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Dispute Settlement Body
26 February 2014

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 FEBRUARY 2014

Chairman: Mr. Jonathan Fried (Canada)

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1.1. The Chairman noted that there were eight sub-items under this Agenda item concerning status reports submitted by delegations as required under Article 21.6 of the DSU. He recalled that this provision was included by the DSU negotiators so as to foster creative and progressive ways of ensuring implementation until the issue was resolved. Once again, he urged 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. With these introductory remarks, the Chairman proposed to turn to the first status report on the Agenda of the present meeting.

A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.134)

1.2. The Chairman drew attention to document WT/DS176/11/Add.134, 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 13 February 2014, in accordance with Article 21.6 of the DSU. At least six bills had been introduced in the current Congress in relation to the DSB's recommendations and rulings in this dispute. These included H.R. 214, H.R. 778, H.R. 872, H.R. 873, H.R. 1917 and S. 647. The

US Administration would continue to work on solutions to implement the DSB's recommendations and rulings.

1.4. The representative of European Union said that the EU thanked the United States for its most recent status report and the 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 had just heard, once again, and for the 134th time, the US status report, which remained unchanged for the past many years reiterating that "relevant legislation has been introduced in the current 113th session of the Congress". Cuba was assuming that "relevant legislation" meant the same bills that had been mentioned up until November 2013, but had never proceeded through legislative channels or offered a solution to this dispute. The fact that these had been removed from the report confirmed that the United States did not envisage any solution or intend to meet its legal obligations in this dispute. February 2014 marked 12 years since the DSB had adopted the Appellate Body Report and had requested the United States to bring Section 211, which had been found to be inconsistent with the TRIPS Agreement, into conformity with those provisions. The situation of non-compliance was of concern to Cuba and to a large number of Members, in particular developing-country Members. The fact that one of the key players in the WTO had been violating its rules for such a long time demonstrated that the dispute settlement mechanism, which was already extremely costly, did not ensure compliance with the WTO Agreements or provide a secure means of settlement of disputes. Failure to comply in this dispute concerned intellectual property rules, which was an area where the United States was a frequent complainant in various fora. Recently, on 31 January 2014, the "Inside US Trade" newsletter had announced that the US Chamber of Commerce had released an index of 25 countries infringing intellectual property. The criteria used related to the protection of patents, copyright, trademarks, trade secrets, market access and compliance following accession to and ratification of international treaties. The index established categories of compliance with intellectual property rights and gave each category a specific weight. The United States, a WTO Member that blatantly violated these rights and consistently failed to comply with its WTO obligations, gave itself the highest score, with 28.52 out of a maximum of 30, while accusing some developing countries of violating the current international intellectual property system and questioning their domestic policies in this area. This was an auditing exercise that the United States conducted every year. The country that consistently failed to comply with its obligations unilaterally assumed the right to judge other WTO Members and it imposed sanctions on them for alleged intellectual property violations. Meanwhile, under Section 211, the United States continued to infringe the intellectual property rights of Cuban trademark holders on US territory, violating commercial and international law and allowing the fraudulent sale of products that were not produced in Cuba, using the Havana Club trademark. This usurpation of the Havana Club trademark by the United States was a reality. The purpose of keeping Section 211 in force was to deny the right to renew registration of the trademark, hence the unending delay in complying with the DSB's recommendations and rulings. Cuba found it impossible to remain silent in the face of this situation of impunity that undermined confidence in the multilateral trading system. In Cuba's view, it was Members' collective responsibility to preserve the effectiveness and credibility of the institutions that had taken so much time and effort to establish. It was also an obligation to demand unconditional compliance with the commitments assumed by all the Members, and in this particular case the solution was to repeal Section 211.

1.6. The representative of Zimbabwe said that his country thanked the United States for its status report and thanked Cuba for the information it had just provided. Zimbabwe, however, was disappointed and regretted that the United States had continued to disregard the DSB's rulings and recommendations in this dispute concerning Section 211. This continued failure by the United States to comply seriously undermined the integrity of the DSB as well as the efficacy and effectiveness of its rulings. Zimbabwe and other Members had, for a number of years now, been calling on the United State to end this flagrant violation of WTO rules and to honour its obligations. Zimbabwe, therefore, strongly supported Cuba's position and urged the United States to comply with the relevant DSB's rulings and recommendations.

1.7. The representative of China said that her country thanked the United States for its status report and the statement made at the present meeting. China believed that the prolonged situation of non-compliance in this dispute was highly incompatible with the prompt compliance requirement under the DSU, in particular since the interests of a developing-country Member were

affected. China urged the United States to implement the DSB's recommendations and rulings without any further delay.

1.8. The representative of Brazil said that his country thanked the United States for its status report on the surveillance of implementation in this dispute. Brazil noted that, once again, the United States reported lack of progress. Brazil remained concerned about this situation of non-compliance with the DSB's recommendations and urged the United States to bring its measures into conformity with WTO rules.

1.9. The representative of the Russian Federation said that his country believed that the dispute settlement system guaranteed the stability of the multilateral trading system. Russia urged the interested parties to finally reach a solution by using all the instruments available to them under the WTO Agreements. In Russia's view, the current situation undermined Members' confidence in the DSB and the WTO as a whole.

1.10. The representative of India said that his country thanked the United States for its status report and the statement made at the present meeting. India noted that, yet again, the United States did not report any progress. Once again, India was compelled to stress that the principle of prompt compliance was missing in this dispute. India renewed its systemic concern about the situation of continued non-compliance by Members which undermined the credibility and confidence that Members reposed in the system. India urged the United States to report full compliance without any further delay.

1.11. The representative of Ecuador said that his country supported Cuba's statement made at the present meeting. Ecuador, once again, recalled 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 in order to promptly comply with the DSB's recommendations and rulings by repealing Section 211.

1.12. The representative of Nicaragua said that his country thanked the United States for its status report. Nicaragua, once again, supported Cuba's statement in this dispute concerning Section 211 and the rights of Cuban owners of the Havana Club Rum trademark. Nicaragua noted that, for more than 12 years, the US status report did not report on any concrete steps taken towards the implementation of the DSB's recommendations. Nicaragua noted the lack of political will on the part of the United States to inform the DSB of any progress made with regard to the bills submitted to Congress. Nicaragua was concerned about the continued US failure to comply with the DSB's recommendations and rulings, which undermined the credibility and efficiency of the DSB and the multilateral trading system. The US non-compliance could also set a precedent with consequences for other Members, in particular developing-country Members. Nicaragua, therefore, hoped that the United States would introduce the necessary legislative reforms without delay so as to comply with the DSB's recommendations and rulings.

1.13. The representative of El Salvador said that her country thanked the United States for its status report. El Salvador joined the previous speakers in expressing its concern about the US lack of compliance in this dispute. This situation of non-compliance affected the interests of a developing-country Member and undermined the multilateral trading system. El Salvador urged the parties to this dispute to find a way to promptly comply with the DSB's recommendations and rulings.

1.14. The representative of Jamaica said that her country thanked Cuba for its statement and the United States for its status report and update. Jamaica, once again, joined the previous speakers in expressing its concern about the US failure to implement the DSB's recommendations of February 2002 with respect to Section 211. The protracted US failure to take the steps necessary to comply with its obligations under the DSU was incompatible with its requirement for prompt and effective implementation of decisions. This was of particular concern in cases such as this where the failure to meet its obligations had an adverse effect on the economic interest of a developing-country Member. Furthermore, Jamaica was compelled to express its deep concern about the systemic implications of any disregard for decisions under the DSU. Such disregard could serve to undermine the overall integrity of the dispute settlement system, which remained a cornerstone of the WTO. Jamaica urged the United States to take the required steps to promptly comply with the DSB's recommendations and rulings.

1.15. The representative of Angola said that his country thanked the United States for its status report in this dispute concerning Section 211. This issue had been discussed on many occasions over many years without any real solution for Cuba. Angola believed that lack of progress in this dispute undermined the efficiency and credibility of the DSB and the multilateral trading system in general. The DSB's recommendations and rulings must be respected because all Members must benefit in the same way and have to comply with the same obligations. In Angola's view, it would be regrettable if the dispute settlement system, which was important to the multilateral trading system, was affected because of measures taken by one Member that were contrary to its obligations. Angola supported Cuba's statement regarding this dispute and urged the United States to bring its laws into conformity with the DSB's recommendations and rulings.

1.16. The representative of Argentina said that his country thanked the United States for its status report and the statement made at the present meeting. Argentina, once again, regretted that 12 years after the adoption of the DSB's recommendations and rulings in this case, the United States did not provide any substantive information on the matter. Argentina would have preferred if the United States had informed the DSB of the status of, or developments regarding, the various bills that had been introduced during the current 113th session of the US Congress, as suggested by Mexico at previous meetings. In Argentina's view, the lack of progress was inconsistent with the principle of prompt and effective implementation stipulated in the DSU provisions, in particular since the interests of a developing-country Member were affected. Argentina, once again, supported Cuba in its request and urged the parties to the dispute, in particular the United States, to take the necessary measures to finally remove this item from the DSB's Agenda.

1.17. The representative of the Bolivarian Republic of Venezuela said that his country supported Cuba, a developing-country Member that challenged the inconsistency of Section 211. The DSB had adopted the recommendations regarding Section 211, but the United States had yet to comply. The current situation of non-compliance not only affected Cuba, but also set a negative precedent for the credibility of the WTO and its ability to resolve disputes. Venezuela, therefore, urged the United States to end this non-compliance and to report, at the next DSB meeting, on the measures it intended to take to resolve this dispute.

1.18. The representative of Chile said that his country, once again, wished to reiterate its systemic concern about the US failure to comply with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Chile hoped that the United States would take the appropriate action to comply in this dispute.

1.19. The representative of Dominica, speaking on behalf of the Organization of Eastern Caribbean States[1], thanked the United States for its status report and for its statement made at the present meeting. The OECS countries remained concerned about the continued non-compliance with the DSB's rulings and recommendations, in particular since this had a negative economic impact on a small developing country. The OECS countries, therefore, urged the United States to implement the DSB's rulings and recommendations without further delay.

1.20. The representative of Mexico said that his country, once again, urged the parties to this dispute to take necessary steps to comply with the DSB's recommendations and rulings to the benefit of all Members, in accordance with Article 21.2 of the DSU.

1.21. The representative of the United States said that his country would like to make two points in response to the comments made at the present meeting. First, in response to comments about systemic concerns about the dispute settlement system, the facts simply did not justify such concerns. The record was clear: the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where its efforts to do so had not been entirely successful, the United States was actively working towards compliance. Second, there were references at the present meeting to actions that the United States had recently taken to protect its intellectual property rights internationally in the territories of other Members. It was of course true that the United States had been and remained a strong advocate for substantial protections for intellectual property rights internationally. However, any suggestion that the United States did not apply the same high standard in its own territory was unfounded

[1] Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.

and ill-placed. In that regard, Members should recall that Section 211 addressed the uncompensated expropriation of assets or businesses. Members should also recall that the Appellate Body in this dispute had not challenged the right of the United States to refuse recognition "in its own territory [to] trademarks, trade names or other rights relating to any intellectual property or other property rights that ... have been expropriated or otherwise confiscated in other territories". Instead, the Appellate Body had found that – when a Member chose not to recognize intellectual property rights in its own territory relating to a confiscation of rights in another territory – its measures must comport with the national treatment and MFN obligations of the TRIPS Agreement. The United States delegate hoped that this explanation helped clarify any concerns about any potential inconsistency in the US position.

1.22. The representative of Cuba said that her country wished to make a brief statement to clarify some of the legal arguments raised. First, Cuba had systemic concerns regarding the Section 211 dispute. In a multilateral organization that sought to protect the multilateral trading system, it was not acceptable to comply with some of the recommendations of the DSB but with all of them. If some of those recommendations had not been implemented for 12 years this had an impact on the system, and it was costly, in particular for developing-country Members such as Cuba. Second, Cuba noted that the United States had mentioned that it was a strong advocate for the protection of intellectual property as such. If so, this dispute was an opportunity for the United States to prove it through action, by repealing a law and measures, which directly affected intellectual property rights. Cuba also wished to make some comments with regard to the issue of nationalization and the US argument, raised in the context of the proceedings in this dispute, namely, that Cuba's concerns with Section 211 might be unfounded because it was a measure linked to the uncompensated appropriation of assets. Paragraph 111 of the Appellate Body Report stated that the United States "contends that Section 211 is an expression of the long-standing doctrine of the United States that those whose claim to ownership of a trademark is based on an uncompensated confiscation of assets cannot claim rights of ownership in the United States, absent the consent of the owners whose assets were confiscated". In Cuba's view, merely mentioning its doctrine during the dispute settlement proceedings did not give the United States the right to assume that this was recognized in law. Moreover, this argument had no basis if one looked at how the process of nationalization took place in Cuba. It was the United States that had prevented its nationals from being duly compensated while the Cuban Government had always been in favour of doing so. In Cuba's view, it was unacceptable for the United States to suggest that the DSB had accepted the non-recognition of expropriation without compensation by a Member in as much as paragraph 362 of the Appellate Body's concluding remarks, which recognized another meaning. Cuba wished to point out that in the specific case of the only trademark that was affected by Section 211, namely the Havana Club, the associated assets nationalized in Cuba belonged to the José Arechabala Corporation, which was not a US national. Therefore, any claim by the United States in defence of an entity that was not a US national when it was taken was unacceptable, as this would amount to the misrepresentation of a foreigner by another state. Through all the compensation agreements that had been signed by Cuba, a basic accepted principle was that the claimants had to be nationals of the claimant state when the property claimed was taken. These were serious legal matters that directly affected Cuba and were part of the economic, trade and financial embargo imposed illegally and unilaterally by the United States. The Section 211 case was one aspect of the blockade which cost Cuba, a developing country-Member, billions of dollars.

1.23. The Chairman said that this sub-item concerned a specific ruling, but there was always a broader context in any particular dispute. He appreciated that most of the statements made had been focused on the implementation issue. As required under the DSU, the DSB collectively take note of all the statements and until such a time as there was full compliance, the DSB would revert to this matter.

1.24. 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.134)

1.25. The Chairman drew attention to document WT/DS184/15/Add.134, 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.

1.26. The representative of the United States said that his country had provided a status report in this dispute on 13 February 2014, 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 the matter.

1.27. The representative of Japan said that his country thanked the United States for its statement and the status report submitted on 13 February 2014. Japan referred to its previous statements regarding its hope that this issue would be resolved as soon as possible.

1.28. 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.109)

1.29. The Chairman drew attention to document WT/DS160/24/Add.109, 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.

1.30. The representative of the United States said that his country had provided a status report in this dispute on 13 February 2014, 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.

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

1.32. 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.72)

1.33. The Chairman drew attention to document WT/DS291/37/Add.72, 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.

1.34. The representative of the European Union said that, in recent DSB meetings, the EU had already reported on authorization decisions taken up to January 2014. At the last DSB meeting, the United States had enquired about the application for cultivation of GM maize 1507. A European Commission proposal for a decision to authorize the placing on the market of GM maize 1507 for cultivation had been presented to the Council of the European Union for adoption. Since at its meeting of 11 February 2014, the Council had been unable to reach a decision by qualified majority either in favour or against the Commission proposal to authorize the placing on the market of 1507 for cultivation and the 3-month period dedicated to the Council to take a decision had elapsed on 12 February 2014, these measures were now to be adopted by the European Commission in accordance with the applicable rules. The standing committee of 21 January 2014 had voted on a draft authorization decision for an oilseed rape[2], for food and feed uses, and had rendered no opinion. The draft decision would be presented to the Appeal Committee for a vote on

[2] GT73 oilseed rape.

27 February 2014. In addition, the standing committee of 20 February 2014 had voted on a draft authorization decision for a cotton product[3], for food and feed uses, and had rendered no opinion. The draft decision would be presented to the Appeals Committee. As had been 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 was working normally as evidenced by the approval decisions and other actions towards approval decisions just mentioned. The details on the relevant products were set out in the EU's written statement.

1.35. 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. As the United States had recalled most recently at the January DSB meeting, the EU had yet to address the product-specific DSB recommendation and ruling with respect to a variety of biotech corn known as BT-1507. The EU had also raised this issue at the present meeting. The application for approval of this product had been pending since 2001. In 2006, the DSB had found that the EU had breached its WTO obligations with respect to this product by not undertaking and completing approval procedures without undue delay.[4] The United States in this regard also took note that the EU's own scientific authority had issued positive opinions on this application for approval at least six times between 2005 and 2012. In a development that was referred to by the EU, the United States understood that earlier in February, the EU Council had considered a regulation that finally would have authorized the approval of this product. The United States regretted, however, that apparently the EU Council had declined to adopt the regulation. The United States further noted that the difficulties that had been faced by this application exemplified the problems with EU measures affecting the approval of biotech products, and the United States urged the EU to take steps to address these matters. However, in regard to the EU's intervention at the present meeting, it would be useful to get a clarification. The EU had stated that the Commission may take some sort of action with respect to this product and may approve it despite the fact that the Council had not adopted the regulation. The United States asked if the EU could clarify the status of the situation.

1.36. The representative of the European Union said that the EU was pleased to clarify how its rules functioned. The EU could confirm that the measures were now to be adopted by the European Commission, in accordance with the applicable rules.

1.37. The representative of the United States said that, although this would have been a positive development, it also exemplified the problems with EU measures affecting the approval of biotech products generally. Additional action by the Commission in the face of EU Council opposition was an extraordinary procedural step, and inevitably resulted in substantial delays.

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

E. Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.21)

1.39. The Chairman drew attention to document WT/DS371/15/Add.21, which contained the status report by Thailand on progress in the implementation of the DSB's recommendations in the case concerning Thailand's customs and fiscal measures on cigarettes from the Philippines.

1.40. The representative of Thailand said that in its most recent status report, Thailand had indicated that it was continuing to prepare responses to the Philippines' recent request for additional information regarding certain aspects of Thailand's implementation and that it had provided some of these responses to the Philippines. Notwithstanding the current uncertainties in capital, Thailand hoped to provide the remaining responses shortly and would discuss the relevant modalities bilaterally with the Philippines. Thailand looked forward to continuing its discussions with the Philippines and to resolving this matter in an amicable manner.

1.41. The representative of the Philippines said that his country thanked Thailand for its status report and for the statement made at the present meeting. Unfortunately, there were no new developments to report at the present meeting. As it had mentioned at the January 2014 DSB

[3] T304-40 cotton.

[4] "European Communities – Measures Affecting the Approval and Marketing of Biotech Products" (WT/DS291/R), adopted on 21 November 2006, at para. 8.18(a)(xi).

meeting, the Philippines had asked Thailand for information on two issues concerning the implementation of the DSB's recommendations and rulings in this dispute. Both issues related to customs valuation. The first concerned a recent decision by the Thai Attorney General to prosecute an importer of Philippine goods, and several of the importer's current and former employees, for alleged under-declaration of customs values in the 2003-2007 time-period, which included the period covered by the DSB's recommendations and rulings in this dispute. The importer had not yet been formally notified of the charges, and the Philippines' efforts to obtain more information on the bilateral level, thus far, remained unanswered. The second issue on which the Philippines had been trying to obtain more information concerned a decision by the Thai Customs Board of Appeals to reject the declared transaction values for 210 entries of Philippine goods from 2002. The Philippines' questions on this matter dated back to September 2013. To date, the Philippines had not received anything other than indications that Thai Customs was working on preparing answers to these questions. The Philippines was continuing bilateral discussions to resolve the remaining issues in this dispute and hoped to be able to report on developments in that regard at the next regular DSB meeting.

1.42. The Chairman said that all Members hoped that further developments would be reported at the next meeting.

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

F. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.20)

1.44. The Chairman drew attention to document WT/DS404/11/Add.20, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain shrimp from Viet Nam.

1.45. The representative of the United States said that his country had provided a status report in this dispute on 13 February 2014, in accordance with Article 21.6 of the DSU. As the United States had noted at past DSB meetings, the US Department of Commerce had published a modification to its procedures in February 2012 in order to implement the DSB's recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. That modification addressed certain findings in this dispute. The United States would continue to consult with interested parties as it worked to address the DSB's recommendations and rulings.

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

G. Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-In Tariff Program: Status report by Canada (WT/DS412/17 – WT/DS426/17)

1.47. The Chairman drew attention to document WT/DS412/17 – WT/DS426/17, which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the cases concerning Canada's measures affecting the renewable energy generation sector and the measures relating to the feed-in tariff program.

1.48. The representative of Canada said that his country was providing the status report pursuant to its obligation under Article 21.6 of the DSU. As already indicated by the Chair, the documentation for this item had been circulated in documents WT/DS412/17 and WT/DS426/17. Canada recalled that, on 24 May 2013, the DSB had adopted recommendations and rulings in the FIT disputes, DS412 and DS426. Canada, Japan and the European Union had agreed shortly thereafter that the reasonable period of time for Canada to implement these recommendations and rulings would end on 24 March 2014, and they had jointly notified the DSB of this agreement on 29 July 2013. On 12 June 2013, the Minister of Energy of the Province of Ontario had issued a Ministerial Directive setting out that large procurements under the FIT program would be replaced with a new competitive procurement process through requests for proposal. As a result, large wind and solar electricity procurement were no longer subject to the domestic content requirements of the FIT program. On 16 August 2013, the Minister of Energy of the Province of Ontario had issued

a Ministerial Directive that lowered significantly the domestic content requirements for procurement of wind and solar electricity under the FIT program more generally. On 11 December 2013, the Government of Ontario had tabled legislation (known as Bill 153 – Complying with International Trade Obligations Act, 2013) to remove domestic content requirements completely from the FIT program. Canada would continue to work with the Government of Ontario to ensure that the DSB's recommendations and rulings would be implemented on time.

1.49. The representative of Japan said that his country thanked Canada for its statement and the status report submitted on 13 February 2014. Japan took note of the actions taken by Canada to implement the DSB's recommendations and rulings and welcomed the fact that the Government of Ontario had tabled legislation to remove domestic content requirements from the FIT program in December 2013. Japan expected that the bill would be passed and be in force by 24 March 2014 when the reasonable period of time for this dispute expired. Japan would closely monitor a new competitive procurement process, which would replace the FIT program. Since this dispute made it clear that the domestic content requirements under the FIT program were inconsistent with the WTO Agreements, Japan expected full resolution of this dispute within the reasonable period of time.

1.50. The representative of the European Union said that the EU thanked Canada for its status report. The EU had taken good note of the actions undertaken by the Government of Ontario thus far, in particular the plan to remove domestic content requirements from the FIT program. The EU trusted that the proposed amendment to the Electricity Act would be expeditiously considered by the Ontario Parliament with a view to its adoption before the end of the reasonable period of time. The EU asked Canada to keep the EU and the DSB informed of developments in that regard. The EU further noted the information in the status report according to which the FIT program would be discontinued for large projects, and would be replaced with a new competitive process through requests for proposals. This was a legitimate policy option. That said, the EU wished to recall that domestic content requirements should be eliminated also if the specific modalities of public support to renewable energy changed. The EU, therefore, trusted that any new system introduced to replace the FIT program would ensure fair competition between domestic and imported generation equipment.

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

H. China – Definitive Anti-Dumping duties on X-Ray Security Inspection Equipment from the European Union: Status report by China (WT/DS425/9)

1.52. The Chairman drew attention to document WT/DS425/9, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning China's anti-dumping duties on x-ray security inspection equipment from the European Union.

1.53. The representative of China said that, in accordance with Article 21.6 of the DSU, China had provided a status report in this dispute on 13 February 2014. On 10 January 2014, the Ministry of Commerce of China had published a notice and had launched a reinvestigation on the x-ray security inspection equipment from the European Union. On 19 February 2014, the Ministry of Commerce had issued the determination (Notice (2014) No. 9) and the anti-dumping duty at issue had been terminated. Through these efforts, China had fully implemented the DSB's rulings and recommendations in this dispute.

1.54. The representative of the European Union said that the EU thanked China for the information provided at the present meeting according to which the measures at issue in this dispute had been terminated as from 19 February 2014. The EU appreciated that China had complied in such a clear manner with the DSB's recommendations and rulings in this dispute. The EU hoped that this marked a change in the way trade defence measures were used in China and that such measures would only be imposed when strict conditions provided for in the Anti-Dumping Agreement were met. In particular, certain Panel's findings in this dispute (such as, for example, the findings on the methodology followed by China's authorities in its price effects analysis or on transparency) were also relevant for other investigations. The EU expected that they would be followed in other cases.

1.55. The Chairman noted that this matter would now be removed from the DSB's Agenda and the DSB would not revert to it at its next meeting. He thanked the parties to this dispute for having found a mutually acceptable solution to this matter.

1.56. The DSB took note of the statements.

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 that the United States stop transferring anti-dumping and countervailing duties to the US industry. Such disbursements were clearly incompatible 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. 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 Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. As it had expressed at previous DSB meetings, Brazil was a party to this dispute and was of the view that the United States was under obligation to submit status reports in this dispute until such time that no more disbursements were made pursuant to the Byrd Amendment. In order for the repeal of the Byrd Amendment to be considered compliant with the WTO, it should have entailed a discontinuation of disbursements originating in the new and old investigations. Only then would the issue be resolved within the meaning of the DSU and the United States would be released from its obligations to provide status reports in this dispute.

2.5. The representative of India said that his country thanked the EU and Japan for bringing this issue before the DSB once again. India shared their concerns and supported their views. India agreed with the previous speakers that this issue should remain subject to the surveillance of the DSB until the United States fully implemented the DSB's rulings and recommendations.

2.6. The representative of Canada said that his country agreed with the statements made by the previous speakers.

2.7. The representative of Thailand said that, like the previous speakers, Thailand's position had not changed. Thailand urged the United States to cease the disbursements and fully implement the DSB's rulings and recommendations on this matter.

2.8. The representative of the United States said that, as his country had noted at previous DSB meetings, the President had signed the Deficit Reduction Act into law in 2006, including a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. As Members had acknowledged during previous DSB meetings, the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. Therefore, the United States 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 comments regarding further status reports, 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 merely repeat what it had said at the present meeting.

2.9. 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 not implemented the DSB's recommendations and rulings in this dispute. Following China's adoption of measures purportedly taken to implement the DSB's recommendations and rulings, foreign suppliers of electronic payment services still could not do business within China in China's local currency. In particular, China imposed a licensing requirement, but provided no criteria or procedures for foreign suppliers to be approved. The result of this was a ban on foreign EPS suppliers. China Union Pay – which was China's own domestic champion – remained the only EPS company that had ever been able to operate in China's domestic market. Yet the DSB's recommendations and rulings in this dispute stated that China had both market access and national treatment commitments concerning Mode 3 for electronic payment services.[5] At prior DSB meetings, China had taken the extraordinary position that these particular DSB findings were not relevant for it to comply with its WTO obligations. However, China had no basis for such assertions. China also stated at last month's DSB meeting that it was working on the necessary regulations that would allow for the licensing of foreign EPS suppliers. Unfortunately, the United States had not seen any evidence that such regulations had been issued. The United States called upon China to inform the DSB of the issuance of a regulation that would allow for the licensing of foreign EPS suppliers and again encouraged China to meet its obligations to implement the DSB's recommendations and rulings in this dispute.

3.3. The representative of China said that her country regretted that the United States had, once again, brought this matter before the DSB. At previous DSB meetings, China had explained that it had fully complied with the DSB's recommendations and rulings in this dispute. China had further explained that the actions being sought by the United States were beyond the scope of China's compliance obligations. Notwithstanding these prior explanations by China, the United States had continued to characterize the actions that it was requesting of China as actions that were necessary to comply with the DBS's recommendations and rulings. It was not China that was taking an extraordinary position, but the United States. Whatever the "ban" the United States was talking about was out of the scope of the DSB's recommendations and rulings. These demands were based on a clear misunderstanding of the dispute settlement process. In this dispute, the US market access claims were based on a "monopoly" theory that it was unable to prove other than with respect to a single measure concerning Hong Kong and Macao. As a result, China's compliance obligations with regard to market access were limited to rectifying the one aspect of this measure that the Panel had found to be inconsistent with China's obligations under Article XVI:2(a) of the GATT 1994. The limited scope of this compliance obligation was a consequence of how the United States chose to style its claims and its inability to prove the greater part of its case. Based on the Panel's finding concerning the classification of the services at issue, the United States appeared to be arguing that China's compliance obligation extended beyond the single measure that the Panel had found to be inconsistent with China's market access commitments. But the Panel's classification finding, and its identification of corresponding market access commitments, was merely a precursor to its evaluation of whether the measures identified by the United States were inconsistent with China's obligations under Article XVI. These findings had not given rise to independent compliance obligations on China, as the United States appeared to suggest. In sum, China had taken all necessary actions and had brought the measures into full conformity with the DSB's recommendations and rulings. Regarding the regulation that the United States called upon China to inform the DSB, it was in discussion through bilateral channels and not subject to the surveillance of implementation. China hoped that the United States would consider the systemic implications and reconsider its position.

3.4. The representative of the United States said that, as it had stated before, the United States strongly disagreed with China's statement and its assertion that it was in full compliance. Further, China's statement that language in the report adopted by the DSB that "China has made a commitment on market access concerning Mode 3" and that "China has made a commitment on

[5] "China – Certain Measures Affecting Electronic Payment Services", WT/DS413/R (adopted on 31 August 2012), paras. 7.575, 7.678.

national treatment concerning Mode 3" were merely "precursors" and not really findings or recommendations and rulings was extremely troubling. It would be a significant repudiation of China's obligations for China to disagree with these findings of the Panel adopted by the DSB that defined China's commitments and were the core of the dispute. China knew, and all knew, that China had commitments here, and the United States would encourage China to live up to them.

3.5. The representative of China said that the identification of the commitment was an issue. However, this did not mean whether or not there was compliance with that commitment. China urged the United States to re-examine the Panel Report in this dispute more carefully.

3.6. The Chairman said that there was obviously a disagreement on compliance or what the obligation was to be complied with. There was an avenue set out in the DSU provisions for such matters and he had also heard both sides consider that at least bilateral discussions might further elucidate the issues concerned. In August 2013, the two parties had signed a so-called sequencing agreement. The more formal avenues were obviously being kept in reserve by each side and the DSB witnessed the exchange of legal views at the present meeting.

3.7. The DSB took note of the statements.

4 UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. Statement by Antigua and Barbuda regarding the implementation of the recommendations and rulings adopted by the DSB

4.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Antigua and Barbuda. He further stated that it was his understanding that, in the absence of Antigua and Barbuda at the present meeting, the representative of Dominica would make a statement on behalf of Antigua and Barbuda.

4.2. The representative of Dominica, speaking on behalf of Antigua and Barbuda, read out the following statement: "We are today reading a statement prepared by and on behalf of the delegation of Antigua and Barbuda, which has requested that this item be placed on the Agenda for today's meeting of the DSB. Antigua and Barbuda wishes to update the DSB on the status of its dispute with the United States over the cross-border supply of gambling and betting services. Having over a year ago gained authorization from the DSB to suspend concessions and certain other obligations to the United States pursuant to Article 22 of the DSU, Antigua and Barbuda has nonetheless gone to great efforts to encourage the United States to make a sincere effort towards an agreed settlement of the dispute. Unfortunately, this has not happened. Antigua and Barbuda wishes to make clear to its fellow Members that, as was explained in the delegation's last presentation to the DSB, the United States has not made any effort to settle this dispute. It has not offered financial compensation. It has not offered Antigua and Barbuda market access of any kind, this even despite a long-standing offer to allow the United States full access to the Antiguan regulatory scheme in practice and, in fact, another long-standing offer to have the Americans fully co-regulate a pared down industry with Antiguan authorities. It has not offered any concessions or changes in its trading relationship with Antigua and Barbuda that could even begin to compensate for the loss to the domestic remote gaming industry – even if viewed from the flawed perspective of two of the panel members in the Article 22.6 arbitration some six or seven years ago. It declined a gracious offer by the prior Director-General of the WTO to sit down with both parties and see if fair ground could be reached through the exercise of his good offices – an opportunity which Antigua and Barbuda eagerly sought and greatly laments was not availed of by the USTR. Late last year, an Antiguan delegation once again travelled to Washington DC on the heels of a promise by the USTR that a real and substantial settlement proposal was going to be presented – only to be bitterly disappointed to discover that the 'settlement proposal' was nothing more than a quickly cobbled together list of US aid-type training opportunities, educational seminars and similar programmes currently on offer to most countries across the globe on a voluntary and largely self-funded basis. Further, licenced Antiguan remote gaming operators remain the subjects of criminal prosecutions in the United States by virtue of the exact same statutes that ten years ago were ruled contrary to the obligations of the United States under the GATS.

4.3. Antigua and Barbuda would like to point out that in all other respects, the two countries enjoy a cooperative and close relationship. In part because of that fact, it is very difficult for the Government of Antigua and Barbuda to understand why the United States has chosen to use this poor and slight country as an example of how it can pick and choose what international obligations it decides to abide by, and how. Perhaps it is because of how the office of the USTR is organized in the American Government that it can do things that in normal circumstances would seem well beyond the pale for other agencies of the United States Government. Whatever the reason, it is a perplexing and, sadly for the citizens of Antigua and Barbuda, cruelly damaging position for the United States to take against a good and vulnerable neighbour. Once again, the Government of Antigua and Barbuda call for the United States to comply with its obligations under the GATS; to deal fairly and honestly with this delicate and honest land; and also to at the very least accord the Government of Antigua and Barbuda the respect to report to the DSU on the status of the American progress towards implementation on this matter monthly as it is lawfully required to do and stop pretending as if this dispute has been long solved and sorted. In the meantime, progress continues on the implementation of the suspension of concessions and other obligations that Antigua and Barbuda might have to the United States under the TRIPS Agreement. In a wise, creative and reasoned fashion, the Government is close to the completion of the remedies mechanism, and if the USTR continues to maintain the blank-faced posture in this case that it has so stoically maintained for over ten years now, the remedies will be pursued. Then, perhaps, the affected industries in the United States can convince the United States Government to do what so far Antigua and Barbuda have been unable to."

4.4. Subsequently, the representative of Dominica, speaking on behalf of the OECS member States, requested that the statement made at the DSB meeting on 20 January 2013 on behalf of the OECS member states be referred to in the record of the present meeting.[6]

4.5. The representative of the Bolivarian Republic of Venezuela said that his country supported Antigua and Barbuda, a small country with serious concerns, as stated by Dominica speaking on behalf of Antiqua and Barbuda. Venezuela supported the statement that it was necessary to rectify the measures so as to bring an end to this situation that had gone on for ten years.

4.6. The representative of Brazil said that his country thanked Antigua and Barbuda for including this item on the DSB's Agenda and thanked Dominica for reading the statement on behalf of Antiqua and Barbuda. As it had stated before, Brazil was of the view that the dispute settlement system had proved to be a useful tool for resolving trade disputes among Members through a rule-based mechanism. However, the credibility and effectiveness of the system depended on the premise that the mechanism worked for the benefit of all Members, regardless of their size or level of development. Bearing that in mind, Brazil encouraged both parties to engage in effective negotiations with a view to reaching a mutually agreed solution to the long-standing "US-Gambling" dispute, in line with the DSB's rulings.

4.7. The representative of Argentina said that his country thanked Antigua and Barbuda for inscribing this item on the Agenda of the present meeting and for keeping the DSB abreast of developments. Argentina, however, regretted that, once again, there had been no progress regarding this matter. Argentina expressed its renewed concern about the systemic implications of protracted failure to comply with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Argentina noted that Article 21.1 of the DSU stipulated that "prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Argentina, therefore, urged the parties to this dispute to redouble their efforts to reach a fair and equitable solution to this long-standing dispute.

4.8. The representative of Jamaica said that her country fully supported the statement made by Dominica, on behalf of Antigua and Barbuda, under this Agenda item. Jamaica had consistently called for a timely resolution of this matter with the full implementation of the DSB's ruling in favour of Antigua and Barbuda. Jamaica was particularly concerned about the protracted failure by the United States to comply with the DSB decision of 20 April 2005. The member States of the Caribbean Community had consistently expressed the region's profound disappointment at the failure to resolve this matter in line with the DSB's ruling. Failure to comply with the DSB's decisions undermined the integrity of the DSB and weakened the foundation on which the WTO

[6] Dominica's statement made at 20 January 2013 is contained in WT/DSB/M/328.

rested. For all countries that relied on the rule-based multilateral trading system, in particular small vulnerable economies, it was important that the credibility of the dispute settlement mechanism be preserved and strengthened through faithful implementation of the decisions, and that it not be undermined by non-compliance. Jamaica urged the United States to take the steps necessary to honour its obligations set out in the Appellate Body's Report as contained in WT/DS285/AB/R in favour of Antigua and Barbuda.

4.9. The representative of Cuba said that her country, once again, noted that the United States was faced with another case of non-compliance with the DSB's recommendations and rulings. Cuba supported the statement made by Dominica on behalf of Antigua and Barbuda. Cuba reiterated the need for the United States to address its failure to comply in this dispute and to avoid these prolonged situations of non-compliance. As Cuba had previously stated, the US lack of compliance undermined the efficiency and credibility of the dispute settlement system. In Cuba's view, this was a violation of Antigua and Barbuda's rights and seriously affected its small economy. Cuba called on the United States to implement the DSB's decisions and its commitments under the GATS.

4.10. The representative of Chile said that her country, once again, wished to express its systemic concern about non-compliance with the DSB's decision in the dispute, which affected the interests of a developing-country Member. Chile hoped that the United States would take the necessary steps to comply with the DSB's recommendations and rulings.

4.11. The representative of Nicaragua said that his country supported the statement made by Dominica, on behalf of Antigua and Barbuda. Nicaragua urged the United States to comply with the DSB's decisions in this dispute, which affected the interests of Antigua and Barbuda, a small and vulnerable economy.

4.12. The representative of India said that his country thanked Antigua and Barbuda for placing this item on the DSB's Agenda. India found it unfortunate that this matter had not been resolved for so long. India fully sympathized with Antigua and Barbuda and was of the view that continued non-compliance was a serious matter with systemic implications for the WTO. India urged both parties to resolve the matter through negotiations at the earliest.

4.13. The representative of China said that her country thanked Antigua and Barbuda for inscribing this item on the DSB's Agenda. China understood the concerns of a small and vulnerable economy regarding the implementation of this long-standing DSB decision. China encouraged the parties in this dispute to engage in consultations on this matter so as to resolve the dispute as soon as possible.

4.14. The representative of the United States said that his country remained committed to constructive dialogue with Antigua to resolve this matter and had been open to meeting with Antigua on this matter at many different levels of the US Government. The US delegate said that some of the comments that it had heard at the present meeting that had implied that the United States was not working in good faith were inaccurate and very unfortunate. As a policy, the United States typically did not comment publicly on ongoing negotiations. But, it was important to note that contrary to statements it had heard at the present meeting, at a meeting last fall in Washington, the United States had presented, in good faith, a range of items that could be part of a final settlement package. The United States continued to await Antigua's answer to the settlement package it had presented. But, in any event, the United States remained ready to engage with Antigua on these issues. With respect to the suggestion that this matter be referred to mediation or good offices with the Director-General, the United States considered that a serious effort to re-engage in negotiations would be more productive than referring the matter to the Director-General. In relation to the statement on further DSB surveillance/status reports, the United States recalled that it had invoked the GATS Article XXI process to withdraw the gambling concession at issue in this dispute. In fact, the United States had reached agreement with all other Members to complete that process by offering substantial new services concessions. Only Antigua prevented completion of the WTO process. Thus, again, it was inappropriate to suggest that the United States had not been trying to resolve this matter in good faith. The United States had been trying to work through the GATS Article XXI process, and it had been trying to engage with Antigua. The United States thought that the GATS Article XXI process was the proper forum for further discussion of this matter, not the DSB. The United States would continue to engage in these efforts and hoped that Antigua and Barbuda would as well.

4.15. The representative of the Bolivarian Republic of Venezuela said that the DSB's recommendations could not be negotiated and had to be implemented. Antigua and Barbuda was a small country that did not have any representation in Geneva. He said that perhaps the Director-General could provide his good offices to help to solve this dispute, and noted that the US compliance would benefit Antigua and Barbuda.

4.16. The representative of Trinidad and Tobago recalled that in 2013, when his country was the WTO coordinator for CARICOM, it had delivered a statement in the DSB meeting supporting Antigua and Barbuda, a CARICOM member. Bearing in mind the statements, which were contained in the DSB minutes, Trinidad and Tobago wished, once again, to make some brief remarks on this particular Agenda item. Trinidad and Tobago recalled the decision of the Heads of Government of CARICOM in 2013 in Haiti in support of Antigua and Barbuda in its efforts to obtain compliance by the United States with respect to the DSB's ruling regarding the cross border provision of gambling and betting services. The countries of CARICOM, like all other small developing states, had consistently worked within the context of international cooperation as engaged members of the international community to defend the imperative of full compliance with internationally accepted norms and rules. In that regard, Trinidad and Tobago firmly believed that all sovereign WTO Members would be regarded as equals and must be respected accordingly. Trinidad and Tobago urged the United States to seek to engage Antigua and Barbuda in urgent, meaningful and constructive negotiations in order to arrive at an amicable, equitable and mutually acceptable settlement to this long-standing dispute. Trinidad and Tobago looked forward to an amicable resolution of this matter in the near future.

4.17. The representative of the United States said that his country appreciated the comment from Trinidad and Tobago about negotiation. The United States remained of the view that a negotiated resolution was the best outcome and remained ready to try through negotiation to resolve this matter.

4.18. The DSB took note of the statements.

5 UNITED STATES – MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

A. Communication from the European Union (WT/DS406/15)

5.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union. In connection with this Agenda item, he drew attention to the communication from the European Union contained in document WT/DS406/15, and invited the representative of the European Union to make a statement.

5.2. The representative of the European Union said that, at the DSB meeting on 22 January 2014, the EU had made a statement concerning the Arbitration proceedings in the "US - Clove cigarettes" dispute. As that meeting had included a discussion about matters to be included under "Other Business" and in order to afford any interested Member the opportunity to comment further, the EU had requested that this matter be placed on the Agenda of the present meeting. In doing so, the EU did not concede that making a unilateral statement on the matter under "Other Business" at the January 2014 DSB meeting consisted of a breach of the Rules of Procedure. The EU simply wished to encourage Members to engage on the matter. The EU had recalled its position stated in the DSB meeting of 22 January 2014 in a communication circulated prior to the present meeting in document WT/DS406/15. As the EU had noted previously, it seemed uncontested that there was disagreement between the United States and Indonesia with respect to compliance in the "US - Clove Cigarettes" dispute. Such disagreement must be decided through recourse to Article 21.5 of the DSU, before recourse to arbitration subsequent to a request under Article 22.2 of the DSU could be entertained. That was the correct sequence, even if Indonesia strongly believed that the United States had failed to comply and even if that belief was reasonably held. However, Indonesia had proceeded to request the authorization of suspension of concessions without and instead of launching the compliance procedure as foreseen under Article 21.5 of the DSU. That meant that, contrary to the procedures and respective roles foreseen in the DSU for compliance panels on the one side and arbitration panels on the other side, the arbitration panel established according to Article 22.6 DSU would necessarily have to decide on compliance first before proceeding to its proper role, the adjudication of the level of concessions to be suspended.

5.3. Such a deviation from the rules and procedures foreseen for compliance proceedings under Article 21.5 of the DSU raised serious systemic concerns that should be of interest to all Members. These concerns were particularly significant if such a course of action changed the procedures applicable to a proper compliance proceeding, such as the right of third-party participation, and, even more worrisome, placed the compliance determination outside the scrutiny of the Appellate Body. But that was exactly what seemed to be happening. Given its interest in the original proceedings as well as in the compliance proceedings, the EU had filed an application with the compliance/arbitration panel, seeking to ensure that it would have an opportunity to exercise its third-party rights. Brazil and Mexico had made similar requests. After a lapse of months, the EU had received the Arbitrator's decision, which had been designated as confidential and thus could not be circulated. Suffice it to say that it appeared to envisage that no other Member apart from the parties was to have a role in or information about these Compliance/Arbitration Panel proceedings. This was despite the fact that these proceedings would necessarily need to deal with the question of compliance in which the EU had a particular interest. The EU was of the firm view that this was not only a breach of its third-party rights, as provided for under Article 10 of the DSU, and the principle of due process. The EU was also of the view that making an Article 22.2 of the DSU request in such a situation while omitting to initiate and pursue compliance proceedings or to suspend the arbitration panel proceedings, was inconsistent with Articles 23.1 and 23.2(a) of the DSU. This was a matter of very serious concern and the EU considered that it necessitated further action on its part. The EU, therefore, appreciated the opportunity to discuss this matter and to hear the views of other Members at the present meeting.

5.4. The representative of Mexico said that his country welcomed the fact that this matter had been placed on the Agenda at the request of the European Union. In order to be brief, Mexico referred to its statement made at the DSB meeting held on 22 January 2014 with respect to this matter. It should be noted that the decisions of Arbitrators in proceedings for the suspension of concessions acquired a systemic importance that went beyond the characteristics of a particular dispute, and this justified the involvement of Members as third parties in appropriate circumstances. Mexico believed that third parties could make valuable contributions to the information and arguments presented before the Arbitrators, thus making it easier for them to objectively assess the case they were called upon to resolve. As had been reported, Mexico, Brazil and the European Union's requests to participate as third parties had been rejected.

5.5. The representative of Canada said that his country thanked the EU for placing this item formally on the Agenda of the present meeting. While the nature of the intervention meant that it might have been addressed under "Other Business", it was probably wise to err on the side of caution and have it discussed as a regular item. On the substance of the matter, on which Canada had declined to comment at the January DSB meeting, as it had indicated on previous occasions and in other venues, Canada did not consider that third parties should be granted the right to participate in proceedings to determine the level of nullification and impairment. On the other hand, Canada did consider that the right of third parties to participate in compliance proceedings was an important one, and this had been unambiguously reflected in the DSU provisions. Compliance proceedings often raised systemic issues that may affect the rights and obligations of non-disputing parties and as such these parties should be given the opportunity to be heard in any compliance proceedings. For these and many other reasons, Canada agreed with the EU that disagreements about the compliance of measures taken to comply should be dealt with in full proceedings initiated under Article 21.5 of the DSU. The problem of the so-called "sequencing" of proceedings had been identified early on, as was an ad hoc solution to correct it. The circumstances that appeared to have arisen in the "US - Clove Cigarettes" dispute reinforced the importance that disputing parties followed proven practices that had emerged to address lacunae in the DSU. Canada, therefore, echoed the EU's call for Members to be mindful of the systemic implications of their actions and to cooperate to ensure the correct functioning of the system. As Canada and others had mentioned at the previous DSB meeting, this situation might also remind Members that ad hoc solutions to problems in the DSU were not always substitutes for permanent solutions. Therefore, Canada once again encouraged delegations to engage fully in the discussions in the DSB Special Session to resolve, once and for all, these outstanding issues.

5.6. The representative of Japan said that his country thanked the EU for bringing this important issue to the present DSB meeting as one of the formal Agenda items. Japan wished to state, once again, that procedural fairness was important for all WTO Members. In its view, it may be a good opportunity for Members to look carefully, once again, at the DSB's Rules of Procedure, to reflect past practices and to reconsider how and what issues should be placed under "Other Business".

Since the EU had raised the issue of "sequencing", Japan wished to reiterate the importance of the issue. Japan would not repeat its position at the present meeting, but referred Members to the details of its statement made at the January 2014 DSB meeting.

5.7. The representative of Brazil said that his country thanked the EU for sharing its views on this important issue regarding the sequencing of Articles 21.5 and 22 of the DSU in the "US - Clove Cigarettes" dispute. Brazil also recognized the underlying question in this debate, which concerned the interpretation on the existence and the scope of measures taken or not taken to comply with the DSB recommendations. Brazil would continue to reflect upon the possible implications of this unfolding process on the proper and fair functioning of the DSU.

5.8. The representative of Chinese Taipei said that her country thanked the EU for inscribing this item on the Agenda and for its statement made at the present meeting. As the EU had pointed out, the present situation gave rise to the sequencing issue and the issue of third-party rights. Chinese Taipei observed that the sequencing issue appeared to generate divergent views in the past, for instance the Decision of the Arbitrators in the "EC - Bananas III" dispute (WT/DS27/ARB) and the Appellate Body Report in "US - Certain EC Products" case (WT/DS165/AB/R). Chinese Taipei had also observed that the issue of third-party rights alluded to by the EU was interrelated with the sequencing issue. The present situation also demonstrated that while certain questions in the DSU may find ad hoc solutions on a case-by-case basis, permanent solutions would be more desirable, in the interest of legal certainty and predictability. Chinese Taipei agreed with Canada that discussions should take place on these questions in an appropriate forum, perhaps with an added sense of urgency generated by the present situation. Chinese Taipei wished to express its strong interest and readiness to engage with Members in such discussions.

5.9. The representative of Norway said that his country thanked the EU for placing this item on the Agenda of the present meeting. Norway had had the time to consult with capital on this matter. In terms of substance, Norway wished to be associated with the EU's position on the sequencing issue in this dispute. Norway was of the view that Article 21.5 of the DSU was the proper procedure for settling compliance disputes.

5.10. The representative of India said that this issue had been discussed under "Other Business" at the January DSB meeting but considering the limitations on a discussion held under "Other Business", substantive discussion on this important issue could only take place under a regular Agenda item. India, therefore, thanked the EU for inscribing this issue on the Agenda of the present meeting. India was a proponent and supporter of sequencing. India believed that this issue had come into focus because of the difference in interpretation of the provisions of Articles 21 and 22 of the DSU, and this issue had been under discussion in the DSB Special Session for many years. Though the issue received a lot of support, no final agreement had yet been reached. Similarly, the issue of third-party rights had also been under discussion in the DSB Special Session. Article 10 of the DSU was about third parties. This Article stated that the interests of the parties to a dispute and those of other Members under covered agreements at issue in the dispute shall be taken into account during the panel process. Thus, from the plain reading of the text of Article 10 of the DSU, it appeared that this Article was limited to the rights of third parties in the panel process only. The DSU was silent on the issue of third parties at the arbitration stage. India agreed that there could be occasions when the arbitration proceedings could involve issues of legal interpretation and, therefore, the issue of participation of third parties in arbitration proceedings required careful and detailed discussion amongst the Membership. Considering that there were differences in opinion on this issue and that the DSB took decisions by consensus, it was most unlikely that the DSB would be in a position to resolve this issue. In India's view, the DSB Special Session was the better forum for discussion on these two and other issues. India agreed that ad hoc solutions may not serve in all situations and there was a need to resolve these issues on a permanent basis at the earliest.

5.11. The representative of Australia said that, while Indonesia's approach in this dispute was not in keeping with the pattern that had developed in the WTO around agreements to sequence compliance and arbitration panels, it was not, in Australia's view, inconsistent with the rules in the DSU itself. That the time-frames in Articles 22.2, 22.6 and 21.5 of the DSU around arbitration requests, retaliation and compliance panels permitted retaliation prior to the determination of compliance was a well-known gap in the rules that had led to the development of sequencing agreements and to reform proposals on sequencing in the DSU review negotiations. Australia, therefore, did not share the view that Indonesia's arbitration request might be inconsistent with

the DSU provisions. Australia urged Members to be mindful of the adopted practice on sequencing as the most appropriate way forward in such situations, to avoid these types of problems arising in the future. As others had said, it also emphasized and showed again the importance of working to try and finalize the DSU negotiations as soon as possible so that issues such as this could be resolved.

5.12. The representative of China said that, without prejudice to China's position on third-party rights in the arbitration proceedings under Article 22.6 of the DSU, China shared the EU's concerns over the sequencing issue in general. Sequencing was a long-standing issue recognized by Members and had been fully discussed in the context of the DSU negotiations. China believed that a multilateral clarification and improvement on this matter was the best means to resolve this issue. This dispute provided impetus for Members to advance the work in the DSU negotiations more urgently with a view to producing outcomes on this matter in the near future. China hoped that Members could follow the sequencing agreement practice in order to provide security and predictability to the system. All Members acknowledged that certainty, predictability and security were of great value to the dispute settlement system.

5.13. The representative of Argentina said that his country had views regarding sequencing and the participation of third parties in arbitrations under Article 22.6 of the DSU. Argentina had expressed its views on this matter in the DSB Special Session. These views were similar to those expressed by Canada. Argentina also considered the DSB was not the right forum to address issues discussed under a specific mechanism created for that purpose. Argentina did not think that the DSB should discuss the same matters like the DSB Special Session. Argentina, therefore, joined other delegations who had stated that Members actively participate in the DSB Special Session to address these matters.

5.14. The representative of Ecuador said that his country wished to point out two facts in relation to the sequencing of compliance and arbitration panel proceedings. First, a similar issue had arisen approximately 15 years ago. Second, it had occurred during a dispute that lasted about 14 years. In that dispute, two requests were submitted four days apart in January 1999. The first was a request for authorization to suspend concessions and the second was a request to establish a compliance panel with a view to determining whether the responding party had actually met its obligations within a reasonable period of time (WT/DS27/43 and WT/DS27/44). As a result, two sets of proceedings had been established at the same time. The responding party had requested that the Article 22.6 proceedings be suspended until the compliance panel had made a ruling, but this request had been refused by the Arbitrators. The Arbitrators' report determining the level of concessions to be suspended had been circulated on 9 April 1999 and the compliance panel's report was circulated three days later. As Ecuador understood, following this and another case in which a different approach had been used, this type of matter had been dealt with through ad hoc arrangements between the parties to the disputes concerned. However, Ecuador reiterated that a similar matter had arisen at least 15 years ago. Since then, several proposals had been submitted at the DSB Special Session. This matter and other issues that went well beyond procedural concerns were still being discussed in that framework, with various proposals regarding "prompt compliance" with the DSB's recommendations and rulings still on the table. Ecuador believed that these were essential for the smooth functioning and credibility of the dispute settlement system. The process to "clarify" and "improve" the DSU should eventually produce a concrete outcome, so that substantive issues, especially those primarily affecting the interests of developing countries, would be dealt with effectively.

5.15. The representative of Indonesia said that her country appreciated the concerns raised by the EU and other Members regarding this dispute. Indonesia wished to refer to its statement made at the DSB meeting on 22 January 2014. Indonesia, once again, regretted that the ongoing dispute was being discussed in the DSB. In this dispute, Indonesia believed that it had acted within its rights and obligations as a WTO Member. Furthermore, Indonesia believed that nothing in the DSU precluded a complainant from having direct recourse to Article 22.2 of the DSU. This was especially true in this case where a respondent, the United States, readily conceded that it had taken no step to implement one or more of the DSB's rulings and recommendations. Article 21.5 of the DSU applied only to circumstances where there was a disagreement as to the existence or consistency of a covered agreement of measures taken to comply with the DSB's recommendations and rulings. In Indonesia's view, such a situation did not exist with respect to this dispute. Indonesia recalled Canada's statement made at the January 2014 DSB meeting when this issue had first been raised. Indonesia agreed with Canada that there were systemic issues

relating to sequencing in the DSU. Indonesia also agreed that ad hoc solutions regarding sequencing agreements were no substitute for negotiations to clarify the DSU procedures. Indonesia also believed that the existing ad hoc solution did not fully take into account every circumstance that may arise in the conduct of dispute settlement proceedings including those that existed in this dispute. Indonesia also appreciated Members' concern about their third-party rights and their systemic interest in the WTO disputes. Indonesia fully supported further discussion in the DSB Special Session to resolve the ambiguity in the DSU provisions and to consider opening more opportunities for third party participation. But in the meantime, Indonesia must continue to defend its interests in accordance with the DSU provisions as they currently exist.

5.16. The representative of Honduras said that his country supported the statements made by other delegations and, like other delegations, considered that the DSB was not the right forum to discuss the sequencing issue.

5.17. The representative of the United States said that his country appreciated that the European Union had chosen to place this item on the proposed Agenda for the present meeting, in accordance with the 10-day rule set out in Rules 2, 3, and 4 of the DSB's Rules of Procedure.[7] As the United States had noted at the January 2014 DSB meeting, placing this item on the proposed Agenda gave all Members advance notice of items to be raised at the DSB meeting and provided delegations with an opportunity to confer with capital, receive instructions, and to engage in the discussion, as they considered appropriate. The United States was glad to hear that numerous other Members echoed this point at the present meeting. This was the appropriate way to proceed under the DSB's Rules of Procedure. On the other hand, raising an item under "Other Business", as had occurred in January, denied Members advance notice and equal notice of the matter to be raised, and therefore disadvantaged any Member that the delegation making the statement had not specifically selected to receive a "heads-up". Placing the item on the Agenda of the present meeting as a regular item also helped avoid engaging in a discussion on substantive issues under "Other Business". Such a discussion, as occurred at the January DSB meeting, was contrary to Rule 25 of the DSB's Rules of Procedure. Therefore, the United States did appreciate the EU's more transparent and more inclusive approach consistent with the DSB's Rules of Procedure. With respect to the EU's written communication, the United States considered that this was a transparent means of informing Members of issues of interest to the EU in advance of the present meeting. In that regard, the United States welcomed the EU's recognition that communications circulated in a DS document series could be a valuable means for a Member to share its views with all WTO Members, and the evolution in the EU's thinking since previously expressing a view to the DSB.[8]

5.18. Turning to the substantive issues, the United States observed that these were not new issues, but were issues that had been addressed by arbitrators in past proceedings, including in arbitration proceedings to which the EU had been a party, and which Ecuador had referenced in its statement. As a result, the United States did not understand the basis for the EU's concerns, nor the "urgency" necessitating the statement at the January 2014 DSB meeting. The first issue raised involved initiating compliance proceedings under Article 21.5 of the DSU rather than requesting authorization under Article 22.2 of the DSU. As the United States had noted, it would have preferred to have concluded such a so-called "sequencing" agreement with Indonesia as it initially had proposed. However, Indonesia had changed course and instead had decided to act on its view that sequencing was not required under the DSU and that issues of compliance may be resolved as part of the Article 22 arbitration. The United States heard Indonesia repeat that view again at the present meeting.

5.19. On the one hand, the United States strongly disagreed with Indonesia's statement that the United States had taken no steps to come into compliance in this matter. That was absolutely not the case and was a subject in the ongoing proceedings. Nonetheless, while the United States may disagree with Indonesia on that issue, it did not disagree with Indonesia's reading of the DSU. This was a reading that had been confirmed by the arbitrator in the "EC - Bananas III" dispute. In that dispute, the EU had made a claim of compliance, and the compliance issue was resolved in the course of the Article 22.6 arbitration, without recourse to 21.5 of the DSU. The United States disagreed with the contrary notion expressed by some at the present meeting that Members were

[7] Rules of Procedure for Meetings of the General Council, WT/L/161 (applicable to meetings of the DSB, WT/DSB/9).

[8] See WT/DSB/M/254, paras. 74, 86 (22 October 2008).

instead required to seek recourse to Article 21.5 of the DSU if the parties to the dispute disagreed on compliance. For these reasons, the United States did not see this as an open issue nor did it see the point in seeking to re-visit this issue at the DSB. Similarly, with respect to the issue of what the EU characterized as third-party "rights", the DSU was clear in not providing for third party participation in such proceedings. The United States appreciated that India had also pointed to this lack of any textual basis at the present meeting. While the EU characterized its request as one conferring "rights", it was important to note that its request would in fact impose additional "obligations" on the parties. The DSU was explicit that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements" and not to add to those obligations.[9] The United States, therefore, did not see how an arbitrator or adjudicator could grant a request to impose additional obligations on a Member not agreed to in the DSU. Finally, the United States noted that the EU appeared to now want to refer to arbitrators by a new name – as a "compliance/arbitrator panel". But, using different terminology could not amend the DSU or transform the legal nature of the Article 22.6 arbitration.

5.20. The representative of the European Union said that the EU did not believe, as suggested by some delegations, that the DSB would not be the appropriate forum for discussing this issue. There seemed to be a disagreement on the right forum. The EU had also just heard that Indonesia was of the view that an Article 21.5 compliance procedure was the correct way forward in the event of a disagreement on compliance. The United States had just confirmed again that there was clearly a disagreement on compliance. The EU, therefore, hoped and urged Indonesia to draw the right conclusions to commence a compliance procedure, failing which the EU would have to consider other options on this matter.

5.21. The Chairman noted that a couple of central issues had been highlighted at the present meeting. They were not new issues as some had observed. The first issue was about finding the intent of the DSU drafters. It was about how one would fill the lacunae that they had left in terms of reconciling sequencing on the one hand, which was between the parties and, on the other hand, the inherent right of third parties to have a systemic interest in the proceedings. The second issue, as implied by India, was that what constituted a panel proceeding was amenable to different interpretations since reference was also made to compliance panels. The third issue was the role of the DSB Special Session on the DSU negotiations and whether Members were obliged to always have packages of "an all or nothing" approach or whether the DSB Special Session might consider particular issues, in a discrete manner, in order to address practical problems.

5.22. The DSB took note of the statements.

6 EUROPEAN UNION – MEASURES ON ATLANTO-SCANDIAN HERRING

A. Request for the establishment of a panel by Denmark in respect of the Faroe Islands (WT/DS469/2)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 January 2014 and had agreed to revert to it. He drew attention to the communication from Denmark in respect of the Faroe Islands contained in document WT/DS469/2, and invited the representative of Denmark in respect of the Faroe Islands to make a statement.

6.2. The representative of Denmark in respect of the Faroe Islands said that, as set forth in document WT/DS469/2, the Kingdom of Denmark in respect of the Faroe Islands requested the DSB to establish a panel pursuant to Article 6 of the DSU, with standard terms of reference. The Kingdom of Denmark in respect of the Faroe Islands had made its first panel request at the DSB meeting held on 22 January 2014, where its request was blocked by the European Union. As this was the second request for the establishment of a panel made by a complaining party, in accordance with Article 6.1 of the DSU, a panel should be established unless the DSB decided by consensus not to do so.

6.3. The representative of the European Union said that the EU regretted this panel request. In light of the ongoing negotiations of the coastal States on herring and mackerel, the EU believed that there was still room to find an amicable solution. The EU was convinced that its measures

[9] Article 3.2 of the DSU.

were in conformity with the WTO Agreements, notably the GATT, and would defend them vigorously.

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

6.5. The representatives of Australia, China, Guatemala, Honduras, Iceland, India, Japan, New Zealand, Panama, the Russian Federation, Chinese Taipei, Turkey and the United States reserved their third-party rights to participate in the Panel's proceedings.

7 UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

A. Request for the establishment of a panel by Japan (WT/DS468/5)

7.1. The Chairman drew attention to the communication from Japan contained in document WT/DS468/5, and invited the representative of Japan to speak.

7.2. The representative of Japan said that his country had made this request for the establishment of a panel on 13 February 2014. This dispute concerned: (i) the illegitimate imposition of definitive safeguard measures by Ukraine on imports of certain passenger cars; (ii) the deficient investigation that had led to the imposition of those measures, and (iii) the inconsistency of these measures with several provisions of the GATT 1994 and the Agreement on Safeguards in particular. The claims had been explained in detail in the panel request and Japan would not repeat them at the present meeting. Instead, Japan wished to highlight certain conspicuous features of Ukraine's safeguard measures. First, in this case, the total number of the motor cars imported to Ukraine had actually decreased significantly during the investigation period between 2008 and 2010. This fact called into question whether the safeguard measures fulfilled the requirements under the Agreement on Safeguards and the GATT 1994. Although Ukraine appeared to assert that the share of imports of the products relative to domestic production had increased, Ukraine had failed to make any reasoned and adequate findings at determination to justify the assertion. Second, Ukraine had applied the safeguard measures more than two years after the end of the investigation period and the data on which the safeguard measures were grounded was utterly obsolete. Japan recalled that the Appellate Body had explained that increase of imports which would constitute the very basis of the imposition of the safeguard measures must be "recent enough, sharp enough and significant enough". Ukraine's flagrant disregard of the notification and consultation requirements was untenable, because such deliberate action would seriously undermine the operation of Article 12 of the Agreement on Safeguards. Specifically, Ukraine had failed to make a notification to the WTO providing all pertinent information including, but not limited to, evidence of serious injury or threat thereof caused by increased imports and a time-table for progressive liberalization. To date, Japan had not received any time-table for progressive liberalization. Ukraine had also failed to provide an adequate opportunity for prior consultations. Japan had requested consultations on 30 October 2013 and had engaged in consultations in good faith with Ukraine on 28 November 2013 as well as 21 January 2014 with a view to reaching a mutually satisfactory solution. While the consultations had been conducted under a cooperative atmosphere and had provided useful opportunities for the parties to better understand their respective positions on this matter, the parties were unable to resolve the problems. Japan, therefore, requested, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994 and Article 14 of the Agreement on Safeguards, that a panel be established to examine the matter as set out in its panel request with standard terms of reference in accordance with Article 7.1 of the DSU. Finally, Japan wished to express its condolences to the people in Ukraine that had suffered from the recent political conflicts. Japan hoped that the political situation would be stabilized as soon as possible.

7.3. The representative of Ukraine said that his country regretted that Japan had considered it necessary to request the establishment of a panel in respect of Ukraine's safeguard measure on passenger cars. Ukraine recalled that, on 14 March 2013, it had published the Notice of the Decision to impose safeguard measures on imports of certain motor cars in the Official Gazette. On 21 March 2013, the Decision was notified to the WTO, in accordance with Ukraine's obligations under the WTO Agreement on Safeguards. This Decision was the result of a thorough and objective investigation by the relevant authorities in Ukraine, which had concluded that the domestic car industry in Ukraine was under threat of suffering serious injury as a result of the significant increase in the imports of cars. When confronted with that threat, and following an

investigation, the rules of the WTO Agreement on Safeguards expressly allowed Members to impose temporary safeguard measures as Ukraine had done. Ukraine had engaged in constructive and meaningful consultations with Japan in an effort to find an amicable solution that was respectful of Ukraine's rights under the relevant WTO Agreements. Ukrainian experts had provided answers to numerous questions from Japan. Ukraine believed that it had provided all the necessary information and clarification explaining its position. Ukraine remained open to continue these discussions in order to achieve a mutually acceptable solution. Ukraine was, therefore, not in a position, at the present meeting, to accept this first request for the establishment of a panel by Japan.

7.4. The Chairman said that both countries had brought the constructive attitude to the consultations. He noted that a first panel request did not preclude continuing efforts to find a mutually acceptable solution. Since there was no agreement and this being a first request for a panel, the DSB was obliged to simply take note of the statements.

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

8 UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

A. Request for the establishment of a panel by China (WT/DS471/5)

8.1. The Chairman drew attention to the communication from China contained in document WT/DS471/5, and invited the representative of China to speak.

8.2. The representative of China said that, on 3 December 2013, her country had requested consultations with the United States with regard to certain methodologies used in US anti-dumping proceedings. Consultations had been held on 23 January 2014. While these consultations had assisted in clarifying some of the issues before the parties, they had failed to resolve the dispute. Therefore, China had requested, in document WT/DS471/5, that the DSB establish a panel to examine this matter, with standard terms of reference. In the panel request, China had made claims regarding a number of measures. These measures reflected acts or omissions of the United States that, in China's view, failed to comply with provisions of the GATT 1994 and the Anti-Dumping Agreement. The US measures at issue may be placed into two broad groups. The first group encompassed the determinations in three original investigations and one administrative review. In these determinations, the United States Department of Commerce (USDOC) deviated from its normal practice, purportedly in order to address dumping that had been "targeted" to particular customers, regions or time periods. In these determinations, the USDOC had used a "W-to-T" comparison methodology, in which a weighted-average normal value was compared with transaction-specific export prices. It had used zeroing when aggregating the intermediate comparison results to determine the dumping margin, and had applied the methodology to all US sales by the exporter in question, even though the "targeting" had been found only in relation to a sub-set of sales. The second group of measures covered by the panel request involved a number of measures falling within 13 different US anti-dumping proceedings, as well as two norms of general and prospective application, which China challenged "as such". China's claims in relation to these measures related, in significant part, to US practices relating to what the United States considered to be "Non-Market Economies". China's claims, however, were of broader relevance. This was because, *inter alia*, they pertained to the failure by the USDOC to comply with basic procedural protections for interested parties required under the Anti-Dumping Agreement. China, therefore, requested the DSB to establish a panel to examine the matter described in the panel request.

8.3. The representative of the United States said that his country had consulted with China with regard to the matters raised in China's request for consultations. The United States had explained to China that the measures in its request – to the extent that they had been properly identified – were fully consistent with US obligations under the WTO Agreement. Accordingly, the United States was not in a position to agree to the establishment of a panel at the present meeting.

8.4. The Chairman said that this was the first request for a panel and since it was hoped that the parties would continue to consult regardless, the DSB was not in a position to act on this request. The DSB would take note of the statements made and would, depending on developments, revert to this matter at its next regularly scheduled meeting.

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

9 CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

A. Recourse to Article 21.5 of the DSU by the United States: request for the establishment of a panel (WT/DS414/16)

9.1. The Chairman drew attention to the communication from the United States contained in document WT/DS414/16 and invited the representative of the United States to speak.

9.2. The representative of the United States said that, on 16 November 2012, the DSB had adopted its recommendations and rulings in the dispute: China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States ("China – GOES"). Members would recall the DSB findings that China had imposed anti-dumping and countervailing duties on US exports of GOES in a manner that breached China's obligations under the Anti-Dumping and SCM Agreements. The DSB had recommended that China bring its measures into conformity with these agreements. The Arbitrator appointed under Article 21.3(c) of the DSU to determine China's reasonable period of time provided China until 31 July 2013 to implement the DSB's recommendations and rulings. On that date, China had issued a re-determination related to the duties at issue in this dispute. The redetermination had continued the imposition of anti-dumping and countervailing duties on imports of GOES from the United States. The United States considered that China had failed to bring its measures into conformity with the covered agreements, and the United States was seeking recourse to Article 21.5 of the DSU. The apparent inconsistencies between China's re-determination and its obligations under the Anti-Dumping and SCM Agreements were set out in the US request for the establishment of a panel. They included the following briefly: (i) China had failed to support its price effects findings with positive evidence and to objectively examine the related evidence; (ii) China had failed to support its findings that GOES from the United States negatively impacted the domestic industry with positive evidence and to objectively examine the related evidence;(iii) China had failed to base its analysis of the alleged causal relationship between GOES from the United States and injury to the domestic industry on positive evidence, and had failed to objectively examine the related evidence; (iv) China had attributed injuries caused by other factors to the dumped and subsidized imports; (v) China had failed to disclose essential facts underlying its conclusions; and (vi) China had failed to provide an adequate explanation of its calculations and legal conclusions. For these reasons, the United States sought recourse to Article 21.5 of the DSU and requested that the DSB refer the matter set out in the US panel request to the original panel, wherever possible.

9.3. The representative of China said that her country was disappointed that the United States had requested a panel to be established under Article 21.5 of the DSU with regard to this dispute. On 24 January 2014, China had held consultations with the United States in good faith, and had introduced the relevant facts, had provided explanations to the United States and had answered its questions. China had always respected the DSB's recommendations and rulings, and implemented them with good faith. For this particular dispute, in order to implement the DSB's recommendations and rulings, China had carried out a reinvestigation, had issued a determination before the expiration of the reasonable period of time and had greatly reduced the anti-dumping as well as the countervailing duty rates. China had also enacted Preliminary Rules Regarding Implementation of WTO Determination of Trade Remedy Disputes, which had authorized the investigation authorities to reinvestigate and amend or repeal the disputed measure in order to implement the DSB's recommendations and rulings. Those rules would apply to all future WTO trade remedy cases to which China was the responding Member. China believed its determination of the reinvestigation was in full compliance with the covered agreements.

9.4. The Chairman said that, as he understood and consistent with the sequencing agreement agreed by the parties to the dispute, China was not objecting to the establishment of a panel at the present meeting.

9.5. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS414/16. The Panel would have standard terms of reference.

9.6. The representative of the European Union, India, Japan and the Russian Federation reserved their third-party right to participate in the Panel's proceedings.

10 AB SELECTION PROCESS UPDATE

10.1. The Chairman said that this item had become a regular feature in the DSB's regular meetings. The update, in effect, was the communication from the Selection Committee which all Members had received by fax, addressed to Heads of Delegation, dated 24 February 2014. It was self-explanatory and it was up to the DSB to receive and to note. He invited delegations who so wished to provide comments regarding the communication.

10.2. The representative of Kenya said that his country appreciated the efforts made by the Selection Committee in line with its mandate. Kenya, however, regretted that after a ten-month long selection process, the Committee was unable to recommend a candidate for the vacant position in the Appellate Body. Kenya took this opportunity to make three brief points. First, in order to break the impasse in the appointment process, voting was required. Second, the geographical representation in the Appellate Body ought to guide the appointment in this case. Third, only the nominating WTO Members may withdraw their nominees and no new nominees ought to be accepted. On the first point, why was voting necessary to break the impasse? To break the impasse, and to restore confidence in the appointment process of the Appellate Body, Kenya recommended that the DSB should vote to appoint one of the four nominees. The legal justification for a vote was that, given that the Rules of Procedure of the General Council applied to the DSB meetings, Kenya was of the view that Article IX:1 of the WTO Agreement, second sentence, which allowed to vote upon failure of consensus should apply to the decision on the appointment of Appellate Body members. Further, Article 17.2 of the DSU which provided for the DSB to make appointments to the Appellate Body, did not use the word "decision" and so the consensus rule in Article 2.4 of the DSU did not apply to it. The consensus rule in Article 2.4 of the DSU was not directed at administrative issues such as the appointment of Appellate Body members particularly where there had been a failure of consensus. In addition, there was no inherent conflict between Article IX:1, second sentence of the WTO Agreement (which provided that where decision-making by consensus had failed, voting shall be conducted), and Article 2.4 of the DSU which provided that DSB decisions shall be taken by consensus. There was no language in the DSU to indicate an intent that Article IX:1 of the WTO Agreement did not apply to the DSB.[10] In any case, even if there was a conflict, by virtue of Article XVI:3 of the WTO Agreement, the recourse to majority voting in Article IX:1 of the WTO Agreement would trump any contradictory language in the DSU. In essence, Article IX:1 of the WTO Agreement, insofar as it provided decision-making by voting, applied to both the DSB and the General Council.

10.3. The second point concerned the criteria to be made in making this particular Appellate Body appointment. In making an appointment, Members ought to bear in mind Article 17.3 of the DSU. It provided that Appellate Body "membership shall be broadly representative of Membership in the WTO". As such, factors such as different geographical areas, levels of development and legal systems were to be taken into account. This reference to different geographical areas and levels of development being taken into account was one of the Recommendations of the Preparatory Committee for the WTO approved by the DSB on 10 February 1995 (establishment of the Appellate Body, 10 February 1995, WT/DSB/1, dated 19 June 1995, para. 5). The third point was that nominations made by WTO Members could only be withdrawn by those Members and no new nominees ought to be accepted. Should Members decide not to take a vote before the current Selection Committee's term were to end, and before the Committee were to make a recommendation on an appointment, Kenya wanted the Membership to note that the current nominees did not have to be re-nominated. Their nominations were still valid. The end of the one-year tenure of Council Chairs did not terminate these nominations. This was because these candidates had validly been nominated by the exercise of the right each Member had. As such, the nominations did not expire until the selection process was over. Kenya recalled the circumstances

[10] Article XVI:3 of the WTO Agreement provides that: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict".

concerning the reappointment process of Appellate Body member Mr. Ricardo Ramírez, whereby the process had been initiated by Mr. Shahid Bashir, the then Chair of the Selection Committee and was concluded by his successor, Mr. Jonathan Fried, the current Chair. The process had proceeded expediently. It had been carried over from one Chair to another without termination or starting a new selection process. Further, Kenya would not endorse the addition of other nominees to the current four. The Selection Committee had not found any of them unqualified for the appointment to the Appellate Body under Article 17.3 of the DSU. The Article provided that the person must be of "recognized authority, with demonstrated expertise in law, international trade and the subject-matter of covered agreements generally". In conclusion, Kenya supported the views expressed by the United States in November 2007 on the occasion of the last deadlock of an Appellate Body selection process when the United States had noted that the Appellate Body "must not be politicized in any way". Kenya requested that its statement be reflected in the minutes of the present meeting.

10.4. The representative of the European Union said that the EU confirmed its full engagement in the process of finding the best possible replacement for Mr. David Unterhalter. What was important was the appointment of the most qualified candidates to the Appellate Body. This was fundamental for the survival of the whole system. The EU was not convinced that the current situation was due to the lacking qualities of the candidates. However, the EU recognized that, at this point in time, it seemed impossible to find a candidate that had the support of the whole Membership, which was also fundamental for the credibility of the Appellate Body. Members needed to resolve the current impasse as soon as possible. Members had, thus far, established a tradition in relation to the selection procedures that had served the Membership well and had resulted in the appointment of outstanding Appellate Body members who had enjoyed the support of the whole Membership. The EU, therefore, confirmed its full engagement in the process of finding the best possible replacement for Mr. Unterhalter as a matter of urgency and would, therefore, support a decision to re-open the procedure.

10.5. The representative of Australia said that his country was disappointed that the Selection Committee had found itself in a position of being unable to recommend one of the candidates for appointment to the Appellate Body, in particular as Australia considered that a number of candidates from the existing pool of nominees could have made significant contributions to the work of the Appellate Body. Australia had put forward a candidate, in good faith, with 30 years of trade law experience, including on highly complex subject areas that comprised a majority of the Appellate Body's workload. As it had previously noted, Australia's view was that the overarching aim of the selection process must be to provide highly-qualified members for appointment to the Appellate Body. To do otherwise would risk the erosion over time of the high standards Members expected of the Appellate Body and, by implication, of the WTO's crown jewel, the dispute settlement system. In that context, the requirement in Article 17.3 of the DSU for the Appellate Body to be "broadly representative of Membership in the WTO" could canvas many types of representation, including geographical spread, various legal systems (whether civil or common law), and different economies and levels of development, as set out in paragraph 5 of WT/DSB/1. Certainly, that phrase in Article 17.3 did not mean that retiring Appellate Body members must, as a matter of course, be replaced by new members from the same geographical region or country. Australia would be very concerned if that were to become the case in the future. It was worth recalling that Australia's former Appellate Body member, John Lockhart, was, when he had unfortunately passed away early in his second term, replaced by South Africa's David Unterhalter. At that time, Mr. Unterhalter had been recommended for appointment ahead of a well-qualified Australian candidate. Australia, however, had no hesitation in accepting the recommendation to appoint Mr. Unterhalter, because it had clearly been based on merit and a proper interpretation of the guidance in WT/DSB/1.

10.6. Australia shared Kenya's disappointment with the state of play in this process. However, Australia did not agree with its proposal regarding voting. Furthermore, despite its concerns with how this selection process had played out, including in an unfortunately public way, Australia accepted that the Selection Committee considered a new selection process to be the only way forward to fill the current vacancy in the Appellate Body. For the future strength and legitimacy of the Appellate Body, Australia hoped that the new process would be carried out fairly, meritoriously and apolitically. In conclusion, Australia reiterated its belief that Ms. Joan Fitzhenry would have made an excellent contribution to the Appellate Body. However, given its disappointment with how this process had transpired, Australia would not be re-nominating Ms. Fitzhenry in the new selection process.

10.7. The representative of Egypt said that his country thanked the Selection Committee for its efforts aimed at selecting a new member of the Appellate Body. Egypt would have wished that the selection process be concluded by now and was disappointed that this was not the case. Egypt believed that, although there was no written regulation, it was a common understanding that the current vacancy should go to the African continent. Egypt noted that its candidate was both from Africa and from the Arab region. However, given the current situation, which was not healthy for the system at large, Egypt did not wish to create any precedence that would further undermine the institutional integrity of the WTO by adopting any procedures or any new measures that would simply complicate matters further in the future. In that regard, Egypt was willing to go along with the suggestion proposed by the Selection Committee. In Egypt's view, any decision on this matter should be without any prejudice to all the candidates, which were highly-outstanding and well-qualified, including the candidate from Egypt.

10.8. The representative of Norway said that his country thanked the Selection Committee for its efforts. Norway sincerely regretted that the Membership had not been able to reach a consensus. With regard to Kenya's proposal to put this question to a vote, Norway supported the statements made by other delegations expressing their view that it would be more appropriate to start a new selection process as proposed by the Selection Committee.

10.9. The representative of Turkey said that, like many other Members, his country was not content with the current situation and hoped that the selection process would be soon successfully concluded. Turkey did not believe that voting would be an appropriate solution because consensus had been a core value of the WTO. Turkey was concerned that voting may open a way to recourse to voting and would deviate from consensus. For that reason, Turkey was of the view that consensus was still of value and should be pursued in this process as well.

10.10. The representative of Japan said that his country appreciated the continued efforts made by the Selection Committee. However, it was regrettable that the Committee had concluded that it could not recommend a new Appellate Body member to the DSB on 24 February 2014. Japan was concerned that one position in the Appellate Body had remained vacant for more than several months. Taking into account the possibility that the number of disputes to be brought to the Appellate Body would increase in the near future, Japan, as stated in the previous DSB meeting, believed that a realistic approach on the way forward as suggested by the Selection Committee was indispensable for a new Appellate Body member to be appointed in the near future. With regard to voting suggested by Kenya, Japan did not believe that voting was helpful to solve this issue and for the system. Japan reiterated that Article 2.4 of the DSU required that "where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". Thus, consensus had to be pursued so as to solve this problem.

10.11. The representative of Brazil said that his country noted with concern that Members had not been able to reach consensus on a candidate for the Appellate Body. It was fully regrettable that consensus had not materialized on the basis of the candidates at hand. The entire Membership would benefit in having, as soon as possible, a complete competent and independent Appellate Body. In view of the common interests that Members had in an efficient and operational Appellate Body, it was also expected that Members show common engagement towards an acceptable and expeditious solution as long as the qualification requirements foreseen in Article 17.3 of the DSU were observed.

10.12. The representative of the United States said that, as the Chairman had noted, all Members had received a fax from the Selection Committee recommending that the DSB commence as soon as practicable a new selection process, to be carried out by the Director-General and the 2014 Chairpersons. As it had noted at the January DSB meeting, the United States viewed the current situation and this type of step forward as far from an ideal outcome. However, given the Selection Committee's view that consensus would not be reached on any of the prior candidates, the United States would support the recommendation of the Selection Committee to commence a new selection process. The United States did not believe that voting was an appropriate or permissible way of resolving the Selection Committee's inability to reach a consensus. The DSU was explicit that DSB decisions were taken by consensus, unless the DSB provided otherwise. A move to voting would have systemic consequences for the WTO as a whole that all Members would need to seriously reflect on. Taking this type of action would also threaten to politicize the Appellate Body selection process in this particular instance and in the future.

10.13. The representative of Chile said that his country regretted the current situation, which set a negative precedent. With regard to voting, Chile believed that this would again set a negative precedent and as Japan had mentioned, it would not be helpful for the procedure ahead. Chile, therefore, supported the suggestion made by the Selection Committee to engage in a new process.

10.14. The representative of China said that her country regretted that the Selection Committee was unable to recommend a candidate for the vacant post in the Appellate Body. In the WTO dispute settlement system, the Appellate Body played a critical role in achieving a solution to a dispute and clarifying the existing provisions of the covered agreements. China, therefore, attached great importance to the work of the Appellate Body, and always hoped that the selection of an Appellate Body member would run smoothly. Since the workload of the Appellate Body would be increased in the coming years, in China's view, the smooth and successful selection of an Appellate Body member to fill the vacancy was urgent for the benefit of the system. China was open to any reasonable suggestion on how to address the current difficult situation, including exploring some further possible rules with respect to how the Selection Committee heard Members' views and made a recommendation to the DSB in order to avoid the same difficult situation happening again. China encouraged Members to follow past practice and show flexibility on this matter.

10.15. The representative of Hong Kong, China said that his delegation thanked the Selection Committee for its hard work. Hong Kong, China was disappointed that, after such a long period of time and with so much effort, Members were still not in a position to conclude the process. Hong Kong, China supported the way forward proposed by the Selection Committee in its fax of 24 February 2014 and hoped that Members would continue to work closely so as to find a qualified candidate for the vacancy by consensus soon. The post would remain vacant for some time and that was not good for the Appellate Body, which was expected to have an increased workload for this year.

10.16. The representative of Canada said that his country thanked the Selection Committee for its work, and for its persistent efforts to arrive at a recommendation for the appointment of one of the four candidates to the Appellate Body. Canada also shared the disappointment of others that these efforts had been unable to result in a recommendation, especially in light of the qualified candidates that had been put forward and of the amount of effort invested by all involved. This outcome was all the more regrettable given recent concerns about the workload of the Appellate Body, which while light in recent months would only get heavier as the year went on. It was the Members, and their efforts to resolve their trade disputes, that would ultimately suffer from a further delay in bringing the Appellate Body back to a full contingent. However, Canada did understand and accept that at this point, the best course of action was to start a new selection process, with new deadlines and under the direction of a Selection Committee made up of 2014 Chairs, and with a call for additional candidates. To pursue any further efforts to force the existing process to result in a nomination risked compromising the legitimacy of any resulting appointment, and would unnecessarily and unhelpfully politicize appointments to the Appellate Body in the process. After all, for the Appellate Body to retain the level of respect and legitimacy that it currently enjoyed among the Membership, it was in all Members' interests, and in fact was the original mandate of the Selection Committee, to appoint an Appellate Body Member that enjoyed the full support of the entire Membership. Canada, therefore, took some consolation from the fact that the Selection Committee had put the highest priority on the interests of the institution by insisting on being able to make a recommendation that would enjoy full support. Canada was ready and willing to engage constructively in any consultations over the next few weeks in the preparation of a decision that the DSB may take at a future meeting on the launch of a new selection process.

10.17. The representative of Singapore said that his country thanked the Selection Committee for its work in trying to find consensus on a new Appellate Body member. However, Singapore supported the statements made by other delegations expressing their concerns on the issue of voting. Singapore noted that Members had always found a way of resolving issues. Singapore urged Members to carefully consider this issue before coming to any decision, especially with respect to the proposal on voting.

10.18. The representative of Chinese Taipei said that her country thanked the Selection Committee for its efforts made in the past months. At the same time, Chinese Taipei also shared some of the concerns expressed by other delegations with the current situation. Chinese Taipei

regretted this situation, in particular given that the Selection Committee had itself recognized the skill and experience of the candidates. Chinese Taipei's concern also stemmed from the fact that the Appellate Body played a role in the multilateral trading system that was too important to have a vacancy in the Appellate Body for a protracted period of time. On the other hand, under the current situation, a new selection process might appear to be the only option although Chinese Taipei was also mindful of the risk that this might set a negative precedent. In Chinese Taipei's view, Members must bear in mind that a new selection process itself was not a solution, and a new selection process did not guarantee success. The issue facing all Members was how to manage the new selection process to ensure that they do not face the disappointing situation again. Chinese Taipei was open to other ideas and believed that it would benefit from further reflections and discussions. Chinese Taipei also shared the views expressed by other delegations that voting was not a solution. In any event, the consensus rule was at the heart of the WTO system, and resort to voting in the present situation may set a negative precedent with systemic implications that went beyond the DSB. In conclusion, the credibility of the Appellate Body was at the heart of the integrity of the WTO. Every Member had systemic interests in ensuring the proper functioning of the Appellate Body composed of persons of the highest calibre. Chinese Taipei remained ready to engage, in a pragmatic spirit, to ensure the rapid conclusion of this process in the interest of the entire Membership.

10.19. The representative of Honduras said that her country regretted that, despite the efforts made by the Selection Committee, it had been unable to achieve a consensus. Honduras supported the recommendation made by the Selection Committee to start a new process that would result in the selection of a candidate that would attract consensus and had the support of all Members.

10.20. The representative of South Africa said that her country regretted that a definitive outcome could not be obtained pursuant to the selection process and that a replacement for Mr. Unterhalter could not be appointed as a result of this process. South Africa was of the view that all proposed candidates held exemplary qualifications and presented outstanding credentials. South Africa continued to support all processes going forward with respect to future appointments and hoped that they would continue to be held in an inclusive, transparent, balanced and fair manner, in accordance with the criteria of excellence established and demanded by this critical position. Furthermore, South Africa hoped that all attempts would be made to avoid future politicization of this process in the interests of expeditiously filling the vacant Appellate Body post and not hampering its important work.

10.21. The Chairman said that the DSB had, in effect, received the final report of the Selection Committee. The Selection Committee had concluded its deliberation and as mandated had made its recommendation. Thus, its report was a recommendation to the DSB and it was up to the DSB to decide what to do next. The Selection Committee had made a suggestion and many delegations had made careful and thoughtful observations. Some of those observations were consistent with, some with slight variants from, the recommendation of the Selection Committee. It was for the DSB itself to adopt a decision on the next steps. That was effectively for the next DSB meeting, since Members had all expressed an interest in moving expeditiously. That next meeting happened to be the time when Members would elect a new Chair and it was his intention to hand over the Chairmanship at the very start of that meeting so that the new Chair would coordinate whatever decision should be taken going forward. He said that he took his responsibilities seriously as the DSB Chair and, until the next meeting, he would try and facilitate ongoing and further consultations among the Members themselves to assist the new Chair so that a consensus might emerge by the time of the next meeting on the details of a process. Different views had been expressed with regard to the status of the current candidates as well as the time-table for the selection process. He hoped that, by the time of the next meeting, the new Chair might be in a position to consolidate a collective view on the next steps. In conclusion, he said that the DSB noted the Selection Committee's communication, dated 24 February 2014, as well as Kenya's statement, along with the other statements made at the present meeting, which would form part of the record of the meeting.

10.22. The DSB took note of the statements.

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