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Dispute Settlement Body
21 December 2015

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 21 DECEMBER 2015[1]

Chairman: Mr. Harald Neple (Norway)

1 UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

A. Recourse to Article 22.7 of the DSU by Canada (WT/DS384/38)

B. Recourse to Article 22.7 of the DSU by Mexico (WT/DS386/39)

1.1. The Chairman proposed that the DSB take up these two sub-items together since they pertain to the same matter. First, he drew attention to the communication from Canada contained in document WT/DS384/38, and invited the representative of Canada to speak.

1.2. The representative of Canada said that first of all, Canada would like to start by acknowledging that over the weekend the United States had taken a number of steps that put it on a path to finally resolving this long-standing dispute between the two countries. This was a positive development for both economies in general and for the integrated North American livestock market in particular. Canada was pleased with where this was heading and appreciated the efforts made, in both the US administration and in the US Congress, to bring about this positive result. Once the United States had completed the remaining steps necessary to remove the discrimination in the US market, this result would also constitute further proof of the effectiveness of the WTO as a forum for dispute settlement, even though Canada would have preferred to have achieved this result much earlier. However, before making a statement about the developments in this dispute, Canada would like to comment on the actions of the United States on 18 December 2015, which were particularly puzzling given the positive direction that this dispute had taken. As delegations were aware, Canada and Mexico had requested this meeting to be held on Friday, 18 December 2015. But when the election convenor attempted to open the meeting, the United States had prevented it from taking place by threatening to block the election of an interim Chair. As a result, Canada had no choice but to go along with the suspension of the meeting until Monday 21 December 2015. With apologies to those who had also been present on 18 December 2015, Canada would take this opportunity to repeat, for the record, some of the points made in its statement on 18 December 2015. Canada reiterated its deep disappointment and regret about the decision of the United States to prevent the meeting from proceeding. The opposition of the United States to the meeting taking place on 18 December 2015 was a clear attempt to interfere with the rights of Canada and Mexico to have the DSB grant authorization to suspend concessions and other obligations to the United States. One had to be clear about the significance of the actions of the United States. The authorization of suspension of concessions was one of the most important functions of the DSB. It was the DSB's last act at the culmination of a long process in disputes where a responding party had failed to bring itself into compliance, despite having had numerous occasions to do so. And as one of the acts of the DSB that is done by negative consensus, the grant of authorization to suspend concessions was also based on one of the most important innovations of the WTO, and was a primary source of the success and credibility this institution had achieved for effective dispute settlement. Any attempt therefore to interfere with a grant of authorization, no matter how indirectly, was an assault on a

[1] This meeting was originally scheduled for 18 December 2015 at 3pm (WTO/AIR/DSB/20).

fundamental component of the system. In its effort to prevent the DSB from considering Canada and Mexico's requests on 18 December 2015, the United States invoked a set of 1995 "Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies" (WT/L/106), and several provisions of the Marrakesh Agreement. Their arguments were unconvincing on 18 December 2015 and would remain unconvincing if they were repeated at the present meeting.

1.3. First, the Guidelines cited by the United States were simply guidelines. Indeed, the Guidelines stated that only one Council meeting "should" be held at a time, a clear use of language that confirmed their non-mandatory character. Moreover, the Guidelines explicitly acknowledged, in Footnote 1, that the DSB had "particular requirements" for meetings and, therefore, that the Guidelines required certain flexibility when applied to DSB meetings. The Guidelines had been drafted in 1995, in the early days of the Organization when the volume and complexity of matters that would be subject to DSB authority currently had not yet been fully appreciated. As a result of these particular requirements, the prerogative of Members to call for a "special" meeting of the DSB had become routine practice, and this prerogative was not undermined by a set of non-mandatory Guidelines. Second, the United States cited Article IV of the Marrakesh Agreement, which they raised for the first time in their statement at the meeting on 18 December 2015, despite the fact that we had been discussing this issue with them for several weeks. While the second sentence of Article IV:2 did provide that the General Council shall carry out the functions of the Ministerial Conference between Ministerial meetings, nowhere did it suggest that the General Council ceased to exist when the Ministerial Conference was meeting. Moreover, in the third sentence Article IV:2 further provided that the General Council shall carry out other functions assigned to it by that Agreement, including convening "as appropriate to discharge the responsibilities of the DSB provided for in the DSU". These other functions were completely separate from those it performed on behalf of the Ministerial Conference. Furthermore, it was not because Article IV:1 provided that the Ministerial Conference had the authority to take decisions on any matter under any agreement that another body responsible for a specific agreement could not meet at the same time as the Ministerial Conference. To accept this argument would mean that no WTO Body could ever meet while the General Council itself was also meeting because, according to the US own argument, the General Council performed the functions of the Ministerial Conference between meetings, including the authority to take decisions under any Agreement. It was clear nonetheless that there was a significant disagreement between the United States, on the one hand, and Canada, Mexico and many other Members, on the other hand, about the interpretation and application of Article IV and the Guidelines. But instead of working to resolve the disagreement, the United States decided to take matters into its own hands and unilaterally prevent the DSB meeting from proceeding. The United States effectively had imposed its own interpretation of the Marrakesh Agreement and the 1995 Guidelines on other Members. This was an unprecedented move in the history of the DSB, one that was all the more concerning given that the item on the Agenda was an issue that was subject to reverse consensus. The negative implications of such a move should therefore not be underestimated. The United States could have and should have pursued a more constructive approach, one that would have preserved the integrity of the reverse consensus rule as well as the prerogative of the General Council to interpret the WTO Agreement. It could have, for example, recorded its reservation about the meeting taking place, but allowed it to proceed anyway given the importance of the principle at stake. It then could have sought to reach agreement in the General Council on the US interpretation, possibly even through an amendment to clarify and strengthen the 1995 Guidelines on this point. Canada therefore encouraged other Members to reject the approach taken by the United States to solve the disagreement over the appropriateness of the DSB meeting on 18 December 2015. Canada would also discourage all Members, including the United States, from considering this kind of approach as an acceptable tactic in the future to resolve disagreements about the interpretation of this Organization's legal structure and its Rules of Procedure.

1.4. Turning to the substance of this Agenda item, Canada returned to the DSB at the present meeting to submit, this time under Article 22.7 of the DSU, its request for authorization from the DSB to suspend concessions and other obligations to the United States. Canada recalled that at its meeting on 29 May 2015, the DSB had adopted the Appellate Body and compliance Panel Reports in the compliance phase of this dispute. The resulting recommendations and rulings of the DSB concluded that the amended COOL measure continued to be inconsistent with the WTO obligations of the United States. At the 17 June 2015 DSB meeting, Canada had requested authorization to suspend concessions and other obligations to the United States. As a result of the US objection at that meeting to the amount requested by Canada, the matter had been referred to arbitration. The report of the Arbitrator had been circulated on 7 December 2015. In its decision, the Arbitrator

had determined the annual level of nullification or impairment of benefits to Canada to be CDN$1,054,729,000. Canada was pleased that the amount fixed by the Arbitrator confirmed the serious adverse impact that the COOL measure had on Canada's cattle and hog industries. Canada was pleased not only with the overall result of the Arbitrator's Report, but also with many elements of the analysis. Canada certainly appreciated the work of the Arbitrator and all those in the Secretariat supporting the Arbitrator for their hard work in dealing with what was very complicated subject matter. Canada would nonetheless like to take this opportunity to comment on certain aspects of the Report.

1.5. First, it was regrettable that the Arbitrator had excluded Canada's losses arising from domestic price suppression caused by the COOL measure from the calculation of the level of nullification or impairment. This exclusion unduly narrowed the scope of the review of the adverse effects of an infringing measure in the calculation of the level of nullification or impairment by an arbitrator under Article 22.6 of the DSU. Canada was concerned that the views of the Arbitrator on this point could, if followed in the future, inappropriately limit the broad concept of nullification and impairment in Article 22.6 of the DSU. Second, regarding the particular methodology used by the Arbitrator, while Canada was pleased that the Arbitrator largely adopted Canada's methodology for calculating the price portion of the export revenue losses, Canada did have some concerns with the methodology developed by the Arbitrator for other aspects. The Arbitrator chose not to use well-established statistical and economic procedures to assess the impact that the COOL measure had on Canadian export quantities. The Arbitrator avoided the use of the historical data on export quantities and thereby missed the opportunity to improve upon the WTO's methods for calculating export quantity losses. More specifically with regard to its calculation of loss of export quantities, the Arbitrator chose to assess export quantity losses that would occur only over a short-run horizon, rather than the complete losses that occurred when a trade measure was imposed. This choice was manifested in the use of short-run elasticities over long-run elasticities, in paragraphs 6.30 - 6.32 of the Report. That choice significantly reduced the quantities concerned and therefore the total calculation of the nullification or impairment suffered by Canada. As a procedural matter, Canada noted that the issue of short-run versus long-run elasticities and their relationship with the appropriate counterfactual had not been discussed to any significant extent in the parties' written submissions, their answers to the Arbitrator's written questions, or in the meeting of the Arbitrator with the parties in Geneva. Given the importance of this issue, Canada should have been given an opportunity to discuss that issue in more detail. In Canada's view, substantively short-run elasticities were inappropriate because, among other things, they presupposed an ability of the market to return to normal over an unrealistically short period of time after the disruptions caused by the COOL measure. In addition, the Arbitrator's position on the counterfactual suggested that the level of nullification or impairment suffered by a Member could be found to be non-existent or minimal if a WTO-inconsistent measure of another Member decimated an industry in its territory. Based on the reasoning of the Arbitrator, no or very small losses would be estimated in such a case given that the removal of the measure was considered to occur after the damage to the industry had been done.

1.6. Finally, Canada wished to comment briefly on an issue that was included in the decisions in both disputes, but that applied only to the dispute in DS386, namely, the jurisdictional issue raised initially in the DSB by the EU and the subject of a follow-up communication from the EU in WT/DS384/39. Canada considered that the Arbitrator's analysis and ruling on this point was unnecessary and that the manner by which it proceeded in conducting that analysis raised due process concerns. First, neither of the parties in that dispute had challenged the jurisdiction of the Arbitrator. In fact, the parties to the DS386 dispute themselves denied that there were any questions of a "fundamental nature" that needed to be addressed by the Arbitrator. Even the EU clearly indicated that it did not and would not seek to undermine the jurisdiction of the Arbitrator. So it was not entirely clear why the Arbitrator felt it necessary to rule on this question, and the fact that it did so remained a concern to Canada. Second, Canada's concern about the Arbitrator's ruling on this matter was exacerbated by the manner by which it had conducted the analysis. While the Arbitrator acknowledged that the issue of the DSB's role in referrals to arbitration was controversial among Members, the Arbitrator had ultimately based its ruling on the input of only three Members. The parties to the DS386 dispute were the only two Members provided with an opportunity to comment in detail, and they presented a single view. The Arbitrator also relied in some detail, but apparently incompletely and incorrectly, on views provided by the EU in its statement to the DSB. Canada had submitted what the Arbitrator referred to as "unsolicited comments", which had been rejected outright on the basis that Canada had only limited intervention rights in the DS386 dispute that did not allow Canada to comment on this issue. But it

was hard to reconcile the Arbitrator's outright rejection of Canada's so-called "unsolicited" written submission and the failure to even acknowledge the comments made by Canada and others in the same DSB meeting in which the EU had raised the issue, on the one hand, with the Arbitrator's extensive reliance on the EU statement in the DSB, on the other. The failure to, at a minimum, refer to the views of other Members on the issue was all the more troubling given that a number of Members in the DSB supported an interpretation that was different to both of those advanced by the parties to the DS386 dispute and the EU. The Arbitrator did not even consider this alternative interpretation, highlighting again the concerns about the Arbitrator's ruling on a matter that was at its heart about the responsibilities of the DSB. The serious due process concerns and the resulting flaws and gaps in the analysis ultimately undermined the Arbitrator's analysis and conclusions on this issue. For that reason, Canada considered that the Arbitrator's Report did not settle the matter and encouraged Members to continue to discuss and arrive at a permanent resolution of this issue. In the meantime, to mitigate any legal uncertainty, Canada would invite Members to ensure that future referrals to arbitration take place at the DSB meeting.

1.7. While these concerns were significant systemically, Canada would like to reiterate its fundamental satisfaction that the final determination of the Arbitrator confirmed unequivocally the serious magnitude of the losses suffered by Canada's cattle and hog industries. These were losses Canada's industry had been suffering since September 2008. As Canada already mentioned, the United States repealed the COOL statute, as it applied to beef and pork, on 18 December 2015, in the evening in fact. In a statement issued on the same day, the US Secretary of Agriculture had confirmed that the US Department of Agriculture would still need to amend the COOL regulations. This part of the repeal of the COOL measure remained to be completed. Accordingly, Canada would need an opportunity to review both the statutory and regulatory aspects of the COOL measure's repeal to determine whether it had been brought into full compliance with the WTO obligations of the United States. Pending completion of that review of the recent steps taken by the United States, Canada was resubmitting its request that the DSB authorize Canada to suspend concessions and other obligations in the maximum amount of CDN$1,054,729,000 annually, consistent with the decision of the Arbitrator. According to Article 22.7 of the DSU, Canada was entitled to have this request granted on reverse consensus on 18 December 2015 and was still entitled to have this request granted at the present meeting, also on reverse consensus. Of course, in the light of steps taken over the weekend by the United States, Canada did not intend to impose retaliatory measures immediately, but would monitor the situation to ensure that the discrimination had been fully removed. Despite the many substantive and procedural disagreements and controversies that had arisen throughout the history of this dispute, Canada looked forward to working with the United States to arrive at a point where it could notify the DSB that this dispute had finally, after all these years, been fully resolved.

1.8. The Chairman drew attention to the communication from Mexico contained in document WT/DS386/39, and invited the representative of Mexico to speak.

1.9. The representative of Mexico said that his country was in the process of examining the recent action taken by the United States to comply with the recommendations and rulings of the DSB, in particular the approval by Congress of a measure repealing country of origin labelling for beef and its enactment by the Chief Executive. The restoration of full market access to the United States for Mexican cattle would benefit producers and Mexico's economy. This result was the fruit of close cooperation between Mexico and Canada. Mexico regretted that the United States was unwilling to hold a meeting on 18 December 2015 on the grounds that the Ministerial Conference and the DSB could not take place at the same time. There were no rules that expressly prohibited the DSB from meeting during a session of the Ministerial Conference. Article IV:2 of the Marrakesh Agreement stated that the General Council "…shall also carry out the functions…". This meant that the General Council had specific functions in addition to acting as a Ministerial Conference which, in this case, would meet as the DSB. The General Council had adopted "The Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies" on 15 November 1995 (WT/L/106). The second paragraph of the Guidelines stated that Council meetings, including the General Council and the DSB, should not take place at the same time. Nowhere did the Guidelines refer to the Ministerial Conference. Moreover, the English version used the verb "should", and there was a clear difference between the use of "shall" and "should". Indeed, Mexico considered this to be merely a guideline that did not establish any obligation but simply provided a recommendation.

1.10. The Guidelines themselves pointed out in Footnote 1 that "[u]pon agreement on the guidelines the Chairman said that the DSB … had particular requirements for meetings and that it

should therefore be understood that while all efforts would be made to schedule the meetings of these bodies in accordance with these guidelines the necessary flexibility would be applied in instances where this would not be possible". This was a case in which flexibility could have been applied. Moreover, Article 21.1 of the DSU provided that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Postponing the meeting, even by one day, unnecessarily delayed the settlement of a dispute that had already been going on for more than seven years. In short, although everything possible was done so that the meeting of 18 December 2015 could start as soon as the Ministerial Conference was concluded, this did not happen. However, all the requirements to hold the meeting on 18 December 2015 were fulfilled: (i) the meeting was requested in time; (ii) the agenda was issued on time; and (iii) all of the documents were submitted in time, so that there was no reason for the United States to object to this meeting. WTO Members had a responsibility to keep the dispute settlement system in operation. The objection raised by the United States was a threat to that system. Mexico regretted that the United States had acted in this way.

1.11. At the present meeting, Mexico wished to thank the Arbitrator, the Secretariat staff that assisted him and the translators for the Decision issued on 7 December 2015. This case had started with a request for consultations on 17 December 2008; i.e., seven years and one day ago. During that time, Mexico had been able to demonstrate successfully that the country of origin labelling (COOL) measure imposed by the United States, in its original version and as amended, was inconsistent with US obligations under the covered agreements. At the conclusion of the original procedure in mid-2012, the United States had a reasonable period of time to bring its measure into conformity. At the end of that reasonable period of time (2013), the United States had amended the measure. However, not only did it fail to comply, it actually exacerbated the consequences of its regulations by making the measure more trade restrictive. As this was a clear case of non-compliance by the United States, Mexico had no choice but to resort to the last remedy provided for under the DSU, namely, the suspension of concessions and other obligations.

1.12. Regarding the Decisions by the Arbitrator, Mexico wished to take this opportunity to comment on some of his reasons and conclusions, which would serve to guide future Arbitrators in proceedings in which the level of nullification or impairment was challenged. First, the Arbitrator had assumed the legal duty to seize himself of questions that were of a "fundamental nature", including the vesting of jurisdiction, so that the case had been referred to arbitration without a DSB meeting being required for that purpose. The Arbitrator had explained that the text of Article 22.6 of the DSU did not explicitly require referral to arbitration by the DSB. He further explained that the context found in other provisions of the DSU, in particular regarding other arbitration procedures, suspension and lapsing of panels, and initiation of appeals, suggested that it was not necessary for the DSB to have an active role in all dispute settlement procedures. Mexico agreed with the Arbitrator's interpretation in this respect for the reasons summarized in the decision (WT/DS386/ARB, paragraph 2.9), which was clear as to what the interpretation should be. Nevertheless, it was surprising that in his decision the Arbitrator should have addressed this issue in the light of a communication from a Member that did not have any third-party rights in the proceedings, a communication that was addressed to the DSB and not the Arbitrator and in which the Member itself pointed out that it did "not intend … to intervene further in these particular proceedings" (WT/DS386/38). Second, although the DSU did not expressly establish third-party rights for this kind of arbitration, the Arbitrator had afforded Canada and Mexico the access and the right to participate in the proceedings, including the opportunity to comment on "issues of comparison" for purposes of each respective arbitration. Mexico considered that the Arbitrator had adopted the right approach, and in fact, Mexico believed that third-party rights should be granted in proceedings under Article 22.6 of the DSU. Third, the Arbitrator had rightly concluded that "in order to meet its *prima facie* burden, an objecting party under Article 22.6 of the DSU must engage with the methodology used to arrive at the proposed level of suspension and that it was not sufficient merely to assert that another methodology was more appropriate. Mexico therefore found that, in merely proposing an alternative methodology, the United States had not validly established a *prima facie* case against the levels of suspension proposed by Canada and Mexico". Fourth, Mexico regretted that the Arbitrator had decided that domestic price suppression losses for Mexican beef producers were not covered by Article 22.6 of the DSU. This price suppression on the Mexican domestic market was clearly the result of the COOL measure. Consequently, Mexico was doubly affected since not only did the measure limit access to the US market, but it also had an effect on the Mexican export market. Fifth, the Arbitrator had correctly refrained from using the equilibrium displacement model (EDM) presented by the United States in making his own

determination, although this was the first time that an affected Member had presented its own methodology. Moreover, the Arbitrator essentially based his own determination on elements of the methodology put forward by Mexico and Canada. Although he had unfortunately failed to take certain important aspects into consideration, such as the elasticity proposed by Mexico or the use of weekly rather than monthly price data, elements that would have helped the Arbitrator to make a pertinent assessment.

1.13. Finally, it was important to mention with respect to the Arbitrator's decision that this case had highlighted the need to improve the DSU as regards effective compliance – an area in which the negotiations had not been completed and in which Mexico had submitted proposals – because what happened in cases like this one, where a Member maintained an offending measure for more than seven years without any consequences, was that while the industry concerned in the complaining party continued to suffer, it was in the respondent's interest to maintain those measures. This situation had been made worse by the dispute settlement system's workload and the resulting delays. Mexico noted that in the Decision of 7 December 2015, the Arbitrator had concluded that Mexico "may request authorization from the DSB to suspend concessions and related obligations in the goods sector under the GATT 1994 at a level not exceeding US$227.758 million annually". Therefore, in accordance with document WT/DS386/39, Mexico was requesting DSB authorization to suspend concessions to the United States.

1.14. The representative of the United States said that the United States regretted that the DSB was meeting to consider these requests that were now obsolete. As the United States would explain, given that the COOL legislation had been repealed, in relevant part, the WTO-inconsistent measure had been fully withdrawn. Because the level of authorization in that circumstance was zero – the DSU permitted only an authorization equivalent to the current level of nullification or impairment – the reasonable and constructive approach for Canada and Mexico would have been to set aside these requests in light of the repeal. But before turning to the requests and the Arbitrators' decisions in substance, the United States would like to address another systemically flawed decision by the complaining parties – that is, the attempt by those parties to convene a meeting of the DSB on 18 December 2015 while the Ministerial Conference was ongoing. The United States appreciated the appropriate rescheduling of this DSB meeting in light of the conflict with the scheduling of the Ministerial Conference in Nairobi. The United States was disappointed by the positions of Canada and Mexico seeking to have the DSB hold a meeting on 18 December 2015. It was clear that as the Ministerial Conference was ongoing in Nairobi, the WTO rules and guidelines for the scheduling of meetings indicated that there should not be a meeting of the Dispute Settlement Body, which was the General Council, where a Ministerial Conference was ongoing. The US position was supported by the WTO Agreement, the Guidelines for scheduling meetings adopted by the General Council, and past practice. The United States had not been able to identify any other instance of the DSB or the General Council convening during a Ministerial Conference. That practice was consistent with the powers given to the Ministerial Conference. The United States noted that, pursuant to Article IV:1 of the WTO Agreement, the "Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements". Pursuant to Article II:2 of the WTO Agreement, the DSU was one of those Multilateral Trade Agreements. Therefore, while "representatives of all the Members" were meeting in a Ministerial Conference pursuant to Article IV:1 of the WTO Agreement, it was for the Ministerial Conference, which had "the authority to take decisions on all matters" under the DSU, to take those decisions. And it is only "[i]n the intervals between meetings of the Ministerial Conference" that "its functions shall be conducted by the General Council" (Article IV:2), which would include the General Council convening as the DSB (Article IV:3). The United States also noted that the General Council had adopted "Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies" (WT/GC/W/16), which provided that "Only one Council meeting (i.e. the General Council, DSB, TPRB, and the Councils on Goods, Services and TRIPS) should be held at a time". Canada and Mexico were both well aware that they were asking the DSB to meet at a time that was not appropriate under the rules – well aware because the United States had so alerted them on multiple occasions. And the United States noted the Canadian delegate's recognition that the United States had brought this issue to their attention several weeks ago. What was unprecedented was not the rescheduling of the DSB meeting to avoid a conflict with the Ministerial, what was truly unprecedented was an effort to hold such a meeting during the Ministerial. As noted, the United States was not aware of a single instance in this organization's 20 years in which a meeting of the DSB or General Council was scheduled while Ministers were meeting. And even more concerning was the fact that Canada and Mexico were insisting on a meeting at a time where they knew the United States Congress was voting on withdrawing the

measure at issue. They provided no explanation for why delegations should be diverted from efforts supporting the Ministerial Conference in order to attend a meeting at a time when it was improper for the DSB to meet and that would not promote the settlement of the dispute.

1.15. Turning to the substance, the United States would like to inform the DSB that the United States had in fact now withdrawn the measure at issue in this dispute and subject to the DSB recommendation. Specifically, the US Congress had passed legislation on 18 December 2015, the Omnibus Appropriations Act, that repealed country-of-origin labeling for beef and pork, the two products subject to this dispute. On the same day, President Obama had signed that legislation, and it took effect upon signature. Therefore, the amended COOL measure for beef and pork, which was the subject of the DSB's findings that the United States had not brought its measure into compliance with the DSB's recommendation, has been terminated. Further, the US Department of Agriculture had publicly indicated that, pursuant to the repeal, it was no longer enforcing the amended COOL measure for beef and pork. In this regard, the United States appreciated the public statements of Canada and Mexico over the weekend stating that they were pleased with the repeal of "COOL for beef and pork, effective immediately". Accordingly, in light of Article 22.8 of the DSU, there was no longer any basis for the DSB to grant authorization to Canada or Mexico to suspend concessions. Indeed, Article 3.7 of the DSU explains that: "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". Consequently, any authorization to suspend concessions would be an obsolete action. Article 22.4 of the DSU states that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment". In this instance, the subject of the DSB recommendations and rulings had been repealed in full and compliance was thus complete. The nullification or impairment of benefits considered by the Arbitrators no longer existed. Therefore, the authorization requested was now inaccurate. As the DSU did not contemplate the authorization of punitive levels of suspension of concessions or obligations, Canada's and Mexico's requests for authorization to suspend concessions were also now obsolete. Nonetheless, as Canada and Mexico were proceeding with their requests at the present meeting, the United States understood that the action by the DSB would necessarily have to be consistent with Article 22.4 of the DSU. Therefore, in light of the repeal of the COOL measure, and the removal of the nullification or impairment, the authorization by the DSB today would essentially be a formality. In light of the facts and DSU provisions described, the level of authorized suspension would be zero. And in that regard, the United States regretted the decisions of Canada and Mexico to push ahead with these requests, which were unnecessary, and not a constructive or judicious use of WTO dispute settlement procedures.

1.16. With respect to the decisions of the Arbitrators that had been notified to the DSB, the United States would like to thank the Arbitrators and the Secretariat assisting them for their work on these Article 22.6 arbitrations. The United States was obviously disappointed in the levels of nullification or impairment determined by the Arbitrators. There were however some aspects of those decisions worth noting. Canada and Mexico had each made a novel argument that the level of nullification and impairment should include an element unrelated to the benefits under the trade agreements at issue – they argued for a substantial increase in the level of nullification or impairment based on so-called domestic price suppression which did not involve market access for Canadian or Mexican livestock. The United States was pleased that the Arbitrators rejected these unfounded arguments by Canada and Mexico. Instead, the Arbitrators found that under the covered agreements at issue "the relevant benefit in this case is the market access" and therefore the Arbitrators did "not include domestic prices suppression losses claimed by Canada and Mexico in the level of nullification or impairment of benefits" (paragraph 5.27). The United States was disappointed that throughout their analysis the Arbitrators relied on inconsistent and unofficial data sources, rather than officially compiled and corrected US trade statistics. The use of data that was not designed to be official, reviewed data for the purposes for which it was being used, particularly where such data diverges significantly from US official import data and Canadian or Mexican export data raises significant concerns. In particular, this selection introduced unnecessary inconsistencies into the trade effects analysis.

1.17. Finally, these arbitrations raised some important procedural issues that the United States understood were of interest to Members more generally. The Arbitrator in the dispute involving Mexico analyzed a question with respect to whether DSB action was required to refer a matter to arbitration under Article 22.6 of the DSU. That issue was not presented directly to the Arbitrator,

but the Arbitrator nonetheless considered it important to investigate the issue. The Arbitrator had properly concluded that the text of the DSU, when read in context, did not require DSB action in order to refer a matter to arbitration. In addition, the Arbitrators dealt with the requests of Canada and Mexico to be third parties in each other's proceedings. The Arbitrator had correctly distinguished between third-party rights provided for panels under the DSU and the lack of any such rights for Article 22.6 arbitrations under the DSU. The Arbitrators instead, with the agreement of the parties, organized their procedures in an efficient way, given the overlap in parties, issues, and the members of the Arbitrators. The Arbitrators afforded to Canada and Mexico the ability to fully participate in each other's proceeding to the extent necessary to avoid their rights being adversely affected, while noting that neither Canada nor Mexico were receiving rights to as great a degree as are afforded to third parties in panel proceedings. Finally, the United States thanked the Chairman and the delegations present for their attention to these important systemic issues and important developments bringing an end to this long-standing dispute.

1.18. The representative of Canada said that his delegation wished to comment on the statement made by the United States. With respect to the point that the developments over the weekend related to the COOL measure somehow affected Canada and Mexico's ability to receive authorization at the present meeting from the DSB, Canada would simply refer again to its original statement. Canada continued to evaluate the efforts by the United States to bring itself into compliance in this dispute. Since the United States only took action over the weekend and more steps needed to be completed, Canada could not yet agree that this dispute had been completely resolved. Regarding the references by the United States to statements in the press by Canadian representatives about the repeal of the COOL measure, Canadian public officials have expressed its government's positive reaction to the steps taken so far by the United States to repeal COOL. At no time, however, had any representative of Canada stated that Canada was fully satisfied that the measure had been withdrawn such that the discrimination had been fully removed in the US market. The statute had been modified only on 18 December 2015 in the evening, and it would take some time to evaluate the effects of those modifications. Just as the United States had quoted from statements of a Canadian Minister, Canada would point to the statement by the US Agriculture Secretary, Tom Vilsack, released on 18 December 2015 in the evening, in which Secretary Vilsack indicated that the "USDA will be amending the COOL regulations as expeditiously as possible to reflect the repeal of the beef and pork provisions". It is clear therefore that there are still a few steps involved. And finally, regarding the amount that the DSB was being asked to authorize, in fact the United States cited Article 22.4 of the DSU to suggest that the authorized level of suspension of concessions should be zero $, based on the claim by the United States that with the withdrawal of the COOL measure the level of nullification was now equivalent to zero. But in fact Canada was making this request under Article 22.7, which provides that the DSB "shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the Arbitrator unless the DSB decides by consensus to reject the request." Since all of the conditions for Article 22.7 had been met, the DSB was required to grant authorization to suspend concessions up to the level that was determined by the Arbitrator, so that was the amount that Canada now expected the DSB to authorize.

1.19. The representative of Mexico said that his country wished to thank the United States for the information it presented orally at the present meeting on the compliance measures taken by its Government on 18 December 2015. As his country had mentioned in the first statement, Mexico was currently examining these measures. However, the DSB had not received this information in writing 10 days in advance as required by the Rules of Procedure for DSB meetings. Consequently the US actions could not be evaluated. Nor was the present meeting the right place to analyse US compliance with the measures adopted on 18 December 2015. The parties to the dispute had not found a mutually agreed solution, so the dispute continued. Consequently, the DSB's authorization should be granted as provided for in the Agenda issued in accordance with the Rules of Procedure for DSB meetings. In fact, this meeting was supposed to take place on 18 December. However, the meeting had been blocked in an illegal and unprecedented manner by the United States, which once again at the present meeting was trying to prevent the requested authorization. Article 22.7 of the DSU provided that "[t]he DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request." In this case, the provisions of the DSU had been complied with and the DSB should authorize the suspension of concessions.

1.20. The representative of the European Union said that, like others, the EU was very concerned about last week's events, which cast doubt on the predictability of procedures on which Members had to rely. The EU recalled that Article 22.7 of the DSU provided that: "the DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request". The EU also recalled the provisions of the DSU which provided that, if a DSB meeting was not already scheduled during the relevant period, such a meeting of the DSB shall be held for the relevant purpose: Footnote 5 (panel requests); Footnote 7 (adoption of panel reports); Footnote 8 (adoption of Appellate Body Reports); and Footnote 11 (with respect to compliance intentions). The EU considered that the same principle applied in the case at hand. The EU therefore considered that the complainants in this case had the right to request and obtain authorization to suspend concessions or other obligations at the DSB meeting convened on 18 December 2015, by negative consensus, and that suspension or postponement of the meeting until 21 December 2015 had no impact on the respective legal positions of the parties.

1.21. At this point, the EU wished to comment on the US statement. The EU noted that Article 22.8 of the DSU provided that the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement had been removed, or the Member that must implement recommendations or rulings provided a solution to the nullification or impairment of benefits, or a mutually satisfactory solution was reached. If the conditions of this provision were fulfilled, the EU would expect a complainant not only to stop any retaliation that had already been started, but also to refrain from commencing such retaliation in the first place, even if a DSB authorization had already been given. The EU noted that Canada and Mexico intended to proceed in this way. Whether or not the conditions of this provision were fulfilled should be determined by following the guidance provided by the Appellate Body in the "Continued Suspension" dispute. In this respect, the EU would expect all parties to act in good faith with a view to reaching agreement. If agreement was impossible, one would expect both parties to submit the matter to a second compliance panel and co-operate in order to obtain a rapid adjudication.

1.22. With regard to the Arbitration award, the EU would like to comment on one procedural matter. The EU would like to refer to paragraphs 2.1 to 2.18 of the Arbitration Panel Report, which addressed the procedural question raised by the EU, namely whether referrals to arbitration under Article 22.6 were done by the DSB or by the party objecting to the request for authorization to suspend concessions made pursuant to Article 22.2 of the DSU. The EU had sent a communication regarding this matter to the Chair of the DSB, which had been circulated to Members on 11 December 2015 in documents WT/DS384/39 and WT/DS386/40. The EU welcomed the fact that the Arbitration Panel expressly decided to follow the guidance previously provided by the Appellate Body to the effect that, as a matter of due process and the proper exercise of its judicial function, and in order to ensure that issues of a fundamental nature were addressed and disposed of, it was appropriate for the Arbitration Panel to deal with the issue raised by the European Union. However, the EU considered that the Arbitration Panel should have provided the EU, and any other Members wishing to participate, with an opportunity to make their views known to the Arbitration Panel. The EU considered that this was particularly appropriate in this case given that both parties disagreed with the EU and rather agreed with each other. The Arbitration Panel had thus decided without hearing all interested parties, which the EU believed substantially diminished the weight of its decision. The EU would particularly note that the summary of the EU position was very substantially incomplete insofar as it failed to address the two most salient points. First, there was no discussion of the relationship between the first sentence of Article 22.6 of the DSU and the second sentence of Article 22.6 of the DSU, which started with the word "however". Second, the Arbitration Panel relied throughout its analysis on a supposed distinction between "arbitrations" and "panels" but failed to address the express terms of Article 22.6 of the DSU, which stipulated clearly that the arbitration was to be conducted "by the original panel". In referring to this part of the provision, the Arbitration Panel altered the terms actually used by the treaty, replacing them with the phrase "by the original panelists". Thus, while professing adherence to the "text" of Article 22.6 of the DSU the Arbitration Panel's interpretation was, in fact, not faithful to that text, and in departing from it, provided no explanation. Furthermore, in other respects, it was not consistent with the customary rules of interpretation of public international law, as codified, at least in part, in Articles 31 to 33 of the Vienna Convention.

1.23. The EU had already explained that it disagreed with the substantive analysis of the Arbitration Panel on this point for the reasons set out in its communication. The EU noted that it had not had the benefit of appellate review. The EU further took note of the fact that the Arbitration Panel based its conclusion, in this particular case, on the absence of any disagreement between the parties. At the same time it recognized that this "is a contentious issue among Members"; that Article 22.6 "did not provide clear guidance"; and that "a resolution of this issue by Members would be desirable". Pending such resolution, either by Members or by the Appellate Body, and given the substantial legal uncertainty thus persisting, for its part the EU intended to continue the practice used in the past in almost all cases. In particular, as a complainant, the EU did not intend to incur the unnecessary legal risk of withdrawing an Article 22.2 request from the DSB Agenda following an objection from the defendant. Rather, the EU preferred the legal certainty that resulted from the referral to arbitration taking place in the DSB meeting, and the EU invited other Members to consider continuing with the same approach.

1.24. The representative of Australia said that his delegation noted the fax from the Secretariat dated 18 December 2015 suggesting that this meeting had been "rescheduled" from that date. Australia did not accept that characterisation of events. As far as Australia was concerned, the present meeting was a continuation of the DSB meeting, which had started as scheduled on 18 December 2015. In Australia's view, that meeting had been suspended in recognition of the fact that the position of Chair was vacant and could not be filled on that day because one Member would not approve the appointment of an interim Chair. In Australia's view, to consider that the present meeting was rescheduled would imply that one Member could prevent the commencement of a meeting that had been duly convened but that was not a right available to any Member. Thus Australia requested that its view be recorded in the minutes of this meeting.

1.25. For the record, Australia would also like to set out its views on the position taken by the United States on the rules applying to convening of meetings. Australia did not accept that there was anything in the Marrakesh Agreement that prevented the DSB from meeting while the Ministerial Conference was in session. It was clear from the wording of Article IV that the General Council could exercise the functions of the Ministerial Conference in the intervals between meetings of the Ministerial Conference, but there is nothing in the Marrakesh Agreement to suggest that that authority in any way detracted from the General Council's authority to carry out its other functions, even when the Ministerial Conference was meeting. Nor did Australia see any problem in practice with a meeting of the DSB being convened during a Ministerial Conference. The decision that was before the DSB for this meeting was one that could be made by the General Council sitting as the DSB, and in practice one that was always made by the General Council. Australia was not aware of any instance where the Ministerial Conference had taken a decision of the type before the DSB at the present meeting. Moreover, it was clear that there was no problem in terms of personnel. Most of the delegates at the present meeting had also been present on 18 December 2015, including the representatives of the parties to the dispute. As was clear from the DSU, the DSB was required to meet as often as necessary to conduct its functions within the time-frames provided for in the DSU that included meeting to grant authorization to suspend concessions or other obligations, in line with the last sentence of Article 22.7 of the DSU.

1.26. Australia did not believe that "The Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies" (1995) cited by the United States had any bearing on the legal status of a meeting of the DSB convened while a Ministerial Conference was in session. As their name suggested, those Guidelines were an administrative tool, designed to promote a shared understanding among Members and the Secretariat about how meetings were to be arranged. They were clearly not binding in any respect, and could not in Australia's view supersede the rights and obligations provided in any of the covered agreements. In any event, Australia did not accept that the US reading of the Guidelines properly reflected how they might apply in the situation Members faced on 18 December 2015. The United States focused selectively on paragraph 2, which provided that only one Council meeting should be held at a time. The US view ignored paragraph 7, which provided that multilateral meetings should only be cancelled or postponed for reasons of overriding importance. Australia was aware of no suggestion that the meeting had been improperly convened.

1.27. In Australia's view, to postpone the meeting on 18 December 2015 consistently with the Guidelines would have required one or more "reasons of overriding importance", but there was nothing to suggest that paragraph 2 overrides paragraph 7 so there was no reason of overriding importance. Even if the Guidelines were relevant, they provided no justification for the

postponement of the meeting scheduled for 18 December 2015. Against this background, Australia remained of the view that the present meeting was a resumption of the meeting that had properly started on 18 December 2015, in accordance with the Airgram dated 8 December 2015. Australia considered that the actions of the United States on 18 December 2015 were all the more regrettable in light of the fact that the United States was at the present meeting seeking to benefit from the delay of the completion of the meeting. There were obviously very serious implications if Members attempt to delay meetings of the DSB in order to avoid the assertion against them of rights conferred under the DSU. Australia would hope that the United States would reflect on the ramifications of its position for the effectiveness of the system if that position were to be accepted.

1.28. On the question of compliance, Australia considered that the DSB should authorize the suspension of concessions or other obligations in accordance with the views of the Arbitrator. This view took into account the circumstances of this particular case, including the actions by the United States on 18 December 2015, as well as the statements by at least one of the complainants about its intention not to retaliate should one or more of the parties make subsequent claims regarding compliance, this would appropriately be dealt with through an Article 21.5 proceeding.

1.29. The representative of Japan said that, first of all, Japan wished to express its deep concern with the fact that in any case the procedures related to the very critical stage of the dispute settlement system was prevented since what happened on 18 December 2015 undermined the effective function and credibility of the dispute settlement system. Despite the fact that this dispute had entered into the critical stage which was suspending concessions and other obligations and that Japan as a non-party of this dispute could not understand all facts and sensitivities related to this dispute, Japan wished to point out that it was not normal that the non-parties to these disputes had to wait more than two hours in room W on 18 December 2015. Japan would also like to point out that parties had to make best efforts to avoid such situations in advance under the leadership of the DSB Chair. Generally speaking, Member should respect these guidelines which had been decided by consensus. The DSB had many guidelines, Japan had to point out that if these guidelines were not respected, it would create serious problems. The differences among parties on procedural matters should not undermine the rights of Members provided in the DSU. Members should make best efforts to avoid any precedents which could have negative impact on the system.

1.30. The representative of Korea said that his delegation wished to add its voice to what was stated by many other delegations. Korea did not believe that the kind of procedural issues raised by the United States was reflective of an appropriate manner for moving forward in any dispute. If anything, it bought the United States one additional working day to face what was inevitable. That extra day came at the expense of denying – however briefly – Canada and Mexico's legitimate right to request authorization from the DSB to suspend concessions. Korea did not agree with the US interpretation that Article IV:2 of the Marrakesh Agreement prevented the General Council from holding a meeting during the Ministerial Conference. That Article only noted that the General Council carried out the functions of the Ministerial Conference in the intervals between the Ministerial meetings. No more, no less. "The Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies" were only guidelines – and the language therein, again, did not support the US position. This was a regrettable incident that Korea hoped would prove to be a single and isolated event in dispute settlement.

1.31. The representative of the United States said that his delegation took note of the EU's concern that the matter had not been referred to arbitration through a correct procedure. The United States said it would like to make a few comments on that issue. First, the United States welcomed the opportunity to discuss the issue further with the EU and other interested Members. The United States thought that the DSU text was clear and the Arbitrator's reasoning was compelling. The only reason that the United States could see for arguing against the clear DSU text would be to support a position that, if the DSB acted to refer the matter to the arbitrator, which consisted of the original panel, if members are available, then the decision of that arbitrator should be subject to appeal. This view was hinted at in the EU's comments at the present meeting. But an attempt to appeal an arbitrator's decision would also be contrary to the plain text of DSU Articles 17.4, 17.6, and 22.7. Amendments to the DSU should not be attempted through contorted legal arguments but through agreement by Members. Second, the EU appeared to have stated that, despite its concern that the matter was not referred to arbitration through the correct procedure, it had no concern with the DSB's taking a decision at the present meeting to authorize Mexico's request in conformity with the Arbitrator's decision. The United States considered that

this would be a pragmatic and correct position for a Member that was not a party where the parties to the dispute accepted the decision as validly rendered. Third, the EU's position that it had no concern with the DSB's taking this decision would imply that, in another dispute, the EU might take a different position. Thus, the EU appeared to be asserting that, due to the alleged deviation from the correct procedure in the DSU, the DSB would not be deciding by negative consensus under DSU Article 22.7, but rather would be taking a decision through the positive consensus rule governing DSB decisions generally under Article 2.4 of the DSU. The implications of this position should be considered further as its logic would apply to other negative consensus decisions in the event that the procedural rules laid out in the DSU were not strictly followed.

1.32. The DSB took note of the statements and pursuant to the request by Canada under Article 22.7 of the DSU contained in document WT/DS384/38 agreed to grant authorization to suspend the application to the United States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS384/ARB. Furthermore, pursuant to the request by Mexico under Article 22.7 of the DSU contained in document WT/DS386/39, the DSB agreed to grant authorization to suspend the application to the United States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS386/ARB.

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