RESTRICTED

WT/DSB/M/356

6 March 2015

(15-1295) Page: 1/19

**Dispute Settlement Body**
**26 January 2015**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 JANUARY 2015

*Chairman: Mr. Fernando De Mateo (Mexico)*

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the dispute on: "India – Measures Concerning the Importation of Certain Agricultural Products" (DS430) was removed from the proposed Agenda, following India's decision to appeal the Report.

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1.1. The Chairman noted that there were five sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "Unless 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". He invited delegations to provide up-to-date information about compliance efforts and to focus on new developments, suggestions and ideas on progress towards the resolution of disputes. He also wished to remind delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "Representatives 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". With these introductory remarks, he turned to the first status report under this Agenda item.

### A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.145)

1.2. The Chairman drew attention to document WT/DS176/11/Add.145, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

1.3. The representative of the United States said that his country had provided a status report in this dispute on 15 January 2015, in accordance with Article 21.6 of the DSU. Several bills introduced in the current US Congress in relation to the DSB's recommendations and rulings in this dispute would repeal Section 211. Other previously introduced legislation would modify it. The US Administration would continue to work on solutions to implement the DSB's recommendations and rulings and to resolve this matter with the EU.

1.4. The representative of the European Union said that the EU thanked the United States for its most recent status report and statement made at the present meeting. The EU hoped that the US authorities would resolve this matter very soon.

1.5. The representative of Cuba said that her country noted that the 145th US status report contained the same information as the previous reports. As a result of the lack of compliance, this dispute had remained under the DSB's surveillance for almost 13 years. Cuba recalled that in 1996, the Havana Club Holdings (HCH) company, established in 1993 as a joint venture between the French company Pernod Ricard and Cuba Ron S.A., had renewed for a period of ten years its registration of the Havana Club rum trademark in the United States. However, in 1997, the Bacardi company had begun to market rum in the United States using the trademark of Havana Club Holdings. In order to legalize Bacardi's operations, the US Congress had passed Section 211 as a legislative amendment to the budget bill being discussed at that time. In September 2000, a WTO panel had been established to examine the complaint by the EU

representing the interests of the Cuban-French joint venture. Subsequently, in January 2002, the Appellate Body had circulated its report (WT/DS176/AB/R). The Appellate Body Report had found that Section 211(a)(2) and Section 211(b) of the Omnibus Appropriations Act of 1998 violated the national and most-favoured-nation treatment obligations under the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property. More specifically, the Appellate Body had found that: (i) as regards original owners and trademarks, Section 211 was inconsistent with Article 4 of the TRIPS Agreement; (ii) under the TRIPS Agreement, WTO Members had an obligation to provide protection to trade names. Consequently, various provisions of Section 211 concerning successors-in-interest and original owners violated the principles laid down in Article 2 of the TRIPS Agreement in conjunction with Article 2 of the Paris Convention (1967) and Article 3 of the TRIPS Agreement; and (iii) in relation to trade names, Section 211(a)(2) and Section 211(b) were inconsistent with Article 4 of the TRIPS Agreement.

1.6. The Appellate Body had recommended that the DSB request the United States to bring its measure, found in the report to be inconsistent with the TRIPS Agreement, into conformity with its obligations under that Agreement. Subsequently, in February 2002, the DSB had adopted the Appellate Body report. Nonetheless, Section 211 remained intact and in force. The Cuban-French joint venture had continued in vain to pursue legal action in the competent US courts. On 21 December 2010 and 20 March 2011, Cuba had reiterated to the United States via diplomatic notes that the Department of State needed to intervene so that the Office of Foreign Assets Control could grant the company CUBAEXPORT the licence that would enable it to renew the Havana Club rum trademark in the United States. These efforts had also failed. Section 211 undermined the rights of holders of Cuban trademarks and had made it possible for the Bacardi company to engage in the fraudulent sale of products that were not produced in Cuba, using the Havana Club trademark that manifestly indicated Cuban origin. Once again, Cuba requested an immediate repeal of Section 211 and an end of the adverse effects caused by the economic, commercial and financial blockade policy against Cuba. Cuba hoped that the United States would recognize the serious implications of its non-compliance with the DSB's decisions and the negative precedent that this was setting. Cuba reiterated its position that the only satisfactory solution in this dispute was the full repeal of Section 211.

1.7. The representative of Jamaica said that her country thanked Cuba, the United States and the EU for their statements, updates and the US status report under this Agenda item. Jamaica noted that the circumstances of this dispute had not changed and that no progress had been reported since the previous DSB meeting. As in past DSB meetings, Jamaica expressed its deep concern about the continued US failure to implement the DSB's recommendations adopted in 2002 in relation to this dispute. The US protracted failure to take the necessary steps to comply with its obligations under the DSU provisions was incompatible with the requirement for prompt and effective implementation of DSB's decisions. This was of particular concern in cases such as this where the failure to meet an obligation had a negative impact on the economic interest of a developing-country Member. Jamaica reiterated its concern about the systemic implications of any disregard for DSB decisions. Such disregard could undermine the overall integrity of the dispute settlement system, which remained a key pillar of the WTO. Jamaica had taken note of the recent positive developments in the bilateral relationship between Cuba and the United States and hoped that these developments would contribute to progress in this matter. Jamaica, therefore, urged the United States to take the required steps to promptly implement the relevant DSB's decisions. After more than 12 years since the adoption of the DSB's recommendations in this dispute, it was more than reasonable for Members to expect that this matter would be resolved and removed from the DSB's Agenda.

1.8. The representative of Argentina said that his country thanked the United States for its status report. Argentina, however, regretted that the US status report did not contain any information on progress in this dispute. As Argentina had stated many times in the past, this lack of progress was inconsistent with the principle of prompt and effective compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were concerned. Argentina supported Cuba and the EU, and urged the United States to adopt the necessary measures to finally resolve this matter.

1.9. The representative of the Plurinational State of Bolivia said that his country noted the positive developments in the relationships between the United States and Cuba. Bolivia hoped that this would assist in resolving this situation of non-compliance by the United States. The 12 years of non-compliance in this dispute undermined the credibility and integrity of the multilateral trading

system and affected the interests of a developing-country Member. Bolivia, once again, called on the United States to comply with the DSB's recommendations and rulings and to remove the restrictions imposed under Section 211. Bolivia supported the statement made by Cuba at the present meeting.

1.10. The representative of the Dominican Republic said that his country thanked the United States for its status report on the steps taken to comply with the DSB's recommendations and rulings in this dispute regarding the inconsistency of Section 211 with Article 21 of the TRIPS Agreement. The Dominican Republic, once again, called on the United States to step up its internal procedures in order to comply with the DSB's recommendations and rulings. This prolonged situation of non-compliance undermined the credibility of the DSB. As stated by Jamaica and Bolivia, the Dominican Republic also hoped that the recent steps taken to improve bilateral relations between Cuba and the United States would quickly result in the resolution of this dispute.

1.11. The representative of Dominica, speaking on behalf of the OECS countries, said that the OECS countries thanked the United States and Cuba for their respective statements on this matter. The OECS countries continued to support Cuba and remained concerned about the lack of progress and the continued non-compliance with the DSB's rulings and recommendations in this dispute. This non-compliance was inconsistent with the requirements for prompt and effective implementation of decisions. The OECS countries were particularly concerned that non-compliance in this dispute continued to have a negative economic impact on the economy of a small developing-country Member. Small countries relied on having a well-functioning rules-based multilateral trading system, including its dispute settlement mechanism, and sought the protection and predictability provided under the DSU. Therefore, this prolonged situation of non-compliance seriously undermined the dispute settlement system and the WTO's integrity in its capacity as the custodian of the multilateral trading system. In that context, the OECS countries once again urged prompt compliance with the DSB's rulings and recommendations in order to resolve this dispute. Like previous speakers, the OECS countries took note of, and welcomed the recent developments in the US relations with Cuba and hoped that this would lead to a prompt resolution of this dispute.

1.12. The representative of the Russian Federation said that his country regretted that it had to, once again, express its concern about the lack of progress in this long-standing dispute. This was an example of non-compliance with, and disregard of, the DSB's recommendations and rulings. Russia believed that due and timely implementation of the DSB's rulings and recommendations by all Members was essential for maintaining trust and credibility in the WTO system. As it had previously stated, Russia urged the parties to this dispute to address the outstanding issues and to resolve this dispute as soon as possible.

1.13. The representative of Mexico said that, as it had done in the past, his country urged the parties to this dispute to adopt the necessary measures to comply with the DSB's recommendations and rulings, in accordance with Article 21.1 of the DSU.

1.14. The representative of Trinidad and Tobago said that his country thanked the United States for its status report and Cuba for its update in this dispute. Trinidad and Tobago recalled its previous statement made at the DSB meeting in December 2014 under this Agenda item. Trinidad and Tobago regretted that, after almost 13 years, there had been no compliance with the DSB's recommendations and rulings. In that regard, Trinidad and Tobago once again referred to Article 21.1 of the DSU, which called for prompt compliance with the DSB's rulings and recommendations. The lack of solution in this dispute undermined the effectiveness and credibility of the DSB and the multilateral trading system. This would undoubtedly affect other WTO Members, in particular those from developing countries such as Cuba and Trinidad and Tobago. His country took note of, and welcomed the recent bilateral developments between the United States and Cuba and hoped that this could accelerate the resolution of this dispute. Trinidad and Tobago supported the call for prompt compliance with the DSB's rulings and recommendations in order to preserve the integrity of the WTO system.

1.15. The representative of India said that his country noted the US status report and its statement made at the present meeting. India shared the concern raised by other Members about the lack of progress in the implementation of the DSB's recommendations in this dispute. India renewed its systemic concerns about the continuation of non-compliance as this undermined the confidence the Members reposed in a rules-based system, especially in the context of a

developing-country Member seeking compliance. India urged the United States to report compliance to the DSB in this matter.

1.16. The representative of China said that his country thanked the United States for its status report and the statement made at the present meeting. China noted that the United States had not reported any substantial progress. The prolonged situation of non-compliance in this dispute was highly inconsistent with the principle of prompt compliance required under the DSU provisions, in particular since the interests of a developing-country Member were affected. China urged the United States to implement the DSB's rulings and recommendations without any further delay.

1.17. The representative of Ecuador said that his country supported the statement made by Cuba. Ecuador recalled, once again, that Article 21 of the DSU referred to prompt compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Ecuador hoped that the United States would step up its efforts and promptly comply with the DSB's rulings and recommendations.

1.18. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Cuba at the present meeting. Venezuela shared the concerns expressed by many delegations that the US status report did not contain any information on progress in the implementation of the DSB's recommendations and rulings in this dispute. Venezuela underscored the systemic repercussions brought about by this prolonged situation of non-compliance by the United States. Non-compliance in this dispute affected the interests of a developing-country Member and undermined the dispute settlement system. Furthermore, this non-compliance set a negative precedent. It also undermined the credibility of the WTO and the multilateral trading system as well as its ability to resolve disputes. Venezuela urged the United States to comply with the DSB's rulings and recommendations by repealing Section 211 so as to finally resolve this dispute.

1.19. The representative of El Salvador said that her country thanked the United States for its status report and Cuba for its update. Like previous speakers, El Salvador noted with concern the lack of compliance in this dispute, which affected the economy of a small vulnerable country. The non-compliance in this dispute also undermined the multilateral trading system. El Salvador noted that resolving this long-standing dispute would promote bilateral relations between the United States and Cuba. El Salvador urged the United States to comply with the DSB's recommendations and rulings.

1.20. The representative of Uruguay said that his country thanked the United States for its status report and encouraged the United States to comply with the DSB's recommendations and rulings in this dispute. Uruguay thanked Cuba for its update on this dispute, which had lasted for 13 years. Uruguay regretted that no progress had been made in this dispute and that the non-compliance undermined the credibility of the WTO. Uruguay hoped that this dispute could be resolved as soon as possible in particular in light of the recent developments in the relations between the United States and Cuba.

1.21. The representative of Nicaragua said that his country welcomed the restoration of bilateral relations between Cuba and the United States and hoped that, this dispute that had lasted more than 10 years, could be resolved promptly. Nicaragua supported Cuba and thanked the United States for its status report, despite the fact that it did not report on any progress in finding a solution to this dispute. Nicaragua urged the United States to ensure compliance with the DSB's recommendations and rulings.

1.22. The representative of Zimbabwe said that his country welcomed the US status report. However, Zimbabwe regretted that the United States had made no efforts to comply with the DSB's recommendations and rulings in this dispute. The US non-compliance undermined and casted doubt on the effectiveness and credibility of the DSB. In that regard, Zimbabwe reiterated its support for the concerns expressed by Cuba and other delegations, and urged the United States to comply with the DSB's recommendations and rulings.

1.23. The representative of Viet Nam said that her country supported the statement made by Cuba. Viet Nam noted that 12 years had passed with no compliance in this dispute. Viet Nam urged the United States to comply with the DSB's recommendations and rulings.

1.24. The representative of Brazil said that the statements made at the present meeting did not seem to convey concrete progress in this matter. Brazil hoped that the new and welcomed political developments between the United States and Cuba may prove fruitful in finding an acceptable solution between the parties to this dispute.

1.25. The representative of Angola said that his country thanked the United States for its status report regarding Section 211. Angola regretted that there was no concrete progress in this dispute which had remained unresolved for 12 years. Angola was concerned that Cuba continued to be adversely affected by the lack of progress in this dispute. Angola understood that each Member had the right to defend its interests under the WTO rules. However, defending one's interests should not be to the detriment of other Members. Such a situation could create a systemic precedent that could undermine the dispute settlement system, which was recognized as one of the main achievements of the WTO. Angola reiterated its support for Cuba and encouraged the parties to this dispute to find a mutual solution. Angola urged the United States to show its commitment to resolve this matter.

1.26. The representative of Pakistan said that his country supported the view expressed by previous speakers that the rules-based system should not be undermined. Pakistan thanked the United States for its status report and continued to remain optimistic that efforts would be made to ensure compliance with the DSB's recommendations.

1.27. The representative of the United States said that his country appreciated Members' comments noting the recent bilateral developments between the United States and another Member. However, the DSB was not the appropriate forum for discussing bilateral relations between Members generally. The United States reminded Members that the parties to this dispute were the United States and the EU. That said, the United States understood that some Members may have questions about this issue, and as it had stated when this issue came up in the TPR, the United States looked forward to answering Members' questions about this matter in the appropriate forum in the months ahead. Additionally, the United States said it would like to respond to the concerns expressed by Members about the systemic implications of this dispute on the system. The facts simply did not justify such systemic concerns. The United States had come into compliance, fully and promptly, in the vast majority of its disputes. In fact, the United States had announced the resolution of other disputes at recent DSB meetings. As for the remaining few instances where it had not yet been entirely successful, the United States had been working actively towards resolving such matters, and would continue to work to implement the DSB's recommendations and rulings in this dispute.

1.28. The representative of Cuba said that, in response to the US statement, her delegation wished to refer to three issues. First, the non-compliance by the United States in this dispute had systemic implications and affected the credibility of the WTO. As stipulated in Article 3 of the DSU, the dispute settlement system was an essential element in providing security and predictability to the multilateral trading system. That security and predictability would be undermined if a Member did not comply, as was the case of the United States in this dispute. Second, the multilateral trading system, which was a rules-based system, had to be respected by all Members. Cuba did not agree with the statement made by the United States that it had complied with the vast majority of the DSB's recommendations. The United States had to comply with all the DSB's recommendations and rulings. As stated by the United States, this was a dispute between the United States and the EU. However, the economic interests of a small developing-country Member, namely Cuba, were affected in this dispute. The main obstacle to improving the bilateral relations between Cuba and the United States continued to be the economic, trade and financial embargo imposed by the United States on Cuba. Section 211 was part of this policy. Finally Cuba thanked all the delegations who made statements at the present meeting and supported Cuba on this matter.

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

### B. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.145)

1.30. The Chairman drew attention to document WT/DS184/15/Add.145, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.31. The representative of the United States said that his country had provided a status report in this dispute on 15 January 2015, 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.

1.32. The representative of Japan said that his country thanked the United States for its statement and status report submitted on 15 January 2015. Japan, once again, requested that this remaining issue should be resolved as soon as possible.

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

### C. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.120)

1.34. The Chairman drew attention to document WT/DS160/24/Add.120, 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.

1.35. The representative of the United States said that his country had provided a status report in this dispute on 15 January 2015, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.36. The representative of the European Union said that the EU thanked the United States for the status report and its statement made at the present meeting. The EU referred to its previous statements made under this Agenda item. The EU wished to resolve this case as soon as possible.

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

### D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.83)

1.38. The Chairman drew attention to document WT/DS291/37/Add.83, 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.

1.39. The representative of the European Union said that, in recent DSB meetings, the EU had already reported on authorisation decisions and other actions towards approval decisions taken up to December 2014. The EU recalled that the EU Standing Committee on plants, animals, food and feed of 9 December 2014 had voted on a draft decision for authorisation of soybean for food and feed use. The committee had rendered no opinion. The European Commission would present this draft decision to the Appeal Committee on 6 February 2015. As stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings. The GMO regulatory regime experienced some hiccups in the past months, but the EU was confident that the situation would be clarified in the near future.

1.40. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. The EU measures affecting the approval of biotech products were seriously disrupting trade in agricultural products between the United States and the EU. The EU had failed to approve a single new biotech product in 2014. Furthermore, based on public statements by EU officials, it appeared that the EU had decided not to make any further approvals until the EU conducted yet another re-examination of EU biotech approval measures. The United States failed to see how a re-examination of existing approval measures could provide a scientific basis for not making biotech product approvals. Indeed, many of the long-pending products had successfully passed comprehensive safety assessments by the EU's scientific authority. The United States was also concerned by biotech legislation recently approved by the European Parliament. According to reports, the legislation would allow individual EU member states to ban or restrict biotech products approved at the EU-level, even where the EU member state had no scientific basis for doing so. The United States urged the EU to address these matters.

1.41. The representative of the European Union said that the aim of the Commission proposal as discussed in the legislative process was to facilitate decision-making on GMOs for cultivation in the EU. Should the text be adopted as expected in March/April 2015, it would allow an individual Member State to request the applicant to remove part of or all its territory from the geographical scope of the application (Option 1). When a Member State had not made a request under Option 1, or when the applicant had not adjusted the scope of the application, after authorisation the relevant Member State could adopt a national measure to restrict or ban the cultivation of the concerned GMOs, or of a group of GMOs defined by crops or traits, on its territory (Option 2, so-called "opt out" measure). The reasons for opting out must be other than health risk or environmental risk as assessed by the European Food and Safety Authority. Member States must respect the international commitments, notably the WTO commitments when justifying their reasons for an opt-out. Thus, the proposal would not affect the core features of the authorisation system for GMOs' cultivation. In particular, the risk assessment done by the European Food Safety Authority would remain unchanged.

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

### E. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.31)

1.43. The Chairman drew attention to document WT/DS404/11/Add.31, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain shrimp from Viet Nam.

1.44. The representative of the United States said that his country had provided a status report in this dispute on 15 January 2015, in accordance with Article 21.6 of the DSU. As the United States had noted at past DSB meetings, in February 2012 the US Department of Commerce had modified its procedures in a manner that addressed certain findings in this dispute. The United States would continue to consult with interested parties as it worked to address the other recommendations and rulings of the DSB.

1.45. The representative of Viet Nam said that her country thanked the United States for its status report. Viet Nam requested the United States to comply with the DSB's recommendations and rulings as soon as possible. As the United States had stated that it would continue to consult with interested parties as it worked to address the DSB's recommendations and rulings, Viet Nam hoped that those consultations would be held soon and that the parties to the dispute would find an appropriate solution to address this issue in order to ensure the effectiveness of the system.

1.46. The representative of Cuba said that her country wished to reiterate the importance of effective compliance in particular since the interests of a developing-country Member, Viet Nam, were affected by non-compliance with the DSB's rulings and recommendations. Cuba noted that the US status report did not report on any significant progress. Cuba urged the United States to fully comply with their commitments in this dispute.

1.47. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela emphasized the need for prompt and effective compliance with the DSB's rulings and recommendations, and urged the United States to promptly resolve this matter.

1.48. 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. Statements by the European Union and Japan

2.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union and Japan. He then invited the respective representatives to speak.

2.2. The representative of the European Union said that, once again, the EU requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. 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.

2.3. The representative of Japan said that since the distributions under the CDSOA had been continuing, Japan, once again, urged the United States to stop the illegal distributions in order to resolve this long standing dispute. As it had stated at previous DSB meetings, Japan was of the view that the United States was under obligation to provide the DSB with a status report in this dispute, in accordance with Article 21.6 of the DSU.

2.4. The representative of India said that his country shared the concerns of the EU and Japan. The WTO inconsistent disbursements continued unabated to the US domestic industry. The latest data available[1] in the CDSOA Annual Report of the US Customs and Border Protection for the fiscal year 2014 indicated that about US$70 million were disbursed to the US domestic industry. India agreed with the EU and Japan that the Byrd Amendment should continue to remain subject to the DSB's surveillance until the United States ceased to administer it.

2.5. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Brazil said that in these disputes one Member claimed compliance while maintaining disbursements after the repeal of the Byrd Amendment Act. Disbursements linked to investigations initiated before that repeal could not constitute compliance. In that regard, the obligation to submit status reports in this dispute remained.

2.6. The representative of Canada said that his country thanked the EU and Japan for having once again put this item on the DSB's Agenda. Canada shared the view that the Byrd Amendment would and should be subject to the DSB's surveillance until the United States complied with its obligations.

2.7. The representative of the United States said that, as his country had noted at previous DSB meetings, the Deficit Reduction Act, which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000, was 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, Japan, and other Members had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, which was over seven years ago. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to the comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement

[1] See: http://www.cbp.gov/sites/default/files/documents/FY2014%20Annual%20Report%20wHolds.pdf

the DSB's recommendations and rulings in these disputes. Indeed, as these very WTO Members had demonstrated repeatedly when they were responding parties in disputes, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance. In fact, one Member that used to call for status reports under this Agenda item was not currently supplying such reports in another matter to be considered under Agenda item 4, giving its position as having taken all actions necessary to comply.

2.8. The DSB took note of the statements.

## 3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

### A. Statement by the United States

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

3.2. The representative of the United States said that his country continued to have serious concerns that China had failed to bring its measures into conformity with its WTO obligations. The situation unfortunately had not changed since the United States had first begun raising this matter in the DSB and despite repeated interactions between the United States and China. China continued to maintain a ban on foreign suppliers of electronic payment services ("EPS") by imposing a licensing requirement on them, while at the same time providing no procedures to obtain that license. As a result, an enterprise located in China remained the only EPS supplier that could operate in China's domestic market. To comply with its WTO obligations, and despite China's assertions in previous DSB statements, China must adopt the regulations necessary for allowing foreign suppliers to operate in China. The United States took note of the statement last October by China's State Council that China would open the EPS market to qualified suppliers. Three months had now passed since the State Council announced its decision, and once again, the United States was waiting. The United States looked forward to prompt issuance of the regulations needed to follow through on the announcement that was made by the State Council.

3.3. The representative of China said that his country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made under this Agenda item at previous DSB meetings. China had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute. China had also further explained that the actions being sought by the United States were beyond the scope of China's compliance obligations. China hoped that the United States would reconsider the systemic implications of its position.

3.4. The DSB took note of the statements.

## 4 THAILAND - CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

### A. Statement by the Philippines

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

4.2. The representative of the Philippines said that, as her country had indicated in its statement made at the previous regular DSB meeting, the Philippines' resolution for 2015 was to resolve this dispute. The outstanding compliance issues, which were well known to the DSB, were important not only for the concerned importer, but also from a systemic point of view. To recall just one of the compliance matters of systemic importance that remained outstanding in this dispute, the Thai Attorney General had recently confirmed the decision to prosecute an importer of Philippine cigarettes for alleged under-declaration of customs value, threatening the imprisonment of 11 accused current and former employees and the existence of the importer itself. As the Philippines had noted, the WTO panel had ruled that Thailand enjoyed no legitimate grounds to reject the customs values that Thailand now sought to criminalize. In addition, Thai Customs' Board of Appeals had explicitly accepted those customs values, in a ruling heralded by Thailand itself as a

measure taken to comply. The authority and credibility of the dispute settlement system was at stake if Members understood their obligation to implement the DSB's recommendations and rulings only as an invitation to adopt a measure ostensibly achieving compliance, only to introduce new methods and measures that restored the same WTO-inconsistent results. Trade was neither secure nor predictable if Members' commitment to achieving compliance was not "substantive", that is, if it was not real. This was the moment for Thailand to prove that its commitment to compliance was real and to rise to its role as a responsible and important WTO Member. As stated at the December 2014 DSB meeting, in 2015 the Philippines would like to see its ASEAN neighbour in this role, and to work together to resolve the dispute outside formal dispute settlement proceedings. However, if that was not possible, the Philippines would resort to its rights under the DSU.

4.3. The representative of Thailand said that his country took note of the Philippines' statement made at the present meeting. As stated in its previous status reports and at the DSB meetings, Thailand had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute. This was without prejudice to any other rights of the Philippines under the DSU provisions. Thailand reiterated that it had been and remained, available to discuss the specific concerns of the Philippines bilaterally, including those not addressed by the DSB's recommendations and rulings.

4.4. The DSB took note of the statements.

## 5 ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

### A. Report of the Appellate Body (WT/DS438/AB/R) and Report of the Panel (WT/DS438/R and WT/DS438/R/Add.1)

### B. Report of the Appellate Body (WT/DS444/AB/R) and Report of the Panel (WT/DS444/R and WT/DS444/R/Add.1)

### C. Report of the Appellate Body (WT/DS445/AB/R) and Report of the Panel (WT/DS445/R and WT/DS445/R/Add.1)

5.1. The Chairman proposed that the three sub-items under Agenda item 5 be taken up together. He drew attention to the communication from the Appellate Body contained in documents WT/DS438/19 – WT/DS444/19 – WT/DS445/20 transmitting the Appellate Body Reports on: "Argentina – Measures Affecting the Importation of Goods", which had been circulated on 15 January 2015 in documents WT/DS438/AB/R – WT/DS444/AB/R – WT/DS445/AB/R. He reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

5.2. The representative of the European Union said that the EU thanked members of the Appellate Body, the Panel and the respective Secretariats for their work in this case. The EU welcomed the outcome of this dispute. The rulings of the Panel and of the Appellate Body had vindicated all the main claims advanced by the EU and its co-complainants, Japan and the United States, with respect to the import restrictive measures adopted by Argentina. The verdict was clear. Argentina had acted illegally under WTO law by forcing on local importers or foreign firms the respect of various trade-related requirements (TRRs) as a condition for importing goods into the country. Furthermore, Argentina had acted illegally under WTO law by devising the Advance Sworn Import Declaration (DJAI) procedure, which since February 2012, required firms to secure the approval by its authorities before importing goods. The implications of the rulings were also clear. Argentina should no longer require importers to offset the value of their imports with equivalent exports, to limit their imports in volume or in value, to use certain amount of Argentine content in their products, to invest in Argentina and/or keep their profits there, as a condition or conditions to engage in the importation of goods into that country. Argentina should also refrain from requiring importers to secure an approval for their imports. The Appellate Body had confirmed the Panel's findings that Argentina's imposition of trade-related requirements operated as a single measure

which constituted a restriction on the importation of goods inconsistent with Article XI:1 and Article III:4 of the GATT 1994.

5.3. The EU also noted that the Appellate Body had left unchanged the Panel's finding that the content of the single measure consisted of the combined operation of the individual trade-related requirements as one of the tools that Argentina used to implement the "managed trade" policy. Furthermore, it had confirmed the finding that the TRRs would continue to be imposed "until and unless the policy is repealed or modified". The EU was pleased that the Appellate Body had upheld the EU's cross-appeal and had considered that the 23 instances of application of the trade-related restrictions were identified as "specific measures at issue" in a manner that was sufficiently precise as to conform to the requirements of Article 6.2 of the DSU and were thus within the Panel's terms of reference. With respect to the DJAI procedure, the Appellate Body had left untouched the Panel's findings that such procedure: (i) hindered access to the Argentinian market; (ii) created uncertainties on the ability to import; (iii) conditioned the ability of the importers to import as much as they wished; (iv) burdened importers in a way disconnected from their normal importing activity; and (v) that in view of all this it had a limiting effect on the importation of goods into Argentina and was, hence, inconsistent with Article XI:1 of the GATT 1994. In light of such clear-cut findings of the Appellate Body and the Panel, the EU hoped that Argentina would promptly take the necessary steps to comply with all the recommendations and rulings to be adopted at the present meeting.

5.4. The representative of the United States said that his country thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. The United States also thanked its co-complainants, the European Union and Japan, for the very close and fruitful collaboration throughout this process. The adoption of the Panel and Appellate Body Reports by the DSB at the present meeting would bring to a close this chapter of a dispute that had taken more than two years to reach this point. In fact, the United States and other Members had sought for many years prior to that to resolve through dialogue their concerns with Argentina. With the adoption of these Reports, it was the US desire and expectation that the parties could work together to achieve a resolution of this matter that would bring Argentina's import licensing measures into compliance with WTO rules. The United States said that it would briefly recall the nature of the measures involved in this dispute, given the importance of the findings by the panel and Appellate Body. First, the United States, together with its co-complainants, had alleged that Argentina had imposed a non-automatic, non-transparent, and highly discretionary import licensing system, the DJAI,[2] that restricted imports in contravention of numerous provisions of the GATT 1994 and the Import Licensing Agreement. The Panel had focused its analysis on Article XI of the GATT 1994, and had found this measure to be an import restriction that breached Argentina's Article XI obligations. The Appellate Body had now rejected Argentina's appeals and had affirmed the Panel's findings entirely. In so doing, both the Panel and Appellate Body had soundly rejected Argentina's arguments that Article VIII of the GATT 1994, which set out hortatory provisions relating to customs formalities, served as an exception to Article XI. There was no textual basis for this argument, and the Appellate Body had rightly pointed to a number of other provisions in the GATT 1994 explicitly setting out exceptions from the obligations in Article XI as relevant context. Thus, to the extent obligations in both Articles may apply to the DJAI, they would apply cumulatively. The Panel and the Appellate Body had agreed with the co-complainants that the DJAI had a limiting effect on imports through its discretionary, non-automatic nature, the uncertainty it created for traders, its imposition of export criteria, and the burdens it placed on importers.[3] To come into conformity with WTO rules, Argentina would need to reform these aspects of any licensing system it applied.

5.5. The United States and its co-complainants had also challenged an unwritten measure imposed by Argentina consisting of restrictive trade-related requirements on importers[4], often as a condition for giving import authorization under the DJAI. The Panel and Appellate Body had agreed that the complainants had demonstrated the existence of this measure, undertaken in pursuit of a policy of so-called "managed trade" or import substitution set out by high-level government officials, and that this unwritten measure itself had also breached Article XI of the GATT 1994. Continued imposition of these restrictions on importers would therefore not be consistent with WTO rules. Although this was not the first time an unwritten measure had been challenged in WTO

[2] Declaración Jurada Anticipada de Importación.
[3] Panel Report, paragraph 6.474; Appellate Body Report, paragraphs 5.284-5.285.
[4] Panel Report, paragraph 6.221; Appellate Body Report, paragraphs 4.5-4.11.

dispute settlement, the occurrences were relatively rare. The United States applauded the Panel's careful and very detailed treatment of the substantial evidence advanced by the co-complainants to demonstrate the existence of this measure, which spanned dozens of pages of the panel report.[5] Against this overwhelming evidence, Argentina had sought to assert what might be described as a "technical" defence to try to shield its unwritten measure from challenge. In particular, Argentina had attempted to invoke the Appellate Body's articulation of the elements needed for an "as such" challenge to an alleged "methodology" measure in a different dispute and apply that here to an entirely different type of measure. Both the Panel and Appellate Body had rightfully rejected that effort. In that regard, the United States drew Members' attention to the Appellate Body's clear and common sense explanation that not every measure would be of the same nature, and that what was required of a complainant was to bring forward sufficient evidence to demonstrate the existence of the measure complained against.[6] The Appellate Body had also rejected the notion that every challenge to a measure that may continue to exist until withdrawn must be framed as an "as such" challenge or that such a measure must be shown to have "general" or "prospective" application.[7] To have introduced such requirements, particularly in the context of a challenge to an unwritten measure, would have run the risk of shielding from WTO scrutiny and disciplines certain acts by Members, such as decisions not reduced to accessible legal instruments. Thus, in substance, the United States was pleased with the high-quality Reports produced by the Panel and the Appellate Body in this dispute, which the United States expected would contribute importantly to achieving a solution to this matter. The United States also noted that this dispute involved a number of import licensing matters of concern to Members, and these Reports should serve as important references for Members applying such measures.

5.6. The United States also wished to touch briefly on a regrettably familiar procedural matter. The United States noted that, for the fifth time in the last six disputes, the Appellate Body had not circulated its reports within 90 days as mandated in Article 17.5 of the DSU. The Appellate Body had also continued its recent deviation from its pre-2011 practice and had failed to consult with the parties or seek their agreement when it became clear that it would be unable to meet the DSU deadline. Instead, the Appellate Body had yet again merely informed the parties via form letter that it would not circulate its Report within the prescribed time-limit. It would also appear that a step had been taken backwards with respect to transparency, as compared with other reports, in that this report did not even mention this issue in its introductory section. Accordingly, a Member that had not seen the Article 17.5 notice[8] and was only reading the Report would not be aware of the circumstances surrounding the timing of this Report's circulation. As previously noted, these types of actions, in the context of a clear and mandatory DSU provision, did not contribute to a strengthening of the rules-based system. They were particularly disappointing in light of the fact that Argentina, the United States, and Japan had clearly indicated in a joint letter sent to the Appellate Body and circulated to the DSB that they would have been willing to positively consider a request from the Appellate Body for extra time to circulate its Report given the circumstances and that they would consider a late report to be deemed consistent with Article 17.5 of the DSU.[9] As it had noted since this issue first came to the DSB's attention, the United States encouraged Members and the Appellate Body to work together to find a solution to this matter, such as a return to past practice. A situation in which Members continued to be informed of and react to circulation of reports in circumstances such as these only further contributed to a lack of transparency and a lack of predictability surrounding the issue.

5.7. The representative of Japan said that his country appreciated the time and effort devoted to this case by the Panel, the Appellate Body and the respective Secretariats. Like the other co-complainants in these disputes, Japan welcomed the findings and rulings by the Appellate Body and the Panel in their Reports that Argentina's measures at issue were in clear breach of its WTO obligations. Japan requested the DSB to adopt the Reports at the present meeting. In this dispute, the measures at issue were the unwritten trade-related requirements (TRRs) measures and the Advance Sworn Import Declaration (DJAI) procedure. Both were import restrictions which were highly non-transparent, arbitrary and uncertain and clearly trade-restrictive. The Panel and the Appellate Body had clearly ruled that under the WTO rules, the import restrictions imposed by

[5] See e.g., Panel Report, paragraphs 6.155-6.341.
[6] Appellate Body Report, paragraphs 5.103-5.104, 5.108.
[7] Appellate Body Report, paragraphs 5.109-5.110.
[8] Communication from the Appellate Body, 24 November 2014 (WT/DS438/17, WT/DS444/15, WT/DS445/16).
[9] Joint Communication from Argentina and the United States, WT/DS444/16 (5 December 2014); Joint Communication from Argentina and Japan, WT/DS445/17 (5 December 2014).

Argentina were inconsistent with the WTO Agreement and could not be justified by making the measures themselves or the manners by which they were applied non-transparent. Thus the lack of transparency and the uncertainty that characterized the TRRs measure and the DJAI procedures did not provide any cover for the WTO-inconsistency of these measures. Japan believed and hoped that these findings and rulings in the Reports would provide a definitive resolution of this dispute, and would also clarify the fact that protective measures such as the measures at hand were not accepted under the WTO Agreement. Importantly, the Panel and the Appellate Body had made useful clarifications to the issues of law and legal interpretation raised in this dispute and Japan wished to highlight two of them. First, with respect to the type of measures that could be challenged in WTO dispute settlement, the Appellate Body had confirmed that "the distinction between 'as such' and 'as applied' claims neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures that are susceptible to challenge".[10] The distinction was "an analytical tool to facilitate the understanding of the nature of a measure at issue".[11] "Measures" challengeable in the WTO dispute settlement "extend to any act or omission that is attributable to a WTO Member"[12] and this "broad concept of measure is not limited merely to rules or norms of general and prospective application and their individual applications".[13] A panel was "not always required to apply rigid legal standard or criteria that are based on the 'as such' or the 'as applied' nature of the challenge"[14], but instead "the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged".[15]

5.8. In this dispute, the Panel and the Appellate Body had rightly found that "the complainants had demonstrated the existence of a TRR measure, which is composed, in particular, of several individual TRRs operating together in an interlinked fashion as part of a single measure in pursuit of the objectives of import substitution and trade deficit reduction"[16]; which "has systemic application, as it applies to economic operators in a broad variety of different sectors"[17] and which "has present and continued application, in the sense that it currently applies and it will continue to be applied in the future until the underlying policy cease to apply".[18] In short, this type of measure as described and characterized by a complainant, if its existence was demonstrated with evidence, could be subject to challenge in WTO dispute settlement. Second, with respect to the scope of disciplines under Article XI:1 of the GATT 1994, after reaffirming its previous findings, the Appellate Body had explained that a "condition or burden placed on importation or exportation" that would constitute "restrictions" which were inconsistent with Article XI were "those that are limiting, that is, those that limit the importation or exportation of products".[19] The Appellate Body had further clarified that "this limitation need not be demonstrated by quantifying the effects of the measure at issue: rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[20] In this dispute, the Panel had found that the DJAI procedure constituted a "restriction" "because it: (i) restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic; (ii) creates uncertainty as to an applicant's ability to import; (iii) does not allow companies to import as much as they desire or need without regard to their export performance; and (iv) imposes a significant burden on importers that is unrelated to their normal importing activity".[21] The Appellate Body had agreed and had explained that "the Panel's reference … [to the notion of not being automatic] is a reference both to the direct connection between the DJAI procedure and the right to import, and to the discretionary control exercised by Argentina agencies in deciding when and subject to what 'exit' status can be attained".[22] Thus the Appellate Body had clarified that the "discretionary nature"[23] of the measures that could create "uncertainty for

[10] Appellate Body Report, paragraph 5.102.
[11] Appellate Body Report, paragraph 5.102.
[12] Appellate Body Report, paragraph 5.109.
[13] Appellate Body Report, paragraph 5.109.
[14] Appellate Body Report, paragraph 5.110.
[15] Appellate Body Report, paragraph 5.110.
[16] Appellate Body Report, paragraph 5.146.
[17] Appellate Body Report, paragraph 5.146.
[18] Appellate Body Report, paragraph 5.146.
[19] Appellate Body Report, paragraph 5.217.
[20] Appellate Body Report, paragraph 5.217.
[21] Panel Report, paragraph 6.474, quoted in Appellate Body Report, paragraph 5.271.
[22] Appellate Body Report, paragraph 5.284.
[23] Appellate Body Report, paragraph 5.282.

importers of goods"[24] was "an element supporting"[25] the view that the measure constituted a restriction under Article XI:1 of the GATT 1994.

5.9. With regard to exceeding the 90-day time-limit in these procedures, as expressed in the joint communication, dated 5 December 2014, from Argentina, the United States and Japan (WT/DS445/17), Japan, once again, expressed its regret about the lack of consultations given the prior practice between Members and the Appellate Body until 2011, in which the Appellate Body had consulted with the participants and had obtained their agreement before circulating reports after the deadline provided for in the DSU. In this regard, Japan believed that providing an opportunity for consultations was an important due process, in particular, in the current circumstances under which the Appellate Body was required to deal with a high amount of work. Japan had requested consultations with Argentina under the DSU in August 2012 and the Panel had been established in December 2012. After years of litigation, the dispute settlement proceedings would come to an end. The DSB would shortly adopt the recommendations and rulings. It was Argentina's turn to take action to bring itself into conformity with the WTO Agreement. Japan urged Argentina to fully implement the DSB's recommendations and rulings by promptly eliminating the import restrictions at issue. Japan noted that Article 21 of the DSU provided that "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes" and directed Members to "comply immediately with the recommendations and rulings". Japan stood ready to engage in discussions with Argentina in a constructive manner in the coming weeks, with a view to achieving the prompt and full compliance by Argentina and the positive resolution of this dispute.

5.10. The representative of Argentina said that his country thanked the Panel, the Appellate Body and their respective Secretariats for their work in this dispute. Argentina noted that this dispute raised difficulties and challenges regarding the interpretation of issues of high value and of systemic importance, some of which, in Argentina's view had not been appropriately resolved. One of these issues concerned the identification of the "overarching measure" and undue expansion of the scope of the dispute. Argentina regretted that the three co-complainants had been able to proceed through all stages of the dispute without having to properly and precisely identify the specific normative content of the alleged overarching measure as a measure distinct from its specific components (Appellate Body Report, paragraphs 5.27 to 5.31). Argentina was not satisfied about the fact that, despite submitting various "as such" claims without naming them in those terms, the co-complainants had been able to proceed in the dispute without the need to meet the legal standard set by the Appellate Body for assessing "as such" claims concerning unwritten measures. This standard, laid down in the "US - Zeroing (EC)" dispute, required an "as such" claim of inconsistency of an unwritten measure to be based on the following evidence: (i) that the measure was attributable to the respondent; (ii) the precise content of the measure; and (iii) that the measure was of general and prospective application. None of this had occurred in this dispute (Appellate Body Report, paragraphs 5.107, 5.108 and 5.111).

5.11. Argentina was surprised by the Appellate Body's decision not to require a higher level of precision as the Appellate Body had recognized the limited approach taken by the Panel (Appellate Body Report, paragraph 5.130). Argentina found it strange that although it had not upheld its claim with regard to the legal standard required to demonstrate the existence of an unwritten measure of "general and prospective application", the Appellate Body had reasoned that the claim was based on an "unwritten measure that has certain characteristics, including systematic and continued application" (Appellate Body Report, paragraph 5.138). In Argentina's view, unless the terms in question were to be interpreted otherwise than in the ordinary and usual sense, it was very difficult to appreciate the difference between "general and prospective application" and "systematic and continued application", all the more so when the clarification given was that the measure was "applied systematically and will continue to be applied in the future" (Appellate Body Report, paragraph 5.139). Argentina was puzzled as to what would be the difference, if any, if that same sentence were to read: "is applied in a general manner, will continue to be applied in a prospective manner", especially given that the Appellate Body appeared to have reached the same "result", in stating that Japan's claim had been decided on the basis of the same evidence and within the same analytical framework as the claims of the other two co-complainants (Appellate Body Report, paragraph 5.156). Argentina was in the process of examining the Reports to be

[24] Appellate Body Report, paragraph 5.283.
[25] Appellate Body Report, paragraph 5.286.

adopted at the present meeting and would proceed in this matter in accordance with its WTO obligations.

5.12. The representative of the European Union said that, unfortunately, the EU had to disagree with the other co-complainants regarding one issue. The EU recalled that it disagreed with the views expressed by the United States and Japan in relation to Article 17.5 of the DSU as detailed in a communication sent to the Appellate Body and circulated to the DSB previously in the context of these disputes.

5.13. The representative of Chinese Taipei said that her delegation thanked the Appellate Body and the Panel for the Reports, and the Secretariat for the support it provided in these disputes. The main reason for Chinese Taipei's participation as a third party was its interest in the interpretation and application of the GATT 1994, specifically the scope of Article XI and its relationship with Article VIII. Chinese Taipei welcomed the fact that, by concluding that Members could not excuse their obligations under Article XI:1 by resorting to Article VIII, the Appellate Body had refused to accept the argument that Articles VIII and XI should be interpreted as being mutually exclusive. This conclusion, once again, served to reaffirm the jurisprudence and helped to maintain the integrity of the multilateral trading system. Chinese Taipei had noticed, though, that the time-frame stipulated in Article 17.5 of the DSU had not been followed in this dispute, and this was also the case in other disputes. One reason for the delay might be the current heavy workload of the Appellate Body. Chinese Taipei wondered whether Members should now give some serious thought to the issue of how to improve the efficiency of dispute proceedings, without prejudice to the accuracy and quality of dispute settlement reports.

5.14. The representative of Brazil said that his country was not a third party in these disputes and, therefore, did not wish to make any substantive comments on the Reports at the present meeting. However, Brazil wished to comment on the views expressed by some co-complainants about the observance by the Appellate Body of the 90-day time-period and, the end of past practice regarding the circulation of Appellate Body reports as referred to by some delegations. Brazil also wished to comment on the statement made by Japan regarding the introduction of a new obligation on the Appellate Body to "consult" with Members on the 90-day time-period. Normally, Members were informed about the reasons for delays in the circulation of the Appellate Body reports or the non-observance of the 90-day time-period. In this regard, the Appellate Body would send a letter 60 days after a notification of an appeal was filed, with a detailed explanation as to why the 60-day period could not be met. Members were aware that similar reasons caused delays in relation to the 90-day time-period. Brazil recognized that transparency was important and more information about the process and reasons for delays should be provided. However, a practice to mandate the Appellate Body to consult with the parties, not only to inform them of possible delays but also to seek their agreement to go beyond the 90-day time-period, could have important systemic consequences for the integrity and the independence of the system. He noted that, at the time when the DSU had been drafted, it was not clear what would be the workload of the Appellate Body. Members should now try to assess the root causes of the problem related to the 90-day time-period. Members were aware that the current heavy workload of the Appellate Body and the long and complex submissions by Members caused delays in the circulation of reports. In order to deal with these problems, Members could consider, for example, to increase the current number of the Appellate Body members or to extend the time-period under Article 17.5 of the DSU. In conclusion, he noted that those were preliminary comments by Brazil on these matters.

5.15. The representative of Australia said that his country thanked the Panel and the Appellate Body for their Reports in these disputes. Australia participated in this dispute as a third party due to its substantial trade and commercial interests in this matter as an exporter of goods to Argentina. Another reason for Australia's participation was that it had an interest in the proper interpretation and application of WTO rules. For these reasons, Australia welcomed the fact that the Appellate Body had upheld the Panel's findings that Argentina's trade-related requirements (TRRs) measure constituted a restriction on the importation of goods and was thus inconsistent with Article XI of the GATT 1994. Australia also welcomed the fact that the Appellate Body had upheld the Panel's finding that the Declaración Jurada Anticipada de Importación (DJAI) procedure constituted a restriction on the importation of goods and was therefore also inconsistent with Article XI of the GATT 1994. These were important findings given the level of concern created by Argentina's measures.

5.16. Australia also wished to comment on delays in completion of appeal proceedings and the need for transparency for all WTO Members on the reasons for such delays, along similar lines to its statement made at the DSB meeting on 16 January 2015 in relation to the DS437 dispute. Australia was fully aware of the current heavy workload of the Appellate Body and the ever-increasing complexity in some appeals under consideration. Australia, therefore, understood that it may not always be possible to adhere to the time-frames provided for in Article 17.5 of the DSU. In Australia's view, the accuracy and high quality of reports remained paramount in the WTO dispute settlement process. However, adherence to time-frames underpinned the predictability of the system and was critical in government and commercial decision-making. Australia would, therefore, encourage as few departures from normal appellate time-frames as possible, and consultation with the parties in the event that delay was likely. In Australia's view, such an approach would ensure transparency and would be consistent with long-standing practice. Once again, Australia thanked the Appellate Body, the Panel and relevant Secretariat staff for their work in this dispute.

5.17. The representative of Canada said that his country had participated in these disputes as a result of its systemic interest in this matter, and in particular, in the correct interpretation of Article XI:1 of the GATT 1994. The Appellate Body had been correct in upholding the Panel's findings that formalities or requirements under Article VIII were not excluded, *per se*, from the scope of application of Article XI:1, and that those provisions did not impose mutually exclusive obligations. With these findings, the Panel and the Appellate Body had confirmed that Article XI:1 was a comprehensive obligation with respect to import restrictions, whatever form they may take. Canada also welcomed the rejection by the Appellate Body of the analytical framework suggested by Argentina to determine if an import formality or requirement constituted a restriction under Article XI:1. The Appellate Body had correctly noted that Argentina's two-step approach was not supported by the GATT 1994 or the jurisprudence and recalled that the analysis under Article XI:1 must be done on a case-by-case basis.

5.18. With respect to the time the Appellate Body had taken to circulate its Report, Canada shared the concern expressed by others that once again it was circulated beyond the 90-day deadline provided for in the DSU. Canada fully understood and accepted that in the circumstances of the current demand placed by Members on the dispute settlement system, the longer circulation period was inevitable and unavoidable. But the inevitability of this situation did not, in itself, diminish the obligatory nature of the time-line that Members had agreed to include in the DSU. Some might like to believe that since the 90 days originally set aside for appeals had become increasingly unrealistic, Members could simply wave away a strict provision of the DSU. Canada did not share that view. On the contrary, Canada considered it even slightly troubling that the DSB, the very body charged with overseeing compliance with the WTO Agreement, and with administering the rules and procedures, had proven to be unwilling or unable to discharge this responsibility in these specific circumstances. A small group of delegations had been pursuing efforts, prompted in part by the Director General's visit to the DSB last fall, to consider possible solutions to this systemic situation, and other issues related to workload. Thus far, this group had been unable to identify a way forward. In the anticipation of the continuation of this trend in upcoming reports to be adopted by the DSB, Canada once again, encouraged delegations to come together to develop a sustainable solution to preserve the systemic integrity of the DSU.

5.19. The representative of Norway said that his country, as a third party, wished to thank the Panel, the Appellate Body and the respective Secretariats for their work in this complex dispute. Norway agreed with others that transparency was important where the Appellate Body could not circulate a report within the 90-day time-frame set out in Article 17.5 of the DSU. Furthermore, Norway also saw the importance of safeguarding predictability and legal certainty in this context. Any uncertainty connected to whether a report was deemed to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU, and hence the adoption procedure for that report, was indeed unfortunate from a systemic point of view. Norway, therefore, would be ready to join other Members in any effort to find a workable solution to this issue.

5.20. The representative of India said that his country wished to comment only on a particular aspect that two of the co-complainants had raised in this dispute, the 90-day period for Appellate Body reports. With respect to the deadline of the 90-day period for circulation of Appellate Body reports, India disagreed with the United States and Japan on their assessment. The reference to the requirement for consultations as past practice did not bear any legal mandate. Article 17.5 of the DSU did not require consultations. India was aware of the deadline under Article 17.5 of the

DSU and the need not to undermine its importance. India was aware of the pressure on the Appellate Body due to the number of cases and complexity. Complexity of the cases was one of the main reasons for the delays. To imply that the Appellate Body Secretariat had to consult and get concurrence of the parties to extend the deadline would be misinterpreting the importance of Article 17.5 of the DSU. Workload issues had to be addressed and they could be addressed in a variety of ways. Increasing the capacity of the Secretariat was one of the ways and that was being done. Increasing the period of time provided was another. Brazil had commented on some of the ways of doing so. Members were aware of the pressure on the Appellate Body and would need to address this issue appropriately instead of highlighting the need for consultations as a legal mandate or past practice.

5.21. The representative of the United States said that his country would like to comment again on a procedural matter that numerous Members had commented on at the present meeting, including Australia, Brazil, Chinese Taipei, Canada, Japan, India, the EU, and Norway. It had been useful to have had this discussion related to this important systemic issue. One comment that had been made that the United States would like to address was the issue of past practice with respect to consultations and agreement. In that regard, the United States said that it may be illuminating to look at paragraph 14 of the Appellate Body report in the "US – Upland Cotton" (Article 21.5) dispute, which described the Appellate Body's consultations with Brazil and the United States in that dispute when it became clear that the report could not be circulated within 90 days. In particular, that paragraph read: "After consultation with the Appellate Body Secretariat, Brazil and the United States agreed, in a joint letter dated 19 March 2008, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time-limit referred to in Article 17.5 of the DSU. Brazil and the United States agreed that additional time was needed because of the complexity of the issues arising in the appeal and the difficulties encountered by the Appellate Body in scheduling the oral hearing. Brazil and the United States accordingly confirmed that they would deem the Appellate Body Report in these proceedings, issued no later than 2 June 2008, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU". That paragraph from the Appellate Body Report described merely one example of 14 consecutive disputes where the Appellate Body had consulted with and had reached agreement with the parties when it was unable to circulate its report within 90 days. It was also a perfect example of where this issue had been described in a transparent manner in the Appellate Body Report, which was the practice that the United States was suggesting the Appellate Body return to. In fact, as it had noted before, the United States would continue to encourage Members to work together and to work with the Appellate Body to return to the pre-2011 practice. This would help enhance the credibility of the system and restore needed transparency and predictability. The United States looked forward to further discussions with Members on this topic.

5.22. The representative of Brazil said that his country wished to respond to the US statement regarding the situation that had taken place many years ago. He said that indeed Brazil had signed that letter in the "United States - Upland Cotton" dispute since, at that time, it was concerned about the complexity of this difficult dispute. However, it was not Brazil's intention to set a precedent. Once Brazil observed that such letters were being misused to try to create a practice, it considered that this was not a good practice. It now became clear that such letters were being used to try to impose an obligation on the Appellate Body, which should be independent. To consult with the parties and to seek their agreement regarding the extension of the 90-day time-period could have strong systemic implications. Brazil noted that, in its previous statement, the United States had stated that the Appellate Body had consulted with the parties in order to "reach agreement". Brazil found this disturbing because this could mean that a report circulated 91 or 95 days after a notice of appeal could no longer be subject to the DSB's adoption by negative consensus. This was troubling and Members should carefully examine this matter. In Brazil's view, there were other more efficient options to alleviate the workload of the Appellate Body.

5.23. The representative of the European Union said that in light of the statements made by other delegations, the EU felt obliged to recall its view that there was no link between Article 17.5 and Article 17.14 of the DSU. At the present meeting, Members could continue to make statements on this issue but they would not be any closer to solving the matter at hand. In the EU's view, Members needed to resolve this matter in another forum. Members should not interpret what they claimed to be past practice because it did not help this process and could make things worse. If Members wanted to find solutions they should not refer to practices that did not necessarily exist.

5.24. The DSB took note of the statements.

5.25. The DSB adopted the Appellate Body Report contained in WT/DS438/AB/R and the Panel Report contained in WT/DS438/R and Add.1, as modified by the Appellate Body Report.

5.26. The DSB adopted the Appellate Body Report contained in WT/DS444/AB/R and the Panel Report contained in WT/DS444/R and Add.1, as upheld by the Appellate Body Report.

5.27. The DSB adopted the Appellate Body Report contained in WT/DS445/AB/R and the Panel Report contained in WT/DS445/R and Add.1, as upheld by the Appellate Body Report.

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