re-argue interpretations arrived at by panels and/or the Appellate Body, but they would not be able to start from a clean slate. WTO Members recognized the value of interpretations provided in prior disputes. Evidence of such recognition could be found in the great extent to which they had come to rely on prior panel and Appellate Body reports in their submissions to panels and the Appellate Body. The United States itself regularly referred to Appellate Body reports in its submissions. This clearly signalled to panels that they should follow the Appellate Body's prior interpretations. Brazil could foresee a scenario where greater uncertainty in the dispute settlement system could provoke an increase in the number of cases brought to the dispute settlement system and a decrease in the willingness of Members to have recourse to mutually agreed solutions. This would undermine the clear preference for amicable settlement reflected in Article 3.7 of the DSU. The increased uncertainty over the manner in which provisions would be interpreted would make it more difficult for parties to find common ground and might make parties more willing to proceed to adjudication when they might otherwise have reached a settlement. Furthermore, interpretations in the context of the dispute settlement system were useful for policy-making: they gave significant guidance to governments and to traders for the design of WTO-consistent trade measures and for the assessment of measures taken by other Members that had affected their exports or imports. Finally, although comparisons between international law and municipal legal systems were never perfect, it was impossible to overlook the fact that this system had tended to mirror the legal practice of common law countries, like the United States. Civil law systems, like Brazil's, although currently more reliant on past judicial decisions than in the past, with varying degrees of binding force, had had to adapt to the weight of prior case law in the WTO. Brazil wondered how many other examples of common law concepts and practices could or should be reviewed in light of criticisms related to interpretative choices by panels and the Appellate Body. Brazil believed that previous rulings in the dispute settlement system did not constitute binding precedent. The real issue here was whether the Appellate Body was acting in a manner inconsistent with this common understanding. Brazil believed that it was not. Brazil also believed that prior interpretations of the Appellate Body provided useful guidance to panels and the Appellate Body itself in deciding subsequent disputes. That, of course, did not absolve panels or the Appellate Body from addressing each case based on its own merits, and from deciding the extent to which a given precedent would be relevant in light of the specific facts of each case.

4.30. The representative of Australia said that Australia wished to thank the United States for its statement made at the present meeting on the precedential value of reports issued by panels and

[71] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para. 158.

the Appellate Body. Australia believed that it was helpful to refer to Articles 3.2 and 19.2 of the DSU, as well as Articles IX and X of the Marrakesh Agreement establishing the WTO. Specifically, Article 3.2 of the DSU stated that: "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". Article 3.2 of the DSU went on to require the WTO dispute settlement to: "preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements". However, Article 3.2 of the DSU stated that recommendations and rulings of the DSB could "not add to or diminish the rights and obligations provided in the covered agreements". Australia believed that requiring dispute settlement to provide predictability implied that some level of consistency in dispute settlement was appropriate. However, Australia did not believe that should go so far as to create a separate body of law, developed through jurisprudence, which had to then be rigorously applied in future disputes through the doctrine of *stare decisis*. Rather, Australia believed that previous decisions of panels and the Appellate Body should only guide future panels and the Appellate Body on how to clarify the provisions of the covered agreements in a manner which predictably preserved the rights and obligations of Members under those agreements. Further, Australia wished to draw attention to the distinction between clarifying, interpreting, and amending the covered agreements. Article IX of the Marrakesh Agreement provided exclusive authority to WTO Members to interpret WTO covered agreements, while Article X provided exclusive authority to WTO Members to amend those agreements. This authority to interpret and amend had to be distinguished from the role of panels and the Appellate Body, under the DSU, to "clarify the existing provisions" of the covered agreements. Australia's views were supported by Articles 3.2 and 19.2 of the DSU, which provided that panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements". Australia was interested in the views of other Members on this matter and stood ready to engage in future discussions on these and other issues of concerns regarding the functioning of the WTO dispute settlement system.

4.31. The representative of Japan said that Japan wished to thank the United States for its statement made at the present meeting. In the US President's 2018 Trade Policy Agenda, the United States had expressed the concerns, which were further elaborated at the present meeting, that "[w]ithout basis in the DSU, the Appellate Body has asserted its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent 'cogent reasons'".[72] In its Report in the "US – Stainless Steel (Mexico)" dispute (DS344)[73], the Appellate Body had stated that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal questions in the same way in a subsequent case".[74] The Appellate Body had expressed this approach, which could be referred to as the "cogent reasons doctrine", notwithstanding its recognition in the same report that "it is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties".[75] Japan believed that the right approach was that: "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties".[76] In the past, the Appellate Body had also explained that: "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[77] As observed by the Appellate Body, the same rationale applied to adopted Appellate Body reports.[78] Japan would agree that the dispute settlement system "serves … to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law"[79] and prior adopted reports could and "should be taken into account" to the extent they were "relevant" to a particular case. However, measures and claims differed from one case to another and so did the relevance of prior adopted reports to a particular case. Ultimately, the significance of prior reports would turn on their persuasive value. Prior reports were not a treaty text and were not binding in subsequent cases. Japan should emphasize that what would constitute "cogent reasons"

[72] President's 2018 Trade Policy Agenda, page 28.
[73] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), paras.160 and 161.
[74] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para.160 (emphasis added).
[75] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para.158.
[76] Appellate Body Report, "Japan – Alcoholic Beverages II" (DS8, DS10, DS11), p.14 (emphasis added).
[77] Appellate Body Report, "Japan – Alcoholic Beverages II" (DS8, DS10, DS11), p.14.
[78] See Appellate Body Report, "US – Shrimp" (Article 21.5 of the DSU – Malaysia) (DS58), para. 109; Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para.160 (emphasis added).
[79] Article 3.2 of the DSU.

was not clear. Japan asked whether they would include: a certain amount of time that would have passed after a report was issued; Members' reliance on interpretations included in reports; changes of circumstances; non-workability; deficiencies in reasoning, logic and/or analyses; ambiguity of reports; conflicting readings of a given report by subsequent panels; manifest errors; whether passages of a given report amounted to obiter dicta; and/or any other reason. Japan believed that the lack of clarity in the concept of "cogent reasons", which had no textual basis in the DSU, was indicative of the deficient nature of this "cogent reasons doctrine". This could be one issue that Members could discuss further with respect to this matter. To support its "cogent reasons doctrine", the Appellate Body had emphasized "the hierarchical structure" between panels and the Appellate Body, which, according to the Appellate Body, would show the Members' recognition of "the importance of consistency and stability in the interpretation of [Members'] rights and obligations under the covered agreements".[80] Indeed, under the DSU, "[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel"[81] in a particular dispute. This appeared to be the provision in the DSU that touched on the relationship between the Appellate Body and panels. This meant that in each dispute, the interpretation of a certain provision by the Appellate Body was superior to that of the panel for that particular case only. Without this order of superiority between decisions of two bodies in the same case, no two-tier judicial system would work. This principle based on the two-tier judicial system did not automatically mean that there was a general "hierarchical structure" between the Appellate Body and panels. Most importantly, Japan found no textual basis in the DSU that suggested any institutional hierarchy between the Appellate Body and panels. In this regard, and as noted by the Appellate Body, its reports "are not binding, except with respect to resolving the particular dispute between the parties".[82] Indeed, this "cogent reasons doctrine" might imply that only the Appellate Body could depart from its prior decisions if there were cogent reasons, whatever they might be, but a panel could not do so with or without cogent reasons. This could be contrary to the fundamental function assumed by a panel under Article 11 of the DSU to "make an objective assessment of the matter before it, including the objective assessment of … the applicability of and conformity with the relevant covered agreements". In discharging this duty, each panel, as well as the Appellate Body, had to act so as not to compromise its own integrity. Japan also noted that the Appellate Body had also explained that "[t]he Panel's failure to follow previously adopted Appellate Body reports addressing the same issue undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU".[83] The "development of a coherent and predictable body of jurisprudence" might arguably be one of the goals of the dispute settlement system, which was "a central element in providing security and predictability to the multilateral trading system".[84] Even assuming that would be case, achieving such goal would be the task of the dispute settlement system as a whole. The development of case law was an on-going and dynamic process and the coherence and predictability of jurisprudence could be achieved in the long term through the continuous operation of, and through robust adjudicative dialogues within, the system as a whole. And as Japan had previously mentioned at the present meeting, there could be many ways to achieve such objective. And Japan did not believe that the clarification of Members' rights and obligations under covered agreements could be made in the abstract, divorced from the particular context and circumstances of each dispute, and could always transcend "the application of a particular provision in a specific case".[85] Finally, while "consistency and coherence in decision-making"[86] of the Appellate Body was certainly important, the Appellate Body should be vigilant and stand ready to review its prior interpretations, where appropriate. Japan wished to note that in practice, any standing judicial body often departed from its prior decisions by distinguishing the case at hand from the previous case(s) without formally denouncing the latter and without compromising its integrity. In this respect, more robust adjudicative dialogues might serve as a basis for this self-reflecting process of reviewing its prior reports. From the perspective of the entire WTO regime, of which the dispute settlement system was an integral part, and its institutional structures, WTO Members' close oversight and frequent reviews of past decisions through the DSB and, where appropriate, recourse to authoritative interpretations under Article IX:2 of the WTO Agreement,

[80] Article 3.2 of the DSU.
[81] Article 17.13 of the DSU.
[82] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para.158.
[83] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para. 161 (emphasis added).
[84] Article 3.2 of the DSU.
[85] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para. 161.
[86] Rule 4(1) of the Working Procedures for Appellate Review.

might also be required to maintain the proper balance of rights and obligations under the covered agreements. For this purpose, Members might wish to establish a common subsidiary committee that would review prior decisions of WTO adjudicators and make recommendations, if necessary. Such committee might serve all WTO Councils overseeing the functions of the covered agreements and would be open to all Members.

4.32. The representative of Singapore said that the United States had raised concerns that the Appellate Body (AB) had asserted that its reports effectively served as precedent, and that panels were to follow prior AB reports absent "cogent reasons". The United States considered that this was inconsistent with WTO rules, as the only means for adopting binding interpretations was in Article IX:2 of the Marrakesh Agreement. One of the examples of US concerns was in paragraph 160 of the Appellate Body report in the "US – Stainless Steel (Mexico)" dispute (DS344), which stated that Article 3.2 of the DSU implied that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case". However, his delegation wished to note that paragraph 158 of the same AB report also affirmed that: "it is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties". Singapore considered this statement of the Appellate Body to be significant because, unlike the ICJ Statute, whose Article 59 explicitly provided that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case", there was no such explicit language in the DSU. Article 3.2 of the DSU stated, *inter alia*, that "the dispute settlement system of the WTO is a central element in providing security and *predictability* to the multilateral trading system". Therefore, even if past AB reports were, strictly speaking, not binding, it would clearly be in accordance with Article 3.2 of the DSU if adjudicators were to refer to past reports and would treat them as being highly persuasive. A predictable and certain legal environment allowed traders and businesses to make informed business decisions and to conduct their affairs effectively. These were his delegation's preliminary observations on this matter, which would likely be among the issues that would be addressed in the informal process for focused discussions on dispute settlement matters, conducted under the auspices of the General Council Chairperson. He said that Singapore stood ready to constructively engage in this process and looked forward to a fruitful discussion, with the view to unblocking the AB selection processes.

4.33. The representative of the Philippines said that his delegation had listened carefully to the full statement of the United States made under this Agenda item. The Philippines continued to study US views not only on this matter, but also US statements made at previous DSB meetings on DSU and DSB issues. On the one hand, his country wished to express some appreciation of the relevance of US statements on the basis of past experience in relation to certain panel and Appellate Body rulings. On the other hand, predictability in the DSU was helpful, if not crucial, in strengthening the multilateral trading system. There was, therefore, a balance between these two seemingly opposing views. Currently, the important matter was to pursue what needed to be pursued in order to address the views expressed by the United States and other Members, should there be agreement to do so. A discussion of these issues might be integral to resolving other and more urgent matters before the DSB. In this regard, the Philippines welcomed the opportunity to engage in constructive discussions with interested Members in order to address all areas of concern, with the aim of contributing to the strengthening and improvement of the WTO rules-based system.

4.34. The representative of Mexico said that his country wished to thank the United States for having placed this item on the Agenda of the present meeting and for providing delegations with the opportunity to discuss this matter in greater depth. The WTO Membership had decided to include the following general provision in the DSU: "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" (Article 3.2 of the DSU). In this respect, emphasis was given to the terms "security" and "predictability", which were precisely what formed the legal basis for the use of previous decisions as "precedent" (or "acquis") by panels and the Appellate Body – something that was in fact desirable. Mexico did not share the position of the United States. First, panel and Appellate Body decisions were binding only for the parties to the dispute, and while it was recognized that they could serve as reference, the very notion of "cogent reasons" made it possible to depart from prior decisions. Panels themselves and the Appellate Body had recognized that no system of *stare decisis* existed.[87] In cases such as the

[87] See, for example: Appellate Body Report, "United States – Final Anti-Dumping Measures on Stainless Steel from Mexico", WT/DS344/AB/R, paras. 158-160, in particular footnote 308; Appellate Body Report, "United States – Measures Affecting the Production and Sale of Clove Cigarettes", WT/DS406/AB/R, para. 258;

"US – Anti-Dumping and Countervailing Duties (China)" dispute (DS379), the Appellate Body stated that: "the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the WTO *acquis* and have to be taken into account as such".[88] Second, Mexico did not know why the United States implied that precedent equated to a binding interpretation under Article IX:2 of the WTO Agreement. Mexico wished to reiterate that the General Council and the Ministerial Conference were the bodies that had exclusive authority to adopt authoritative interpretations of WTO rules. Third, the function of panels and the Appellate Body was to interpret legal texts, and it was precisely in carrying out this function that they needed to interpret the rules as provided for in the DSU, namely, "[t]he Members recognize that [the WTO dispute settlement system] serves … to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law" (Article 3.2 of the DSU). Fourth, regarding public international law, it was common for decisions to be treated as a source of ideas, even though the principle of *stare decisis* did not exist. Members of international courts in most fora were not required to follow the particular legal analysis of a previous decision, and yet did so in practice in order to foster the coherence and consistency of decisions, including where there had been no legal requirement for this. Moreover, in public international law, judicial decisions had been considered subsidiary means for the determination of rules of law. Fifth, in international law there was no doctrine of precedent (understood as the legal obligation to follow previous decisions). The position of the United States was therefore surprising, as this doctrine did not in any case exist in either the WTO or any other forum of public international law. Sixth, the US statement raised a number of questions, including what was meant by "precedent". If the United States did not want precedent to be used in the sense of "WTO acquis", Mexico wondered whether it would agree to one case being resolved one way, while another similar case would be resolved differently. Mexico asked how security and predictability could be ensured through divergent rulings that were not based on the WTO acquis. Mexico also asked whether the United States could name an international court in which precedent was not used. Seventh, Mexico said that what the United States failed to take into account was that panel and Appellate Body reports were ultimately adopted by the DSB, which meant that in the final instance it was the DSB itself that provided guidance to panels and the Appellate Body, including with statements made by Members during DSB meetings when reports were adopted. Lastly, Mexico wished to reiterate its readiness to continue and deepen discussions of the concerns that existed with respect to the WTO dispute settlement system, and to the Appellate Body in particular. However, such concerns could not serve as reasons to prolong the blockage of the AB selection processes.

4.35. The representative of China said that China wished to thank the United States for having placed this item on the Agenda of the present meeting. As discussed during the General Council meeting on 12 December 2018, the joint proposal contained in document WT/GC/W/752 and cosponsored by the EU, China and many other Members had made concrete efforts to address US concerns over the "precedential value" of panel or Appellate Body reports. China believed that this issue would be discussed in detail in the informal process that would be set up by the Chair of the General Council soon after the present meeting. Without prejudice to China's position on this important issue, China would be happy to share some preliminary observations at the present meeting. It seemed that the exact meaning of the term "precedent" varied depending on the context in which it was used. In legal theory, it might have different meanings, such as binding precedent, persuasive precedent, *de jure* precedent, or *de facto* precedent. To avoid theoretical debates on this complex issue, China rather wished to suggest that the discussion should focus on what had happened under the current Appellate Body practice. First, it was well settled that panel or Appellate Body reports were not binding, except with respect to the parties to a particular dispute.[89] The DSU did not explicitly provide that panel or Appellate Body reports were "precedent" or a source of WTO jurisprudence. By contrast, Article 9.2 of the Marrakesh Agreement explicitly stated that the

Appellate Body Report, "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China", WT/DS379/AB/R, para. 325; Panel Report, "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products", Complaint by the European Communities and their member States, WT/DS79/R, paras. 7.25–7.30; Panel Report, "United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea", WT/DS402/R, para. 7.31; Panel Report, "China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States", WT/DS414/R, para. 7.392.

[88] Appellate Body Report, "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China", WT/DS379/AB/R, para. 325.

[89] "Japan – Alcoholic Beverages II" (DS8, DS10, DS11); "US – Shrimp" (Article 21.5 of the DSU – Malaysia) (DS58); "US – Stainless Steel (Mexico)" (DS344).

Ministerial Conference and General Council were the exclusive bodies for rendering a definitive interpretation of the GATT provisions or the Uruguay Round Agreement. Second, the "precedential value" of panel or Appellate Body reports was the natural effect of the requirement of Article 3.2 of the DSU, which provided that: "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". "Security and predictability" did not imply that deviation from prior decisions was impermissible. Rather, it underscored the legal presumption that the same legal issue had to be treated in the same manner. In that regard, it was necessary to take into account prior panel or Appellate Body reports adopted by Members and not depart from well-established jurisprudence clarifying the interpretation of the same legal issue unless because of compelling reasons. Failure by subsequent panels to follow previously adopted panels and Appellate Body reports which had addressed the same issue would undermine the development of a coherent and predictable body of jurisprudence that clarified Members' rights and obligations under the covered agreements. During the GATT-era, Panels had issued reports with conflicting interpretations, and that had been seen as problematic. For example, regarding the issue of equitable share rule, the Panel Report in the "EEC-Subsidies on Export of Wheat Flour" dispute (1983) and Panel Report in the "French Assistance to Exports of Wheat and Wheat Flour" dispute (1958) had reached conflicting findings which thereafter had caused great concerns for some delegates to the Subsidies Committee.[90] The Appellate Body had been, in part, a deliberate response to the problem of inconsistent panel interpretations. By saying that that panels had to follow adopted Appellate Body reports absent "cogent reasons" one implied that the jurisprudence would become more consistent and Members would have a much clearer and more predictable understanding of what the rules meant. Third, the prevailing practice of Members had also indicated the common interest of Members in maintaining the "precedential value" of adopted panel and Appellate Body reports. WTO Members, including the United States, frequently cited adopted panel and Appellate Body reports to support their legal arguments in dispute settlement procedures. This suggested that they fully recognized the "precedential value" of these reports. Moreover, as China recalled, the "precedential value" of adopted Appellate Body reports had been extensively debated in various occasions, and the vast majority of Members seemed to agree with the Appellate Body's approach that an adjudicatory body should resolve the same legal question in the same way absent cogent reasons. For instance, at the 20 May 2008 DSB meeting, while discussing the Appellate Body Report in the "US – Stainless Steel (Mexico)" dispute (DS344), the EU had stated that the Appellate Body's approach confirmed the rules-based nature of the WTO as well as the multilateral aspects of dispute settlement. At the same DSB meeting, India stated that it believed that legal interpretations embodied in the adopted Panel and Appellate Body Reports had become part and parcel of the acquis of the WTO dispute settlement system. Rejecting this prior jurisprudence by a panel amounted to undermining Members' faith that adopted reports created legitimate expectations for the purpose of consistency and stability in the interpretation of their rights and obligations under the covered agreements. Furthermore, according to Article 11 of the DSU, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Taking the adopted panel or Appellate Body interpretations into consideration did not amount to the abdication of a panel's responsibility to conduct an objective assessment. Where there was cogent reason to do so, a panel or the Appellate Body could depart from prior interpretations in adopted reports. Fourth, the "precedential value" of Panel and Appellate Body reports was compatible with other provisions of WTO agreements. According to Article 3.9 of the DSU, prior judicial interpretations by panels and the Appellate Body did not prejudice the right of WTO Members to exercise their competence under Article 9.2 of the Marrakesh Agreement. Although panels and the Appellate Body exercised interpretive autonomy, the ultimate interpretive authority was with WTO Members. Simply put, judicial interpretation was not a freewheeling instrument that operated without checks and balances. For instance, Members had full authority under Article 9.2 of the Marrakesh Agreement to correct views of the Appellate Body or trends in its reports on any specific treaty interpretation issue. From that perspective, revitalization of the negotiation pillar of the WTO could greatly alleviate Members' concerns on the "precedential value" of panel and Appellate Body reports. China wished to conclude its statement by expressing the great importance that China attached to this systemic issue. China did not think that paralyzing the Appellate Body was the right way to solve this concern. China looked forward to more detailed discussions in the informal process to be set up by the Chairman of

[90] Robert Howse, "The World Trading System: Critical Perspectives on the World Economy", Routledge, p. 100.

the General Council shortly. China also called for the immediate launch of the AB selection processes and for AB vacancies to be filled as soon as possible, in accordance with the Article 17.2 of the DSU.

4.36. The representative of New Zealand said that New Zealand wished to thank the United States for having explained its concerns on this issue at the present meeting. New Zealand valued the opportunity for Members to exchange views on this matter. New Zealand acknowledged US concerns regarding the precedential value of Appellate Body reports. New Zealand agreed that Appellate Body reports were not a substitute for the text agreed by Members, and that the ability to adopt authoritative interpretations of WTO rights and obligations was reserved for WTO Members pursuant to Article IX:2 of the Marrakesh Agreement. A panel established to hear a dispute had a duty to carefully consider the facts of the case and apply the agreed text to those facts. Having said that, New Zealand also acknowledged that Appellate Body reports provided helpful guidance for future cases, and that reference to previous Appellate Body reports could support greater security and predictability in the multilateral trading system. New Zealand looked forward to a deeper discussion with the United States and other Members on the functioning of the Appellate Body, including through processes proposed at the 12 December 2018 General Council meeting.

4.37. The representative of the European Union said that at the outset, the European Union wished to stress that there was no *stare decisis* or formal rule of precedent in WTO law. Any suggestion that such rules existed in the WTO, or that they had been asserted to exist by WTO adjudicators was misleading. The principle of *stare decisis*, or binding judicial precedent, by which courts were bound by their previous decisions, was traditionally recognized in common law jurisdictions. It was often regarded as one of the distinctive aspects of Anglo-American common law systems, which set them apart from other legal systems. Indeed, the doctrine of *stare decisis* was generally unknown to civil law jurisdictions. Neither did it generally apply to international jurisdictions. To cite but one example, Article 59 of the Statute of the International Court of Justice emphasized that: "[t]he decision of the Court has no binding force except as between the parties and in respect of that particular case". A rejection of the doctrine of *stare decisis* should not however be mistaken for a rejection of continuity and consistency in jurisprudence. First, all legal systems shared a common an interest in the continuity and consistency of their jurisprudence. Whether as a matter of doctrine or practice, a high value was placed on consistency, certainty and predictability of the jurisprudence, particularly as regarded decisions rendered by the highest courts. Second, decisions rendered by the hierarchically superior court or tribunal were, in all legal systems, followed by subsidiary courts or tribunals. The absence of *stare decisis* merely meant that the decision bound only the parties to a particular case. However, it did not prevent that decision from being treated in a later case as the correct legal position. Regarding the WTO dispute settlement system specifically, it was undisputed that Appellate Body or panel reports did not have precedential effect or automatic applicability beyond the specific dispute and the immediate parties. The Appellate Body had clearly and consistently held that, under the DSU, "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties".[91] At the same time, and notwithstanding any specific characteristics of the WTO dispute settlement system that might differentiate it from international or national courts or tribunals, there was no doubt that it also served to provide security and predictability to WTO Members and the multilateral trading system as a whole. It did so by clarifying and interpreting the rules, so that Members could act accordingly. This objective of the WTO dispute settlement system was reflected *expressis verbis* in Article 3.2 of the DSU. It was also clear that, in accordance with Article 3.2 of the DSU, the need for security and predictability required consistency in WTO jurisprudence, including in particular Appellate Body decisions relating to questions of law and legal interpretations of the covered agreements. This did not of course mean that departures from previous decisions were impossible. Security and predictability should not be equated with rigidity and inflexibility. The EU believed that there should be enough room for the evolution of the jurisprudence which could sometimes be necessary, for instance due to changing circumstances. However, having regard to the objectives of the dispute settlement system, departures from previous decision had to be carefully considered and required the identification of cogent reasons for doing so. The EU recalled that the approach followed by the Appellate Body was that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[92] The EU believed that this approach struck the right balance between security, predictability and coherence on the one hand, and flexibility, on the other hand. In particular, the

[91] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para. 158.
[92] Appellate Body Report, "US – Stainless Steel (Mexico)" (DS344), para. 160.

reference to "cogent reasons" obviously allowed for evolution of the jurisprudence, where warranted in the presence of such cogent reasons. Any suggestion that each case should stand on its own and should be decided without regard to the recommendations and rulings of the DSB in prior cases would deny the major achievement of the WTO dispute settlement system and undermine the central feature of the rules-based multilateral trading system. The EU wished to conclude by stating that ensuring security and predictability through consistency of the jurisprudence did not, by any means, amount to the application of the *stare decisis* doctrine in the WTO system or to asserting that Appellate Body or panel reports had precedential value.

4.38. The DSB took note of the statements.

5 COSTA RICA – MEASURES CONCERNING THE IMPORTATION OF FRESH AVOCADOS FROM MEXICO

A. Request for the establishment of a panel by Mexico (WT/DS524/2)

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 4 December 2018, and had agreed to revert to it. She then drew attention to the communication from Mexico contained in document WT/DS524/2, and invited the representative of Mexico to speak.

5.2. The representative of Mexico said that his country welcomed the opportunity at the present meeting to raise this matter for a second time in order to address the ongoing dispute regarding the measures adopted by Costa Rica concerning the importation of fresh avocados for consumption from Mexico. Mexico had held consultations with Costa Rica on 26 and 27 April 2017 with a view to resolving this matter. Regrettably, and in spite of the considerable efforts and patience of Mexican authorities, the dispute had not yet been settled. Mexico was extremely disappointed by Costa Rica's measures, especially because this Member was a trading partner that had been known to guarantee free trade, and more specifically because Mexican avocados had been exported to Costa Rica without any problems for more than 20 years. Mexico therefore had no choice but to proceed with this dispute in light of Costa Rica's failure to duly comply with its obligations under the Agreement on Sanitary and Phytosanitary Measures and the GATT 1994, and the continuing ban on the importation of Mexican avocados. Mexico therefore requested, for the second time, that the DSB establish a panel with the standard terms of reference provided for in Article 7.1 of the DSU, to examine the consistency of the measures adopted by Costa Rica.

5.3. The representative of Costa Rica said that Costa Rica regretted Mexico's decision to request, for the second time, the establishment of a panel on this matter. Costa Rica did not see any need for the establishment of this panel, since Costa Rica and Mexico had signed a bilateral agreement under which both parties had agreed to establish a joint technical work programme that would enable the parties to settle this dispute. In any event, Costa Rica considered its phytosanitary measures to be consistent with the provisions of the Agreement on Sanitary and Phytosanitary Measures and the GATT 1994. The phytosanitary requirements applied by Costa Rica were fully justified and were supported by a risk analysis that complied with WTO rules. Costa Rica therefore believed that the panel would reject Mexico's claims. Furthermore, Costa Rica was assessing Mexico's panel request in light of the relevant requirements of the DSU and would assert its procedural rights should this be deemed necessary.

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

5.5. The representatives of Canada, China, El Salvador, the European Union, Honduras, India, Panama, the Russian Federation and the United States reserved their third-party rights to participate in the Panel's proceedings.

6 RUSSIAN FEDERATION – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. Request for the establishment of a panel by the United States (WT/DS566/2)

6.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 4 December 2018, and had agreed to revert to it. She then drew attention to the communication from the United States contained in document WT/DS566/2, and invited the representative of the United States to speak.

6.2. The representative of the United States said that the United States had explained that the US actions 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 WTO Members including Russia. 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". Just as these Members appeared to be ready to undermine the 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. Russia, for example, had not addressed whether its action was in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there had been an absolute increase, the right to suspend substantially equivalent concessions under the Safeguards Agreement could not be exercised for the first three years of the safeguard measure. 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 Russia's WTO commitments and were applied only to the United States, contrary to Russia'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.

6.3. The representative of the Russian Federation said that Russia was disappointed by the decision of the United States to request the establishment of a panel for the second time. Russia reaffirmed its position that Russia's challenged measures constituted a WTO-consistent step taken due to the imposition of additional duties on steel and aluminium by the United States. Russia had already explained it in detail at the 4 December 2018 DSB meeting. It was most bewildering to hear from the delegation of the United States that it was Russia who undermined the dispute settlement system. It was the United States who had arbitrarily imposed additional duties on steel and aluminium and who had used them as leverage that would allow the United States, with varying degrees of success, to secure trade concessions from certain Members. Russia also wished to note that due to US efforts to "improve" the WTO dispute settlement mechanism, which had left the Organization with a paralyzed dispute settlement system, the United States was the last Member to deserve the title of guardian of the dispute settlement system in particular, and of the multilateral trading system, in general. With all the damage already done, at the present meeting the United States was requesting the establishment of a panel to challenge measures explicitly authorized by WTO law in cases, such as the imposition of additional duties in the way that the United States had done. Russia believed that all US actions were merely another attempt at turning the WTO "upside down".

6.4. The representative of the European Union said that the DSB had considered this US panel request at the 4 December 2018 DSB meeting. The DSB had considered four similar panel requests by the United States at the 21 November 2018 DSB meeting. The EU had then spoken in relation to the panel request that had related to the EU suspension of equivalent GATT obligations in response to the undeclared safeguard measures which the United States had taken in support of its steel and aluminium industries. The EU welcomed the fact that Russia, like quite a number of other WTO Members, had likewise resorted to its right to suspend equivalent obligations *vis-à-vis* the United States. The EU looked forward to defending, before the panels, its right and the right of other WTO Members to suspend equivalent obligations, and to defending the rules-based multilateral trading system. The United States remained wrong in suggesting that the actions of the EU and of other Members undermined the WTO, that their actions were blatantly against WTO rules and that they were undermining the dispute settlement system by standing up to the abuse by the United States of Article XXI of the GATT. The EU indeed firmly believed that the US measures were safeguards and that other WTO Members therefore had the right to suspend the GATT obligations.

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

6.6. The representatives of Brazil, Canada, China, Egypt, the European Union, India, Indonesia, Kazakhstan, Japan, Malaysia, Mexico, New Zealand, Norway, Qatar, the Kingdom of Saudi Arabia, Singapore, Switzerland, Chinese Taipei, Thailand, Turkey and the Bolivarian Republic of Venezuela reserved their third-party rights to participate in the Panel's proceedings.

7 SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

A. Request for the establishment of a panel by Qatar (WT/DS567/3)

7.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 4 December 2018, and had agreed to revert to it. She then drew attention to the communication from Qatar contained in document WT/DS567/3, and invited the representative of Qatar to speak.

7.2. The representative of Qatar said that Qatar wished to reiterate at the present meeting its request that the DSB establish a panel to examine this dispute. Qatar had explained the subject matter and circumstances of this dispute at the 4 December 2018 DSB meeting. In short, Saudi Arabia failed to protect intellectual property rights contrary to its obligations under the TRIPS Agreement. Copyrighted media content owned by a Qatari company, beIN Corporation, was subject to widespread, wilful and commercial scale piracy in Saudi Arabia. Yet, this Qatari company could not seek civil remedies against the Saudi-based pirate to protect its rights or otherwise benefit from copyright protection in Saudi Arabia. Moreover, Saudi Arabia had not applied criminal procedures and penalties to the pirate, far from it. Remarkably, Saudi authorities aided the pirate in its business of distributing stolen content including content licensed to beIN by rights holders from around the world. Such content included the 2018 FIFA World Cup, the 2018 Super Bowl and many other games and events. Further, the Saudi pirate's set-top boxes enabled access to hundreds of proprietary television channels and thousands of on-demand programmes from around the world without the authorization of the rights holders. Saudi Arabia's tolerance of and support for intellectual property theft threatened in particular the business model of professional sport. And Saudi Arabia's apparent belief that its measures were immune from review undermined the foundations of international intellectual property protection and extended far beyond copyrights. Qatar wished to comment on a few points raised at the 4 December 2018 DSB meeting. Saudi Arabia had contended that the absence of diplomatic relations between it and Qatar made it impossible to conduct dispute settlement procedures. Another Member had expressed the preference that this dispute be resolved without recourse to WTO dispute settlement. Qatar wished that it would not have to initiate dispute settlement procedures at the present meeting. Indeed, the preamble to the TRIPS Agreement highlighted that issues of intellectual property infringement concerned private rights. As such, these issues should be adjudicated in Saudi Arabia's domestic courts, and dealt with through the Saudi criminal justice system. This was precisely what was required by the TRIPS Agreement. However, with the unchecked violations of intellectual property rights having persisted for well over a year and with Saudi Arabia refusing to engage in opportunities for dialogue with Qatar, a WTO panel was one of the few fora open to Qatar to effectively address this dispute. The absence of diplomatic relations

did not render dispute settlement impossible. Saudi Arabia had not freed itself of any WTO obligation by severing relations with Qatar, and diplomatic relations were not required to engage in dispute settlement procedures. Indeed, it would be incompatible with the whole purpose of the DSU if dispute settlement were not open to the parties to this dispute, precisely at the moment when such recourse was needed the most. This was the second time that Qatar's panel request appeared on the DSB's Agenda, therefore, pursuant to Article 6.1 of the DSU, a panel must to be established at the present meeting.

7.3. The representative of the Kingdom of Saudi Arabia said that Saudi Arabia deeply regretted that a panel had been requested for a second time with regard to a matter that had no legitimate connection to the WTO or to compliance with WTO rules. As Saudi Arabia had explained in its statement made at the 4 December 2018 DSB meeting on this matter, establishing and maintaining diplomatic relations between nation States was a fundamental exercise of a State's sovereignty on which the WTO agreements did not and could not infringe. Saudi Arabia had severed diplomatic relations with the complaining party in June 2017 in order to protect its essential security interests. The severance of diplomatic relations rendered impossible the conduct of any dispute settlement procedures in this matter, consistent with Saudi Arabia's essential security interests. As Members were aware, consistent with Article 73 of the TRIPS Agreement, nothing could compel any Member to engage in dispute settlement procedures in circumstances of national security. Indeed, a panel would have no power to make findings in this matter, other than to recognize that Saudi Arabia had invoked Article 73 of the TRIPS Agreement. Therefore, Saudi Arabia did not see any point regarding this panel request. Saudi Arabia wished, once again, to reconfirm that it fully respected all obligations that applied under WTO Agreements, including under the TRIPS Agreement. His delegation strongly submitted that the WTO was not and could not be turned into a venue to resolve national security disputes. Saudi Arabia simply would not engage in dispute settlement procedures or any other international interaction with a party that it did not recognize diplomatically, due to an emergency in international relations, other than to assert its invocation of the national security exception under Article 73 of the TRIPS Agreement. Therefore, Saudi Arabia continued to see no basis for this dispute and did not agree to establish a panel in this matter.

7.4. The representative of the United Arab Emirates said that his delegation wished to be associated with the statement made by the Kingdom of Saudi Arabia, the Kingdom of Bahrain and the Arab Republic of Egypt at the 4 December 2018 DSB meeting, as well as with the statement made by Saudi Arabia at the present meeting. The United Arab Emirates (UAE) strongly supported the rejection by Saudi Arabia of the request to establish a panel on the matter related to national security exceptions under Article 73 of the TRIPS Agreement and Article XXI of the GATT 1994. Therefore, the UAE wished to underline that the measures taken by Saudi Arabia were necessary to protect its national security interests. The UAE regretted that this matter had been brought to the DSB. The UAE considered that a panel would not have proper jurisdiction to hear this dispute.

7.5. The representative of the Kingdom of Bahrain said that his delegation regretted that this matter had been brought before the DSB for the second time. Bahrain wished to reiterate its position that issues related to national security could not be resolved in the WTO. As stated at the 4 December 2018 DSB meeting, Bahrain noted that Saudi Arabia had invoked Article 73 of the TRIPS Agreement. Bahrain therefore believed that there was no basis for a panel to review the complainant's claims.

7.6. The representative of the European Union said that the EU wished to recall its position on some procedural aspects raised in the context of this dispute. The EU wished to note that Qatar had requested that a panel be established with the standard terms of reference, as provided by Article 7.1 of the DSU. Pursuant to Article 7.1 of the DSU, these had to be the terms of reference of the panel, unless the parties to the dispute agreed otherwise within 20 days from the establishment of the panel. The EU took note of Members' views regarding the panel's jurisdiction or authority over certain issues that might be raised in this dispute. If such issues indeed arose, these arguments could be raised before the panel which would examine these issues, in accordance with its terms of reference. The EU would offer its views before the panel in its capacity as third party in this dispute. With respect to security exceptions, such as Article XXI of the GATT 1994 and the equivalent provision of the TRIPS Agreement, the EU could already recall its position, which it had regularly expressed at recent DSB meetings, namely, that these provisions were GATT and TRIPS exceptions and, therefore, justiciable for panels and the Appellate Body.

7.7. The representative of the United States said that Saudi Arabia had, once again, indicated at the present meeting that its measures were justified on the basis of essential security. As the United States had observed at the 4 December 2018 DSB meeting and previously, from the very beginning of the international trading system, Members had understood that each WTO Member retained the authority to determine for itself the actions it considered necessary to protect its essential security interests under provisions such as Article 73 of the TRIPS Agreement. A WTO panel's review of a Member's invocation of its essential security interests would be contrary to the text of Article 73 of the TRIPS Agreement, which – like GATT 1994 Article XXI – made clear that this provision was self-judging, meaning that every WTO Member had the right to determine, for itself, what actions were in its own essential security interests. Under these circumstances, the United States considered that the parties should resolve the issues raised in this dispute outside the context of WTO dispute settlement.

7.8. The representative of China said that China had taken note of the panel request made by Qatar under the DSU to resolve its dispute with Saudi Arabia regarding the TRIPS measures. China was closely following this dispute, which potentially involved the application of provisions on security exceptions. China recognized that security exceptions were sensitive provisions relating to the sovereignty and security interests of Members. Given the potential implications to the multilateral trading system if abused, China was of the view that the security exception provisions should only be invoked to safeguard genuine national interests and be implemented in a faithful and cautious manner. China also acknowledged that under WTO rules, WTO Members had the legitimate right to defend their trade interests through the dispute settlement mechanism. Measures alleged to be in relation to security did not constitute an exception to the application of DSU, since neither the relevant security exceptions provisions under the covered agreements, nor the negotiation history had specified such exceptions.

7.9. The representative of Canada said that Canada had taken note of Saudi Arabia's position regarding the absence of diplomatic relations with Qatar. When a country became a Member of the WTO, it accepted the compulsory jurisdiction of the WTO dispute settlement system. The DSU did not foresee exceptions to that rule. The sole basis for the DSB not to establish a panel when one was requested was if there was a consensus amongst all WTO Members to that effect in the DSB. The authority of a panel to adjudicate was not negated by the absence of diplomatic relations between disputing parties. Saudi Arabia's position, if it were to prevail, would "add to or diminish rights or obligations" under the DSU, contrary to Article 3.2 of the DSU. In addition, Canada wished to recall that, pursuant to Article 3.10 of the DSU, "the use of the dispute settlement procedures should not be intended or considered as contentious acts" and that, "if a dispute arises, all Members will engage in these procedures in good faith and in an effort to resolve the dispute".

7.10. 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.

7.11. The representatives of Australia, the Kingdom of Bahrain, China, the European Union, India, Japan, Korea, Mexico, Norway, the Russian Federation, Singapore, Chinese Taipei, Turkey, the United Arab Emirates and the United States reserved their third-party rights to participate in the Panel's proceedings.

8 UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

A. Request for the establishment of a panel by China (WT/DS543/7)

8.1. The Chairperson drew attention to the communication from China contained in document WT/DS543/7, and invited the representative of China to speak.

8.2. The representative of China said that China had requested consultations with the United States in this dispute on 4 April 2018, and had filed addenda to its request for consultations on 6 July, 16 July, and 18 September 2018. Consultations had been held on 28 August and 22 October 2018. These consultations had failed to resolve this dispute. Due to the urgency of the dispute which brought tremendous damages to the rules-based trading system and China' trade interests, China had no other choice but to request that the DSB establish a panel at the present meeting in accordance with WTO rules. The measures at issue affected significant trade interests of China.

Following the report released on 22 March 2018 by the US Trade Representative under Section 301 of the Trade Act 1974, on 6 July 2018, the United States had unilaterally imposed a 25 percent additional import duty on US$34 billion of imports from China, starting from 20 June 2018 based on its own determination under Section 301. Subsequently, on 24 September 2018, the United States had taken further action by imposing a 10 percent additional import duty on US$200 billion of imports from China. The US unilateral measures imposing additional tariffs on Chinese products affected thousands of tariff lines of Chinese products worth hundreds of billions of dollars of trade from China. These US measures further worsened the global economic and trade environment, damaged global industrial supply chains and hurt the interests of numerous companies and consumers around the world. China wished to reiterate its position that the unilateral actions taken by the United States not only infringed China's rights and interests, but also flagrantly violated WTO rules. The measures at issue taken by the United States appeared to violate the WTO's fundamental principles of non-discrimination, bound tariffs and strengthening of the multilateral system, as set forth in Articles I and II of the GATT 1994, as well as Article 23 of the DSU respectively. As China had stated at the 8 May 2018 General Council meeting, the WTO was indeed a shield for Members to defend themselves against trade protectionism. And it was not a shield to hide measures that went against WTO rules. If unilateralism were unrestrained, it would bring destruction to the world economy to the detriment of all Members, especially developing countries. Any Member could be the target of such actions, and no Member, especially small and medium economies, could defend itself on its own. The unilateral tendency of US trade policy was of serious concern to all Members and had to be firmly rejected. Silence on these unilateral actions would compromise the rules and disciplines that were the foundation of the multilateral trading system. China was extremely concerned and resolutely opposed to these unilateral actions. China urged the United States to take immediate action to restore the bound tariffs. The United States should never engage in actions so obviously WTO-inconsistent and had to reject this path and return to complying with WTO rules. At the present meeting, China requested that the DSB establish a panel and firmly believed that the DSB would deal with this matter in an objective and fair manner, and restore orderly global trade.

8.3. The representative of the United States said that the United States had serious concerns with China's request for establishment of a panel. First, in bringing this dispute, China sought to use the WTO dispute settlement system as a shield for a broad range of trade-distorting policies and practices not covered by WTO rules. In doing so, it was China, and certainly not the United States, that was threatening the overall viability of the WTO system. Second, China's request was hypocritical. China was currently retaliating against the United States by imposing duties on over US$100 billion in US trade. China could not challenge US tariff measures for being "unilateral" and WTO-inconsistent, while at the same time openly adopting its own tariff measures in connection with the very same issue. Third, in these circumstances, the outcome of any dispute settlement proceeding would be pointless. As the United States had noted, China had already taken the unilateral decision that the US measures could not be justified, and China had already imposed tariff measures on US goods. China's unfair trade practices with respect to forced technology transfer were well-documented. China could not credibly dispute their existence, their unfairness or their distortionary impacts on world trade. The United States had previously addressed China's technology transfer policies at the DSB meetings held in March, April, and May 2018. In addition to the US statement at the present meeting, the United States referred Members to the US statements made at those prior DSB meetings. In March 2018, the United States had released a comprehensive report on four aspects of China's policies regarding technology transfer. The report was over 200 pages in length, and was based on public testimony, public submissions, and other evidence.[93] The report had supported the following conclusions.

8.4. First, the United States said that China used foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies. China's foreign ownership restrictions prohibited foreign investors from operating in certain industries unless they partnered with a Chinese company, and in some cases, unless the Chinese partner was the controlling shareholder. China's requirements laid the foundation for China to require or pressure the transfer of technology. Pressure was applied through administrative licensing and approvals processes which had to be completed in order to establish and operate a business in China. Second, China's regime of technology regulations forced foreign companies seeking to license technologies

[93] The report is available at: https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF

to Chinese entities to do so on non-market-based terms that favoured Chinese recipients. These rules did not apply to technology transfers occurring between two domestic Chinese companies. Third, China directed and unfairly facilitated the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies. The role of the Chinese State in directing and supporting this outbound investment strategy was pervasive, and evident at multiple levels of government – central, regional, and local. China had devoted massive amounts of financing to encourage and facilitate outbound investment in areas it deemed strategic. China employed tools such as investment approval mechanisms and a system of encouraged sectors to channel and support outbound investment. Fourth, China conducted and supported unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. Through these cyber intrusions, China had gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications. China had used cyber-enabled theft and cyber intrusions to serve its industrial policy objectives.

8.5. In November 2018, the United States had issued a 50-page supplemental report.[94] The supplemental report explained that China had not fundamentally altered its unfair, unreasonable, and market-distorting practices that had been the subject of the March 2018 report. Indeed, certain practices, such as cyber-enabled theft of intellectual property, appeared to have grown worse. These four technology transfer policies harmed every Member, and every industry in every Member, that relied on technology for maintaining competitiveness in world markets. From the outset of the US technology transfer investigation, the United States had been clear that where a Chinese policy had appeared to involve WTO rules, the United States would pursue the matter through WTO dispute settlement. The investigation revealed that the concerns with China's technology licensing measures appeared to be amenable to WTO dispute settlement. Accordingly, immediately following the issuance of the March 2018 report, the United States had initiated a WTO dispute.[95] Consultations had not resolved the matter, and the DSB had established a panel at the 21 November 2018 DSB meeting. As China was well aware, the United States had made no findings that the licensing measures at issue in the WTO dispute were inconsistent with China's WTO obligations. Further, the US trade measures taken in subsequent phases of the US investigation were unconnected to the matters covered in the ongoing WTO dispute involving China's technology licensing measures. In contrast, the three other categories of policies covered in the US investigation did not appear to implicate WTO obligations. And, China had had many opportunities to argue otherwise. For example, at the 27 March 2018 DSB meeting, the United States had invited China to inform the DSB if China believed that the technology transfer policies addressed in the US investigation could amount to breaches of WTO rules. To date, China had not responded to this invitation. As the United States had repeatedly stated, the goal of the US technology transfer investigation was to obtain the elimination of the unfair acts, policies, and practices adopted by China. China, however, was trying to use the WTO system not as a means for promoting conditions for fair trade, but rather as a shield to defend China's unilateral, unfair, and economically damaging technology transfer policies. These efforts by China, and not actions taken by the United States to address China's unfair and economically damaging policies, constituted the real threat to the viability of the WTO system.

8.6. Second, the United States said that China's decision to bring this matter to the DSB was hypocritical. On the one hand, China complained that the United States was being "unilateral" in adopting trade measures as part of the US investigation. At the very same time, however, China had openly adopted retaliatory trade measures on over US$100 billion in US goods. On 16 June 2018, China had issued State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on US$50 Billion of Imported Products Originating from the United States.[96] Through this legal instrument, the Government of China had announced two lists of tariff subheadings subject to an additional 25 percent duty on US goods. The 25 percent additional duties on the first list – containing 545 tariff subheadings – had gone into effect on 6 July 2018. According to China, this list applied to US goods with an annual trade value of US$34 billion. On 8 August

[94] The supplemental report is available at https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf.

[95] "China — Certain Measures Concerning the Protection of Intellectual Property Rights" (DS542).

[96] "State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on US$50 Billion of Imported Products Originating from the United States" (State Council Customs Tariff Commission 2018 Public Notice No.5, 16 June 2018).

2018, China had issued *State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on US$16 Billion of Imported Products Originating from the United States*.[97] Under this notice, China was imposing additional tariffs of 25 percent on US goods with a purported trade value of approximately US$16 billion dollars. Most recently, on 18 September 2018 – the same date as China's letter requesting supplemental consultations in this dispute – China had issued *State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on Approximately US$60 Billion of Products Originating from the United States*. Under this announcement, China was imposing additional tariffs of either 5 percent or 10 percent on over 5,000 products, with a purported trade value of approximately US$60 billion dollars.[98] These tariffs had taken effect on 24 September 2018.

8.7. In sum, China was currently imposing retaliatory tariffs on US goods with an annual trade value of approximately US$110 billion. These retaliatory duties covered more than half of all US exports to China. China had made no claim of any WTO justification for taking these measures. It was hypocritical to the extreme that, with respect to the very same matter, China attempted to invoke WTO rules, while at the same time ignoring those rules by imposing retaliatory duties on more than US$100 billion in US goods. Third, and finally, given that China had already taken the decision to retaliate against US goods, any findings in a dispute settlement proceeding would be pointless. At most, a Member that prevailed in a WTO dispute could obtain the authority to suspend WTO concessions. But here, China had already taken the decision to suspend tariff concessions owed to the United States by imposing increased duties on most US goods exported to China. In conclusion, Members had arrived at this point because China had chosen to adopt aggressive, unfair policies regarding technology transfer in pursuit of its industrial policy goals. As Members were likely aware, the Leaders of the United States and China had agreed to enter into negotiations to address these issues. It was those discussions, and certainly not a WTO dispute settlement proceeding, that were the appropriate forum for addressing the technology transfer issues covered by the US investigation. For these reasons, the United States would not agree to establishment of the panel requested by China at the present meeting.

8.8. The representative of China said that China simply wished to respond briefly to the US statement. With respect to US claims against China's economic policy, China wished to refer to its statements made at previous General Council meetings, CTG meetings as well as DSB meetings in 2018. In those statements, China had fully rebutted the arguments made by the United States at the present meeting. With respect to Section 301 measures of the US Trade Act 1974, they were unilateral in nature and were as such and as applied inconsistent with US WTO obligations. China saw no reason that attacking China or blaming China's policy could provide any legitimacy for its Section 301 measures.

8.9. The representative of Japan said that China requested that the DSB establish a panel to examine the WTO-consistency of the tariff measures taken by the United States. Japan wished to note that China had also imposed additional duties on products from the United States. Japan wished to emphasize that any trade measure had to be consistent with the WTO Agreement, and no country benefitted from exchanges of trade restrictive measures and counter-measures taken against each other.

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

[97] "State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on US$16 Billion of Imported Products Originating from the United States", Public Notice No.7 (8 August 2018).

[98] "State Council Customs Tariff Commission Public Notice on Additionally Imposing Tariffs on Approximately US$60 Billion of Products Originating from the United States", Public Notice No.8 (18 September 2018).

9 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; CUBA; 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.7)

9.1. 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.7 and invited the representative of Mexico to speak.

9.2. The representative of Mexico said that the delegations referred to in document WT/DSB/W/609/Rev.7, whose number had grown in relation to Mexico's previous proposal, had agreed to submit the joint proposal dated 6 December 2018 to launch the AB selection processes. His delegation, on behalf of 71 Members, wished to state the following. The considerable number of Members submitting this joint proposal reflected a common concern with the current situation in the Appellate Body that was seriously affecting its workings and the overall dispute settlement system against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out at the present meeting. This proposal sought to: (i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy that resulted from the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December, 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates. The proponents were flexible in the determination of the deadlines for the selection processes, but Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

9.3. 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. 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.7. The EU invited all other Members to endorse this proposal so that AB appointments could be made as soon as possible.

9.4. 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 contained in document WT/DSB/W/609/Rev.7. The systemic concerns that the United States had identified at the present meeting and in previous DSB meetings 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. The United States recognized the proposals presented by some WTO Members at the 12 December 2018 General Council meeting. These proposals to some extent acknowledged the systemic concern the United States had been raising in the WTO for years – namely, that the Appellate Body had strayed from the role agreed for it by WTO Members. As the United States had noted in detailed statements in DSB meetings over the past year, and again at the present meeting, many WTO Members shared this concern, whether on the mandatory 90-day deadline for appeals, or review of panel findings on domestic law, or issuing advisory opinions on issues not necessary to resolve a dispute, or the treatment of Appellate Body reports as precedent, or persons serving on appeals after their term had ended. However, on a close reading, the proposals would not effectively

address the concerns that WTO Members had raised. The United States had made its views on these issues very clear: if WTO Members said that they supported a rules-based trading system, then the Appellate Body had to follow the rules Members had agreed in 1995. For many years, the United States and other WTO Members had also been sounding the alarm about the Appellate Body adding to or diminishing rights or obligations under the WTO Agreement in areas as varied as subsidies, anti-dumping and countervailing duties, standards under the TBT Agreement, and safeguards. Such overreach restricted the ability of the United States to regulate in the public interest or protect US workers and businesses against unfair trading practices. The United States shared the view that it was "the collective responsibility of all Members to ensure the proper functioning of the WTO dispute settlement system, including the Appellate Body".[99] As the United States had stated many times in the DSB, the United States was ready to engage with other Members on the important issues raised. The United States looked forward to further discussions with Members on these critical issues.

9.5. The representative of Costa Rica said that on behalf of the group of Latin American and Caribbean (GRULAC) countries that were also Members of the WTO, Costa Rica wished to reiterate its concern regarding the delicate situation that Members were currently facing as a result of the deadlock in the AB selection processes. This situation affected the proper functioning of one of the WTO's central bodies and breached an obligation under a covered agreement. Costa Rica was aware of the concerns that had been raised in respect of the functioning of the Appellate Body and some specific issues regarding decision-making, which were preventing the launch of the AB selection processes. However, the search for a solution to these concerns should not stop the system from continuing to function. Nowhere was it suggested in the text of Article 17 of the DSU, read together with Article 2 of the DSU, that positive consensus was required to launch the AB selection processes. Costa Rica asked the Chairperson, once again, to continue her efforts to resolve this issue.

9.6. The representative of Canada said that Canada wished to be associated with the statement made by Mexico. Canada deeply regretted that the DSB had been unable to meet 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. Canada wished to note 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.7 and urged the DSB to adopt it without further delay. The failure to launch the AB selection processes for new Appellate Body members 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 decided not to join the consensus to adopt the proposal contained in document WT/DSB/W/609/Rev.7. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that it 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 so as to allow the AB selection processes to start and to be completed as soon as possible.

9.7. The representative of Brazil said that Brazil wished to be associated with the statement made at the present meeting by Costa Rica on behalf of the GRULAC under this Agenda item. His delegation did not wish to fully repeat its statement made at the 21 November DSB meeting under this Agenda item, when the group of Members co-sponsoring the proposal contained in document WT/DSB/W/609/Rev.7 had reintroduced it, with a view to finally unblocking the AB selection processes. That statement remained valid in its entirety and contained Brazil's view, which Brazil believed was shared by many, that the launch of the AB selection processes was not an option that required positive consensus in the DSB, but rather was an obligation that bound all Members by virtue of a number of provisions of the DSU. The situation had simply become more urgent and critical with each passing DSB meeting. At the present meeting, Brazil wished to reiterate some key messages. First, there was no legal justification for blocking the AB selection processes and the appointment of Appellate Body members. The Appellate Body was a standing, permanent body established by consensus when the Marrakesh Agreement and the DSU had been negotiated. The essential feature of the Appellate Body was its members. Only they could collectively deliver on the function conferred upon the Appellate Body by the Agreement. In summary, the DSB was not entitled to decide on the existence of the Appellate Body, but only to guarantee that it functioned

[99] See WT/GC/W/754.

uninterruptedly according to DSU provisions. Notwithstanding Brazil's willingness to discuss systemic concerns, systemic concerns did not qualify as legal justification for blocking the AB selection processes. In reality, the systemic concern that overrode all others resulted from the failure to proceed with the AB selection processes. The DSB had a collective responsibility to comply with the mandatory rules of the DSU. The DSU, in Article 17, did not leave room for a decision on whether it will appoint persons to serve on the Appellate Body. The only requirement was that the DSB take a decision on *whom* it should appoint. The initiation of selection processes to establish selection committees was an automatic procedure to be followed by the DSB Chairperson. 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 consequence, the Appellate Body was already in breach of the expected geographical representativeness and variety of legal traditions and, in this highly precarious situation, it was unable to perform its duties as foreseen in the DSU, and had to incur constant delays that affected all Members. If the current crisis were not addressed, the situation would become more critical at the end of 2019, when the terms of two other AB members would expire. The breadth and scope of the consequences caused by the current deadlock could not be underestimated. It was causing nullification and impairment of benefits under the WTO Agreement to all Members that wished to make use of their rights to solve trade disputes through the dispute settlement mechanism. As Brazil had already mentioned at the previous DSB meeting, Brazil had counted approximately 50 ongoing disputes, at consultation and panel phases, that could potentially not benefit from an appeal or not even be adopted, absent agreement between the parties. Members affected by this state of affairs included Brazil, the EU, China, Canada, Japan, India, Vietnam, Korea, Mexico, Turkey, Ukraine, Switzerland, the United Arab Emirates and others, besides the United States. The dispute settlement system was essential for the effective functioning of the other WTO pillars. As debate around the issue of "WTO reform" gained momentum, the deadlock in the Appellate Body risked to undermine Members' confidence in the negotiating pillar and in the effectiveness of new rules. In light of the foregoing, Brazil therefore urged the DSB to launch the AB selection processes. This would help all Members, including the United States, to meet their collective responsibility to comply with the obligations that they had voluntarily accepted under the DSU. Brazil also wished to thank Mexico for the statement made at the present meeting on behalf of the co-sponsors.

9.8. The representative of India said that India referred to its statements made at previous DSB meetings on this matter and 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, along with the European Union and some other Members, had put forward concrete textual proposals as a starting point to begin an open, inclusive and expeditious process for unblocking the AB selection processes. India called on all Members to engage constructively with these proposals, in the process to be launched by the General Council Chairperson, with a view to promptly ending the impasse in the Appellate Body.

9.9. The representative of Switzerland said that Switzerland regretted that the DSB continued to be unable to launch the AB selection processes towards filling the Appellate Body vacancies. Switzerland wished to note with satisfaction the constructive discussion that had taken place at the 12 December 2018 General Council meeting. This discussion demonstrated that Members were willing to engage constructively in order to find a way forward. Switzerland believed that different proposals regarding dispute settlement matters currently on the table formed a comprehensive basis to address the concerns that had been raised concerning the functioning of the dispute settlement system. Switzerland considered that a solution-oriented process to be conducted under the auspices of the General Council would be the best way forward. Switzerland hoped that the modalities for such a process would be agreed upon in the coming days, and that substantive discussions could start soon.

9.10. 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.7 and emphasized the importance of launching the AB selection processes as soon as possible. New Zealand was a staunch supporter of the multilateral dispute settlement system, and had repeatedly emphasized the importance of looking to find solutions to the current impasse through discussions among Members, including through suggestions that New Zealand and other co-sponsors had made at the 12 December 2018 General Council meeting. New Zealand looked forward to a deeper discussion on these issues.

9.11. The representative of Qatar said that his delegation supported the proposal for the DSB to commence in parallel a substantive reform of various Appellate Body practices and rules as well as the initiation of the important AB selection processes. Qatar wished to reiterate its support for a robust, rules-based multilateral trading system. For such a system to function, there had to be an effective and credible mechanism for the resolution of disputes among Members. As confirmed by the DSU, the WTO dispute settlement system was a central element in providing security and predictability to the multilateral trading system. The current lack of consensus to begin the AB selection processes threatened the effectiveness of the dispute settlement system. Without an effective dispute settlement mechanism, the capacity of the WTO to enforce the rights and obligations that Members had negotiated over decades would be put at risk. Weakening of the WTO rules-based multilateral trading system should be avoided. It risked allowing international disorder, it threatened to release unpredictability and instability in the international order. The Appellate Body review mechanism was an essential pillar of an effective dispute settlement system. The Appellate Body had made valuable contributions to the multilateral trading system. Yet, the Appellate Body had not been a perfect instrument of dispute settlement. With this agreed principle and objective in mind, Qatar supported the immediate negotiation and early harvest of various legitimate Appellate Body reform issues raised by many Members at the present meeting. Qatar endorsed Members' concerns regarding the compulsory requirement of the 90-day deadline for deciding appeals, as set out in Article 17.5 of the DSU, with an exception in a situation where parties would agree to a longer timeline. Qatar also believed it was appropriate to address the interpretation of appellate review under Article 17.6 of the DSU with a view to limiting appeals to issues of law and legal interpretations of domestic measures. Qatar would further agree to negotiations on the current use of Rule 15 of the Working Procedures for Appellate Review. With such an early harvest in mind, Qatar believed that Members should initiate in parallel the process of selecting and ultimately appointing new Appellate Body members. Many Members including Qatar relied on the dispute settlement system as a tool for the peaceful settlement of disputes concerning the interpretation and application of WTO rules. A properly functioned Appellate Body was a critical component of the current system. Qatar believed such reforms would send a positive signal that appellate procedures adhered to the rules-based system agreed to by all WTO Members. Qatar believed that the successful negotiation of such reforms could be achieved relatively quickly as it depended upon the willingness of all Members to achieve a balanced outcome.

9.12. The representative of Chinese Taipei said that his delegation simply wished to refer to its statements made at previous DSB meetings. Chinese Taipei urged Members to agree to launch the AB selection processes as soon as possible.

9.13. The representative of Norway said that Norway wished to refer to its statements made at previous DSB meetings under this Agenda item. Norway wished to reiterate its serious concerns about the current impasse in the Appellate Body. Norway regretted that the United States still could not join consensus and supported the proposal to launch the AB selection processes. Norway was pleased that the General Council, at its meeting of 12 December 2018, had agreed to establish an informal open-ended process to discuss different concerns raised in the DSB and addressed by the proposals and communications put forward at that General Council meeting, some of which Norway was co-sponsoring. Norway wished to express its support for that informal open-ended process. Norway looked forward to engaging with Members in active and constructive discussions.

9.14. The representative of Hong Kong, China said that his delegation wished to refer to its statements made at previous DSB meetings on this matter. Hong Kong, China wished to reiterate its deep concern with the prolonged impasse over the AB selection processes. Hong Kong, China wished to note that momentum was building up to discuss improvements to the WTO dispute settlement system. Hong Kong, China was prepared and committed to constructively engage with all Members in this discussion. But that discussion should not be a reason to delay appointments to the Appellate Body. Hong Kong, China urged Members to agree to start a process for filling the vacancies of the Appellate Body immediately.

9.15. The representative of Singapore said that Singapore wished to refer to its statements made at previous DSB meetings and reiterated its serious systemic concerns on the failure to launch the AB selection processes. More appeals continued to be filed even as the number of Appellate Body members decreased by attrition. Given the strain that the Appellate Body was facing, Singapore called on Members to bear this in mind when considering the filing of appeals. Systemic issues which

had been raised could be discussed in a separate process. In this regard, Singapore viewed the informal process for focused discussions under the auspices of the General Council as a positive step, and hoped that it could bring about the unblocking of the impasse. Singapore wished to reiterate its readiness to engage constructively and collaboratively with other Members, as well as the Chairperson, to help resolve this impasse.

9.16. The representative of Japan said that Japan supported the proposal to launch the AB selection processes. Japan wished to note in this respect that solution-oriented proposals had been communicated at the 12 December 2018 General Council meeting. The proposals put forward specific ways to address the specific concerns on the functioning of the dispute settlement system, including the Appellate Body, which had been raised for years but had remained unaddressed. Japan considered that the proposals were a valuable contribution and would provide a good start and basis for Members' solution-focused dialogues. Following the recent discussions at the General Council, Japan would actively engage in focused discussions with other Members in order to restore and improve the proper functioning of the WTO dispute settlement system.

9.17. The representative of Australia said that Australia wished to refer to its previous statements made on this matter, and reiterated its serious concerns regarding the DSB's inability to commence the AB selection processes. Australia had joined a number of other Members to co-sponsor pragmatic and constructive proposals at the 12 December 2018 General Council meeting, which was intended to help Members overcome this impasse. Members had a collective responsibility to resolve the challenges threatening the dispute settlement system. Therefore, Australia called on all Members to engage constructively to find mutually agreeable solutions to address all outstanding concerns and to move forward with the AB selection processes as a priority.

9.18. The representative of Korea said that Korea, as one of the co-sponsors of the proposal made at the 12 December 2018 General Council meeting, shared the urgency related to this issue. Korea supported the statement made by Mexico on behalf of the proponents of the proposal contained in document WT/DSB/W/609/Rev.7. Korea simply wished to refer to its previous statement on this matter.

9.19. The representative of China said that China wished to echo the statement made by Mexico on behalf of 71 Members under this Agenda item. Ensuring the integrity and functioning of the Appellate Body was not only a collective obligation of Members, but it also served the common interests of the whole Membership. China regretted that the collective efforts by these Members was, once again, frustrated by a particular Member’s persistent blockage of the AB selection processes without any legitimacy. While the appointment of a specific individual as Appellate Body member might require positive consensus, positive consensus was not required for the launch of the AB selection processes. Article 17.2 of the DSU clearly stated that: "[v]acancies shall be filled as they arise". The choice of using "shall" in this provision was more than adequate to suggest the automatic nature of the AB selection processes. China noted that Members had made earnest efforts to try to accommodate the concerns of the concerned Member and to safeguard the central nature of the dispute settlement system. Various proposals had been tabled to address the current impasse, including joint proposals co-sponsored by China, the EU and other Members which had been discussed at the 12 December 2018 General Council Meeting. Such efforts had already formed a solid basis for future text-based consultations. It was time to substantiate these discussions. China believed that when Members had different views on any specific concern, solution-oriented discussions were the only way to move forward. China called on all Members to have meaningful and substantive participation in the relevant process and to strive to solve the current AB selection impasse without further delay.

9.20. The representative of Thailand said that Thailand wished to refer to its statements made at previous DSB meetings on this matter. Thailand wished to thank Mexico and Members that had co-sponsored the proposal contained in document WT/DSB/W/609/Rev.7 under this Agenda item. Thailand supported the launching of the AB selection processes as soon as possible. All WTO members had a shared responsibility to promptly resolve the vacancies in the Appellate Body. While Thailand was open to discuss any systemic concerns which had been raised, such a discussion should be held on a separate track and should not prevent the start of the AB selection processes. Thailand wished to reiterate its commitment to working constructively with all Members to resolve the Appellate Body impasse as a priority.

9.21. The representative of Mexico said that his delegation, on behalf of the 71 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.7, wished to express its regret that for the nineteenth occasion, Members had still not been able to start the AB selection processes, and that they had thus continuously failed to fulfil their duty as Members of this Organization. The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body could not serve as pretext to impair and disrupt its work. There was no legal justification for the current blocking of the AB selection processes, which resulted in nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". By failing to act at the present meeting, Members would maintain the current situation which was seriously affecting the work of the Appellate Body against the best interest of all WTO Members.

9.22. The Chairperson thanked all delegations for their statements. She said that, as in the past, the DSB would take note of the statements expressing the respective positions, which would be duly reflected in the minutes of the present meeting. As Members were aware, this matter required political engagement on the part of all Members. At the same time, she said that her door was open to any delegation wishing to share ideas or views on this matter.

9.23. The DSB took note of the statements.