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**Dispute Settlement Body**
**22 July 2014**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 JULY 2014

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

Prior to the adoption of the Agenda, the representative of China said that in relation to item 7 of the proposed Agenda, his country had noted that a corrigendum to the Appellate Body Report (WT/DS449/AB/R/Corr.1) had been circulated in order to rectify a clerical error in the Report. Accordingly, as it was an integral part of the Appellate Body Report, China proposed that the corrigendum be considered together under item 7.

The representative of the United States said that his country supported China's request and did not object to that action.

The Chairman proposed that the DSB agree that as requested, the corrigendum contained in WT/DS449/AB/R/Corr.1 be added to the proposed Agenda in relation to item 7.

The DSB took note of the statements and so agreed.

## Table of Contents

## 1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.139)

B. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.139)

C. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.114)

D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.77)

E. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.25)

F. China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States: Status report by China (WT/DS427/8)

1.1. The Chairman noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 of the DSU required that, "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". The Chairman invited delegations to provide up-to-date information about compliance efforts and to focus on new developments, suggestions and ideas on progress towards the resolution of disputes. In the context of this Agenda item, he also wished to remind delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings, "Representatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record." With these introductory remarks, he turned to the first status report under this Agenda item.

## A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.139)

1.2. The Chairman drew attention to document WT/DS176/11/Add.139, 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 10 July 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, some of which would repeal Section 211 while others would modify it. At the previous month's meeting of the DSB, the United States had described the status of each of these bills. The US Administration would continue to work on solutions to implement the DSB's recommendations and rulings.

1.4. The representative of the 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, once again, noted that the United States had referred to five legislative proposals in its 125th status report, issued on 12 April 2013, which had been introduced in the 113th session of the US Congress, namely H.R. 214, H.R. 778, H.R. 872, H.R. 873 and S. 647. However, since January 2014, the United States had chosen to omit this reference from its status reports, confining itself to noting that certain proposals had been submitted to certain bodies of the US Government. Cuba found it contradictory for the United States to submit a brief status report lacking in substance. At the same time, the United States had referred orally to alleged actions that had been left out of the report formally submitted to the DSB. Cuba reiterated that Article 21.6 of the DSU, which established the basis of and the mandate for this item on the DSB's monthly Agenda, specifically required the Member concerned to provide a status report "in writing" of its "progress in the implementation of the recommendations or rulings". The most recent US status report (No. 139) circulated to Members as an official WTO document, constituted an outright violation of Article 21.6 of the DSU. A compilation of the US status reports concerning this dispute submitted over the course of more than 12 years of non-compliance showed that, at different stages, the United States had reported a vast number of legislative proposals that had never been enacted into law. In all these years of continued non-compliance, neither Chamber of the US Congress had been able to adopt any legislation that could resolve this dispute. As Cuba had pointed out on previous occasions, it seemed that the United States had serious institutional limitations. However, Members knew that this was not the case. In fact, the United States was a country which, because of its economic, political and military potential, exercised considerable control world-wide and felt entitled to take action beyond its borders and to decide the fate of many countries. If there was any doubt, it sufficed to recall the illegal economic, financial and commercial blockade that the United States had maintained against Cuba for more than 50 years. The blockade also affected other countries. Section 211, as unlawful as it may be, was part of that policy. Nevertheless, Members continued to hear about the US lack of capacity to settle this dispute and the inability of Congress to resolve numerous pending issues, including the legislative measures needed to bring Section 211 into conformity with WTO rules. The content of the draft legislation mentioned by the United States and the lack of viability of its implementation would result in a situation of permanent non-compliance with the DSB's recommendations and rulings. The scenario suggested by some of the legislative proposals was disturbing. If these legislative proposals were adopted, Members would be faced with outright legal gimmickry designed to present the appearance of compliance with the DSB's recommendations and rulings. The conditions allowing the Bacardi Company's theft and use of the Havana Club trademark to continue would be maintained, with the corresponding effect in terms of falsification of other renowned Cuban trademarks. Although Cuba had denounced these violations for more than 12 years, the lack of provisions in the DSU to ensure effective compliance with the DSB's recommendations and rulings unfortunately provided an incentive for the United States to continue to ignore the DSB's decisions. Cuba urged the United States to meet its obligations and to repeal Section 211, which was the only way to resolve this dispute.

1.6. The representative of Nicaragua said that his country supported Cuba's statement made at the present meeting and shared the concerns expressed by other countries regarding the US status report. The repeated failure to include any new information on the progress made showed the lack of political will on the part of the United States to comply with the DSB's recommendations in this dispute. Nicaragua reiterated that such non-compliance not only had serious systemic consequences for the DSB, but undermined the credibility of the multilateral trading system and had a negative impact on Cuba, a country with a small economy. Nicaragua, once again, urged the United States to take the necessary steps to comply with the DSB's recommendations and rulings.

1.7. The representative of the Dominican Republic said that his country thanked the United States for its status report on implementation of the DSB's rulings and recommendations of February 2002 regarding the inconsistency of Section 211 with WTO rules, as set out in Article 42 of the TRIPS Agreement. The Dominican Republic, once again, urged the United States to step up its internal procedures so as to comply with the DSB's rulings. The extended period of time that had passed with no implementation undermined the WTO's credibility.

1.8. The representative of India said that his country thanked the United States for its status report and its statement made at the present meeting. India noted with concern that there was no substantive change in the situation and that there was a lack of progress in the implementation of the DSB's recommendations. The United States had informed the DSB in 2002 of its intention to implement the DSB's recommendations and rulings in connection with this matter. Non-compliance of DSB recommendations had serious repercussions not only for the credibility of the dispute settlement system but also on a predictable and rules-based multilateral system. As stated by previous speakers, non-compliance undermined the system and questioned the efficiency of the dispute settlement process especially in the context of a developing-country Member seeking compliance. In that regard, India urged the United States to report compliance without further delay.

1.9. The representative of Jamaica said that her country thanked both Cuba and the United States for the update and the status report under this Agenda item. Jamaica noted that the circumstances of this dispute had not changed and that no progress had been reported since the previous DSB meeting. As it had repeatedly done at previous DSB meetings, Jamaica, once again, joined other delegations in voicing its concern about the continued US failure to implement the DSB's recommendations adopted on 2 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 an obligation had a negative impact on the economic interests of a developing-country Member. Furthermore, Jamaica reiterated its deep concern about the systemic implications of any disregard for DSB decisions. Such disregard could serve to undermine the overall integrity of the dispute settlement system, which remained a key pillar of the WTO. Jamaica, once again, joined others in urging the United States to take the required steps and promptly implement the relevant DSB decisions. After more than 12 years since the adoption of the DSB's recommendations in this case, it was critical that this matter be resolved without delay and that the matter be removed from the DSB's Agenda.

1.10. The representative of Ecuador said that his country supported the statement made by Cuba. Ecuador noted that Article 21 of the DSU referred to the prompt compliance with the DSB's rulings and recommendations, 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 ensure the prompt implementation of the DSB's rulings and recommendations. Ecuador noted that more than 12 years had passed since the adoption of the DSB's recommendations and rulings. In Ecuador's view, non-compliance undermined the credibility of the dispute settlement system and the WTO.

1.11. The representative of Zimbabwe said that his country took note of the brief statement made by the United States which was devoid of any new information with regard to full compliance with the DSB obligations. Zimbabwe thanked Cuba for yet another comprehensive briefing regarding the US non-compliance with the DSB's rulings. Zimbabwe, once again, was disappointed and regretted that the United States had continued to disregard the DSB's rulings and recommendations in this dispute. The continued US failure to comply seriously undermined the integrity of the DSB. Zimbabwe, therefore, urged the United States to comply with the relevant DSB's rulings and recommendations without further delay.

1.12. The representative of Brazil said that his country thanked the United States for its status report concerning surveillance of implementation in this dispute. Despite the recent intense exchange of views between the United States and Cuba on this issue, concrete and new progress towards implementation had not been reported. 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.

1.13. The representative of Antigua and Barbuda, speaking on behalf of the OECS countries, which also includes St. Kitts and Nevis, Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines, said that the OECS countries thanked the United States and Cuba for their respective statements on this issue. The OECS countries remained concerned about the lack of progress and continued non-compliance with the DSB's rulings and recommendations. In particular, non-compliance in this dispute had a negative economic impact on the economy of a small developing-country Member. This prolonged non-compliance seriously undermined the dispute settlement system and the WTO's integrity in its capacity as the custodian of the multilateral trading system. In that context, the OECS countries urged prompt compliance with the DSB's rulings and recommendations so as to resolve this dispute.

1.14. The representative of Mexico said that, as it had done in the past, Mexico urged the parties to this dispute to adopt the necessary measures to comply with the DSB's recommendations and rulings, in accordance with Article 21.1 of the DSU. Mexico noted that prompt compliance would benefit all Members.

1.15. The representative of the Plurinational State of Bolivia said that, as his country had stated for more than 12 years, the US status report did not contain any new developments that could be described as progress towards resolving this dispute. Bolivia, therefore, reiterated its concern about the systemic implications of the US failure to comply with the DSB's rulings and the lack of political will to take steps towards doing so. Such non-compliance undermined the credibility and integrity of the multilateral trading system and affected the interests of a developing-country Member. Bolivia, once again, called on the United States to comply with the DSB's rulings and to remove the restrictions imposed under Section 211. Bolivia supported the concerns expressed by Cuba in its statement made at the present meeting.

1.16. The representative of China said that his country thanked the United States for its status report and its statement made at the present meeting. China noted that the United States reported no substantial progress. The prolonged situation of non-compliance in this dispute was highly incompatible with the prompt implementation required under the DSU provisions, in particular since the interests of a developing-country Member were affected. China urged the United States to implement the DSB's rulings and recommendations without any further delay.

1.17. The representative of Uruguay said that his country thanked the United States for the information and in particular the statement regarding the bills presented to Congress. However, Uruguay noted that there had been no progress. Uruguay urged the United States to resolve this matter as soon as possible so that the item could be removed from the DSB's Agenda.

1.18. The representative of the Bolivarian Republic of Venezuela said that her country supported Cuba's statement made at the present meeting. Venezuela noted with concern that the US status report was not only monotonous and repetitive but, once again, did not contain any new information on progress towards compliance with the DSB's recommendations and rulings. As stated by previous speakers, Venezuela was concerned about the prolonged non-compliance and urged the United States to comply with the DSB's recommendations and rulings. This prolonged situation of non-compliance undermined the interests of a developing-country Member. It also undermined the credibility of the multilateral trading system, the dispute settlement system, and its ability to resolve disputes. Non-compliance in this dispute showed the lack of political will on the part of the US Administration to put an end to this flagrant violation and lack of respect of the DSB's decisions. Venezuela regretted that the DSB was seriously affected by the repeated action or the repeated omission of one Member. Venezuela supported Cuba and condemned the behaviour of the US Administration. Venezuela urged the US authorities to repeal Section 211 and to comply with the DSB's recommendations and rulings.

1.19. The representative of South Africa said that her country wished to refer to its previous statements stressing its systemic concerns that this non-compliance with the DSB's recommendations and rulings undermined the integrity of the enforcement pillar of the WTO, as well as the credibility and legitimacy of the multilateral trading system as a whole. South Africa was also concerned that non-compliance perpetuated significant negative economic consequences for a particular developing-country Member's economic interests. Furthermore, South Africa was concerned that protracted non-compliance with the DSB's recommendations and rulings would eventually entail significant adverse implications for access to the dispute settlement mechanism as a whole by the lesser-resourced developing countries. South Africa, therefore, urged the United States to bring its legislation into compliance with the DSB's recommendations and rulings.

1.20. The representative of Angola said that his country thanked the United States for its status report regarding Section 211. Angola noted that this dispute had been discussed for many years without any favourable result for Cuba's legitimate rights. As a result, Cuba continued to be adversely affected. This situation of non-compliance was a cause for concern over recent years and there was no sign of a solution being found soon. Angola believed that the dispute settlement system depended on its ability to promptly resolve disputes, while preserving Members' rights. Failure to do so would undermine the system and affect Members, in particular developing-country Members. All Members had the same rights and were, as a result, required not only to comply with their obligations, but also with decisions taken by WTO bodies. In Angola's view, it was regrettable that the dispute settlement mechanism, which was one of the main achievements of the multilateral trading system, continued to be undermined because of the measures taken by one Member. In that regard, Angola reiterated its support to Cuba and urged the United States to take concrete steps to comply with the DSB's recommendations and rulings.

1.21. The representative of Argentina said that his country thanked the United States for its status report and its statement made at the present meeting. However, Argentina noted that, once again, no substantive information had been provided on this matter. Argentina had no choice but to repeat what it had been saying for some time now. This lack of progress was inconsistent with the principle of prompt and effective compliance stipulated in the DSU provisions, in particular since the interests of a developing-country Member were concerned. Argentina joined Cuba and the previous speakers and urged both parties to the dispute, especially the United States, to take the necessary steps to finally remove this item from the DSB's Agenda.

1.22. The representative of the Russian Federation said that his country shared the opinion expressed by certain Members that the dispute settlement system provided stability to the multilateral trading system. Russia urged the parties to this dispute to find a solution through the instruments available under the WTO Agreement. Russia believed that this situation of non-compliance raised serious and deep systemic concerns, as it undermined Members' respect and trust in the DSB and the WTO as a whole.

1.23. The representative of Viet Nam said that his country thanked the United States for its status report. Viet Nam, once again, was concerned about the non-compliance in this dispute. Viet Nam urged the United States to implement, without any further delay, the DSB's recommendation and rulings for the benefit of Cuba, a developing-country Member.

1.24. The representative of El Salvador said that her country thanked the United States for its status report. El Salvador, once again, was concerned about the lack of compliance in this dispute which adversely affected the multilateral trading system. El Salvador urged the parties to this dispute to find a way to comply with the DSB's recommendations and rulings in this prolonged dispute.

1.25. The representative of Kenya said that his country thanked the United States for its statement. Kenya, like many other Members, attached great value to the WTO as an organization, to the decisions of its bodies and to the multilateral trading system that had strongly guided the growth of international trade since 1947. The WTO's contribution under the auspices of the GATT in stabilizing and facilitating growth of global trade had been documented and served as a reminder to all Members of the need to continue protecting the image and the credibility of the WTO which all Members valued and cherished. In that regard, the 12 years of non-compliance with

the DSB's recommendations and rulings in this dispute sent a wrong message to the international community. Kenya called for the prompt and unreserved implementation of the DSB's recommendations and rulings.

1.26. 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.139)

1.27. The Chairman drew attention to document WT/DS184/15/Add.139, 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.

1.28. The representative of the United States said that his country had provided a status report in this dispute on 10 July 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 this matter.

1.29. The representative of Japan said that his country thanked the United States for its statement and status report submitted on 10 July 2014. Japan referred to its previous statements in which it had indicated its wish that this issue should be resolved as soon as possible.

1.30. 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.114)

1.31. The Chairman drew attention to document WT/DS160/24/Add.114, 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.

1.32. The representative of the United States said that his country had provided a status report in this dispute on 10 July 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.

1.33. 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 on its wish to resolve this case as soon as possible.

1.34. 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.77)

1.35. The Chairman drew attention to document WT/DS291/37/Add.77, 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.

1.36. The representative of the European Union said that, in recent DSB meetings, the EU had already reported on authorization decisions taken up to June 2014. The EU Standing Committee on the food chain and animal health of 23 June 2014 had voted on a draft decision for authorization of

a maize[1], for food and feed uses. The Committee had rendered no opinion on the draft decision. The draft decision had been presented to the Appeal Committee for voting on 10 July 2014, which had rendered no opinion. The European Commission would initiate the last stage of the procedure. 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.

1.37. 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 it had explained at past DSB meetings, the United States had substantial concerns regarding EU measures affecting the approval of biotech products. At the June 2014 DSB meeting, the United States had noted that the EU had not approved a single new biotech product in 2014. At the moment, at least nine products were awaiting final action by the EU Commission. Each of these products had received a positive safety assessment by the EU's own safety authority. Following the positive safety assessments, each of these nine products had been considered by the relevant EU regulatory committee, and then subsequently by the EU appeals committee. However, due to opposition from certain EU member States, these EU committees had failed to make decisions. In fact, the United States had heard the EU in their statement made at the present meeting describe a couple of instances where its committees had failed to make decisions. Under the EU's own legislation, the European Commission was to act without delay to approve biotech products in the event that votes in the regulatory committee and the appeals committee did not result in a decision. But not once in the present year had the EU undertaken its responsibility and approved a pending application. These failures by the EU regulatory committee, by the EU appeals committee, and by the EU Commission resulted in delays for all pending biotech applications. The EU measures, including such delays in the processing of specific applications and product bans adopted by EU member States, were causing serious disruption in trade in agricultural products. Indeed, EU feed manufacturers had expressed concern about the impact of these delays on the availability of protein feeds for European livestock industries. The United States urged the EU to take steps to address these matters.

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

### E. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.25)

1.39. The Chairman drew attention to document WT/DS404/11/Add.25, 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.

1.40. The representative of the United States said that his country had provided a status report in this dispute on 10 July 2014, in accordance with Article 21.6 of the DSU. As it 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 recommendations and rulings of the DSB.

1.41. The representative of Viet Nam said that his country thanked the United States for its status report and the statement made at the present meeting. Viet Nam recalled that the reasonable period of time mutually agreed by the parties to this dispute had expired 13 months ago. However, the US Administration had not taken any action to recalculate and revoke the anti-dumping duty for the second and third administrative review that was inconsistent with the DSB's recommendations. Viet Nam, once again, requested the United States to fully comply with the DSB's recommendations and rulings without any further delay so as to maintain the multilateral trading system disciplines and to the benefit of Viet Nam's exporters.

[1] NK603 maize.

1.42. The representative of Cuba said that her country, once again, wished to reiterate the importance of effective compliance, in particular since the vital interests of a developing-country Member were involved. Cuba urged the United States to comply with the DSB's rulings and recommendations in an effective manner. As Viet Nam had noted, the reasonable period of time to comply in this dispute had expired. The 25th US status report and Viet Nam's statement showed that this was another case of non-compliance by the United States. Cuba urged the United States to take the necessary measures in order to comply with the DSB's recommendations and rulings.

1.43. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela shared the concerns expressed by Cuba regarding the importance of complying with the DSB's rulings and recommendations. Venezuela urged the United States to take the necessary measures to finally resolve this dispute.

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

### F. China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States: Status report by China (WT/DS427/8)

1.45. The Chairman drew attention to document WT/DS427/8, 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 and countervailing duty measures on broiler products from the United States.

1.46. The representative of China said that his country had submitted a status report in this dispute on 10 July 2014. On 25 December 2013, the Ministry of Commerce of China had published a notice (Notice (2013) No. 88) and had launched a re-investigation on broiler products from the United States. On 8 July 2014, the Ministry of Commerce had published a notice (Notice (2014) No. 44) and had announced the determination of the re-investigation on broiler products from the United States. Through that re-investigation, China had fully implemented the DSB's recommendations and rulings before the expiration of the reasonable period of time in this dispute.

1.47. The representative of the United States said that his country took note of China's statement that it had taken measures to comply with the recommendations and rulings of the DSB. The measures that China had taken were re-determinations that maintained anti-dumping duties (ADs) and countervailing duties (CVDs) on broiler products from the United States. The United States was not in a position to accept China's assertion that these measures resulted in compliance with the DSB's recommendations and rulings. Based on its review to date, the United States had serious concerns with China's re-determinations. In particular, the re-determinations appeared to have many of the same flaws that the DSB had identified in the original AD and CVD determinations. For example, in making the re-determinations, China had adopted procedures that did not appear to have provided the respondents with an opportunity to defend their interests. Similarly, the reasoning used in the re-determinations with respect to cost allocations and injury to the domestic industry seemed to have many of the same problems as identified by the DSB in the original determinations. The United States would continue to review the re-determinations and consider how to best address its concerns. Finally, the United States noted that the parties had reached an understanding regarding procedures under Articles 21 and 22 of the DSU in order to facilitate the resolution of this dispute. The understanding had been circulated in document WT/DS427/9.

1.48. 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 EU 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. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports pertaining to this dispute.

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

2.4. The representative of Canada said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Canada acknowledged that there was some uncertainty about when a dispute should be subject to the surveillance of the DSB. However, in the circumstances of this dispute, where the DSB had authorized the suspension of concessions and there was a claim of compliance, the DSB's surveillance mandate was clear, as was the corresponding obligation to provide status reports. The text of Article 22.8 of the DSU was clear on this. In its report in "US - Continued Suspension", the Appellate Body had clarified that in the event of a disagreement about the compliance of measures in the post-retaliation context, the fulfilment of the obligation in Article 22.8 of the DSU must be subject to a multilateral determination of compliance. Until then, the Member concerned had an obligation to provide status reports. Therefore, Canada agreed with the EU and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it, or until there had been a multilateral determination that its administration was consistent with the WTO Agreement.

2.5. 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 in previous DSB meetings, Brazil was of the view that the United States was under obligation to submit status reports in this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue be resolved within the meaning of the DSU and would the United States be released from its obligation to provide status reports in this dispute. Moreover, disbursements made after the repeal of the Byrd Amendment but related to investigations that originated before the repeal of the Act continued to amount to non-compliance.

2.6. The representative of India said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. As India had noted at previous DSB meetings, the United States continued WTO-inconsistent disbursements to its domestic industry. India urged the United States to fully comply with the DSB's recommendations and rulings. In India's view, this item should remain under the DSB's surveillance until full compliance was achieved.

2.7. 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 on 8 February 2006, which included 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. Furthermore, the United States recalled that Members, including the EU and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods that were entered after 1 October 2007, which was nearly seven years ago. The United States therefore did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings. Indeed, as the United States had expressed at past DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB's recommendations and rulings. The United States had in the past noted that Members speaking under this item had followed the same approach in disputes where they had been the responding party and had not continued to provide status reports where the complaining party had disagreed over compliance. The United States disagreed with the statements made at the present meeting by some of those parties attempting to distinguish the situations under Article 21.6 and 22.8 of the DSU. The United States did not find their logic

persuasive. Generally speaking, the United States agreed, and that for the same reason the status reports were not required in other disputes, the United States was not required to provide status reports in these disputes where the necessary action had been taken many years ago.

2.8. The DSB took note of the statements.

## 3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

### A. Statement by the United States

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

3.2. The representative of the United States said that his country continued to have serious concerns that China had failed to bring its measures into conformity with its WTO obligations. The situation had not changed since the previous month or since the United States had first begun raising this matter at the DSB. China continued to maintain a ban on foreign suppliers of electronic payment services ("EPS") by imposing a licensing requirement on them while providing no procedures for them to obtain that license. As a result, China's own domestic champion, China Union Pay, remained the only EPS supplier that could operate in China's domestic market. China's measures could not be reconciled with the DSB's findings that China's WTO obligations included both market access and national treatment commitments concerning Mode 3 for EPS.[2] The United States took note of China's statements made in prior DSB meetings that it was working on the necessary regulations to allow for the licensing of foreign EPS suppliers which would be necessary to provide the market access and national treatment set out in its Schedule. The United States continued to engage with China at many levels to seek the timely issuance of these regulations, which had still not been issued nearly one year after the expiry of the reasonable period of time in this dispute. As such, the United States urged China to move forward with these regulations and to allow the licensing of foreign EPS suppliers in China, consistent with its WTO obligations.

3.3. The representative of China said that his country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made under this Agenda item at previous DSB meetings. China had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute. China had also further explained that the actions being sought by the United States were beyond the scope of China's compliance obligations. With respect to the regulation that the United States had mentioned, China reiterated that this matter was not relevant to the implementation of the DSB's recommendations and rulings in this dispute. China hoped that the United States would reconsider the systemic implications of its position.

3.4. The DSB took note of the statements.

## 4 CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR/CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

### A. Statements by Japan and the European Union

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

4.2. The representative of Japan said that, as his country had explained under "Other Business" at the previous DSB meeting, Japan was deeply disappointed with Canada's notification to fully comply on 5 June 2014, since this dispute had not yet been resolved. In fact, Canada had committed itself to take further steps to comply with the DSB's recommendations and rulings beyond the measures initially identified in its 13 February 2014 status report. Canada had even indicated that these were "interim" in nature but did not take any further steps towards

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

implementation. Japan was of the view that, given its failure to repeal the domestic content requirements in the FIT Program from the law, Canada was still in breach of its obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. Japan, therefore, believed that Canada was under obligation to provide the DSB with a status report in this dispute, in accordance with Article 21.6 of the DSU. Japan recalled that Canada had requested Japan to extend the reasonable period of time to 5 June 2014, and Japan had agreed to that extension. However, Canada had notified the DSB, the day on which the reasonable period of time was to expire, that it had fully complied without having taken any of the further actions that it had indicated it would take. Japan was thus compelled to express its systemic concern that Canada's decision would significantly undermine the confidence in the dispute settlement system. In order to make sure that Canada fully complied with the DSB's recommendations and rulings, Japan reserved its rights to all available steps.

4.3. The representative of the European Union said that the EU had asked to raise this item on the Agenda of the present meeting, pursuant to Article 21.6 of the DSU, which stated that "the issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption". The EU had already expressed its surprise about Canada's decision not to submit a status report ahead of the DSB meeting of June 2014. Moreover, the late submission of Canada's communication had made it difficult for the EU to request an item on the Agenda of the June 2014 DSB meeting. The EU attached great importance to the multilateral surveillance of the implementation of the DSB's recommendations and rulings. That was why, at the present meeting, the EU wanted Canada to inform all Members in a transparent way about its position and, importantly, to allow a discussion. By means of a letter dated Thursday, 5 June 2014, the day on which the reasonable period of time had expired, Canada informed the EU that it "considers that it has complied with the recommendations and rulings of the DSB in these disputes". Canada supported this statement by reference to actions taken by the Ontario authorities in June and August 2013, about one year ago. The EU recalled that on 29 July 2013, Canada and the EU had communicated to the DSB an agreement under Article 21.3(b) of the DSU on the reasonable period of time in this dispute, which had originally been envisaged to be ten months. Therefore, before the agreement on the reasonable period of time, the Ontario authorities had already taken the first action on the basis of which Canada claimed compliance. The second measure had been adopted on 16 August 2013, barely 18 days after the agreed reasonable period of time. As all Members could understand, if the EU had been led to negotiate in good faith a ten-month reasonable period of time, it had definitely not been on the assumption that compliance could be achieved by means of Ministerial decisions that could, and had been, adopted overnight. On 24 March 2014, seven months after Ontario had adopted the Ministerial decisions in question, the EU and Canada had agreed to modify the reasonable period of time to expire on 5 June 2014. That represented an additional two and a half months. The EU had agreed to modify the reasonable period of time in good faith. Again, as all Members could understand, if Canada and the EU had agreed to modify the reasonable period of time, it must have been because in March 2014 both sides considered that compliance had not yet been achieved and that additional time would be useful to secure a positive solution to the dispute. Yet, Canada now claimed that it had complied as of August 2013. The EU was dismayed by the turn of events in this dispute. It was extremely worrying not just from the perspective of the specific trade interests of the EU, but more broadly for a dispute settlement system that must be based on the commitment of all Members to act in good faith under the DSU provisions. The EU urged Canada to re-engage constructively in this dispute and to work towards a positive solution. Therefore, the EU wished to offer Canada an opportunity to explain to all Members what its intentions were with regard to this dispute and, in particular, whether Canada intended to conclude the procedure to amend the Ontario Electricity Act. The EU wished to announce already at the present meeting that it would ask that this item be included again in the Agenda of the DSB regular meeting in August, in order to ensure appropriate follow-up.

4.4. The representative of Canada said that, as his country had indicated on previous occasions, the actions taken to ensure compliance with the DSB's recommendations and rulings had been outlined in the status reports submitted in these disputes and in Canada's 5 June 2014 notification of compliance. On the basis of those actions, Canada considered that it had complied with the DSB's recommendations and rulings in this matter. Canada understood that Japan and the EU disagreed with that assessment. The attempt to enact Bill 153 to amend the Electricity Act, referred to by both Japan and the EU, had not been necessary to comply with the DSB's recommendations and rulings because the Government of Ontario had addressed the issue of domestic content requirements by way of Directions from the Ontario Minister of Energy. Bill 153

had been tabled by the Government of Ontario in December 2013 to amend the governing legislation of the FIT Program for domestic legislative housekeeping purposes. Bill 153 had been terminated when the 40th Parliament of Ontario was dissolved on 2 May 2014 for general elections. On 14 July 2014, in the 41st Parliament of Ontario, the Government of Ontario had tabled Bill 14 (Building Opportunity and Securing our Future Act (Budget Measures), 2014). Bill 14 contained a clause – subsection 10(3) of Schedule 7 – providing for the same amendment to the Electricity Act as Bill 153. In including this clause in Bill 14, the Government of Ontario was completing what it had set out to do with Bill 153. Bill 14 was a budget bill and central to the recently re-elected majority government's legislative agenda. However, Canada considered that Bill 14, like Bill 153 before it, was not necessary to comply with the DSB's recommendations and rulings. Regarding the suggestion that Canada had been and was required to continue providing status reports to the DSB after notifying its compliance, Canada did not understand why the complaining parties insisted on this point. As it had explained at the June 2014 DSB meeting, after Canada had sent its written communication to Japan, the EU and the DSB setting out its notification of compliance, there was no further obligation on Canada to provide status reports to the DSB. This approach was consistent with the DSU provisions and the DSB practice. Other delegations had agreed with Canada, in words and in deeds, that further status reports were not required in these circumstances. As such, Canada disagreed with the points raised by Japan and the EU at the present meeting.

4.5. The representative of the European Union said that the EU welcomed this development and Canada's intention to achieve full compliance in this case. The EU was looking forward to Canada's official communication to the DSB of the new legislative amendment, which would then be carefully analysed. Until then, the EU would continue to request that this item remain on the DSB's Agenda in order to ensure that it was appropriately followed up by the Membership.

4.6. The representative of the United States said that his country appreciated that Japan and the European Union had inscribed this item on the Agenda of the present meeting to permit Members to become aware of their concerns relating to implementation in this dispute. As it had stated previously at past DSB meetings and just a few Agenda items ago, the United States agreed with Canada on the systemic issue that it was not required to continue providing status reports to the DSB if it had informed the DSB that it had taken the necessary steps to comply. That systemic position, of course, did not apply just to Canada, but also to other Members making the same claim; had it been otherwise, Canada's position could not be described as "systemic". At the same time, while the matter was not subject to another WTO proceeding, the complaining parties were of course free to bring the item to the attention of the DSB. Given the concerns that Japan and the EU had expressed at the present meeting, the United States encouraged Canada to engage in a dialogue with them to seek ways to address their concerns.

4.7. The DSB took note of the statements.

## 5 EUROPEAN UNION – COST ADJUSTMENT METHODOLOGIES AND CERTAIN ANTI-DUMPING MEASURES ON IMPORTS FROM RUSSIA

### A. Request for the establishment of a panel by the Russian Federation (WT/DS474/4)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting on 18 June 2014. He drew attention to the communication from the Russian Federation contained in document WT/DS474/4, and invited the representative of the Russian Federation to speak.

5.2. The representative of the Russian Federation said that his country wished to refer to its statement made at the DSB meeting on 18 June 2014. Russia reiterated its request for the establishment of a panel, with standard terms of reference, to examine the cost adjustment methodologies and certain anti-dumping measures on imports from Russia. The consultations held with the EU had not resulted in any acceptable solution. For that reason, recourse to a WTO panel was required.

5.3. The representative of the European Union said that the EU regretted that a panel would be established at the present meeting. The EU was convinced that its measures were in conformity with the WTO Agreements and it would defend them during the panel proceedings.

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

5.5. The representatives of Argentina, Australia, Canada, China, Indonesia, Norway, Turkey, Ukraine and the United States reserved their third-party rights to participate in the Panel's proceedings.

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

### A. Request for the establishment of a panel by the European Union (WT/DS475/2)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 10 July 2014. He drew attention to the communication from the European Union contained in document WT/DS475/2, and invited the representative of the European Union to speak.

6.2. The representative of the European Union said that, regrettably, the EU found itself left with no choice but to make a second request for the establishment of a panel in this dispute, which was of serious concern to the EU from both a legal and from an economic perspective. As had been previously noted, Russia maintained an EU-wide restriction against imports of live pigs, pork and other pig products since January 2014. The restrictions had been applied based on four cases of African swine fever (ASF) detected in January in wild boars in Lithuania and Poland, close to the border with Belarus. As had also been noted during the previous DSB meeting, the EU had demonstrated to Russia that all necessary measures to contain a further spread of ASF had been put in place immediately and that there was no scientific reason to ban imports from unaffected areas of the EU. However, Russia continuously refused to recognize the EU regionalization measures and continued banning imports from the whole EU territory. Therefore, the EU was seeking the establishment of a panel to ensure that Russia played by the rules and respected its WTO obligations. The EU noted that, in document G/SPS/N/RUS/64 dated 16 July 2014, Russia had notified to the WTO a measure imposing a temporary restriction on the import of live pigs and pork products from Latvia due to the outbreak of the ASF virus, and introducing a temporary restriction on the transit of live pigs through the territory of Latvia to the Russian Federation. The EU panel request covered the measures at issue and any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures. It also addressed the position with respect to the entire EU territory, other than properly restricted areas, thus already including the relevant parts of Latvia. Consequently, the EU panel request also covered the measure notified in document G/SPS/N/RUS/64. The EU respectfully informed Russia, prospective third parties and the Membership generally that this was the basis on which the EU would proceed, thus giving all concerned ample opportunity to fully understand the scope of the proceedings and prepare their legal positions accordingly. In the meantime, in the event that Russia wished to make any written or oral representations to the EU specific to the measure notified in document G/SPS/N/RUS/64, the EU stood ready, in good faith, to accord full and sympathetic consideration to any such representations.

6.3. The representative of the Russian Federation said that his country regretted that the EU requested the establishment of a panel to examine this matter. As it had already stated, Russia had participated in consultations with the EU in April-May 2014 in good faith with the intention of finding a mutually satisfactory solution. With recurring ASF outbreaks in the territory of the EU, now spread to Latvia, evidence of the ineffectiveness of European efforts to prevent the spread of the disease was quite clear. The exceptional epizootic character of the ASF entailed a veterinary issue with high health and economic risks that could not be resolved by forcing or speeding up the legal procedure. Regarding the allegations made in the EU's request for the establishment of a panel, Russia wished to re-state that it was confident that the measures at issue did not in any way violate Russia's obligations under the WTO Agreements. Russia believed that issues related to this animal disease may only be effectively resolved through expert consultations and arrangements. Russia was willing to continue cooperation with the EU. However, Russia was ready to exercise all its rights provided for under the DSU provisions.

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, India, Japan, Korea, Norway, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

## 7 UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

### A. Report of the Appellate Body (WT/DS449/AB/R and Corr.1) and Report of the Panel (WT/DS449/R and Add.1)

7.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS449/9 transmitting the Appellate Body Report on: "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", circulated on 7 July 2014 in document WT/DS449/AB/R. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that, "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

7.2. The representative of China said that his country thanked the Appellate Body, the Panel and the Secretariat for their work in this dispute, as well as the third parties for their participation. China welcomed the Report of the Appellate Body in this dispute. The Appellate Body Report under consideration at the present meeting corrected an erroneous Panel Report, which if it had not been reversed by the Appellate Body, it would have caused significant damage to the requirements of transparency and due process set forth in Article X of the GATT 1994. China predicted that the Appellate Body Report in this dispute would become an important milestone in the jurisprudence of Article X of the GATT 1994. The facts and circumstances which had led China to initiate this dispute represented an outrageous abuse of transparency and due process. In 2006, the United States Department of Commerce had abruptly departed from settled US law and had begun applying countervailing duties to imports from countries that the United States designated as non-market economies, including imports from China. The Government of China and interested Chinese parties had promptly challenged this action in US courts, fully expecting that the relevant countervailing duty orders would be revoked if they prevailed in their understanding of US law. In December 2011, the United States Court of Appeals for the Federal Circuit had ruled in favour of the Chinese parties, holding that the countervailing duty provisions of the US Tariff Act did not apply to non-market economy imports. That should have been the end of the matter. Instead of allowing the Federal Circuit's decision to take effect, the US administration had proceeded to Capitol Hill and asked Congress to change the US law retroactively to make lawful what the Federal Circuit had held was unlawful. While this retroactive legislation may have been consistent with US law, it was not consistent with Article X:2 of the GATT 1994. Article X:2 clearly prohibits the enforcement of measures that increase rates of duty or impose new or more burdensome requirements on imports as a result of events that had occurred prior to the official publication of the measure. In this case, the relevant measure had been published on 13 March 2012, but had been enforced in respect of events dating all the way back to 20 November 2006. Had these actions taken place in any other country, the United States would almost certainly have cried foul. Instead, the United States came before the Panel in this dispute and advocated an interpretation of Article X:2 of the GATT 1994 that, had it been allowed to stand, would have removed any meaningful constraint upon the ability of Members to increase rates of duty on a retroactive basis. This interpretation was preposterous and so inconsistent with principles of transparency and due process that the Panel should readily have dismissed it. Unfortunately, two panelists representing the Panel majority had adopted the US interpretation. That should never have happened, and it had left China with no choice but to seek the reversal of that erroneous interpretation by the Appellate Body.

7.3. In its Report, the Appellate Body had rejected the majority of Panel's interpretation and application of Article X:2 of the GATT 1994. The Appellate Body had correctly recognized that it was the prior municipal law of the importing Member, not a government agency's "practice", that established the baseline for determining whether a measure amounted to an increase in a rate of

duty or imposed a new or more burdensome requirement or restriction on imports. This interpretation was fully consistent with the ordinary meaning of Article X:2 and with the broader context provided by Article X, which indicates that governments and traders could ordinarily expect the law of the importing Member to be set forth in published measures of general application. China welcomed, in particular, the Appellate Body's recognition that the baseline of prior municipal law was to be determined in accordance with the standard that the Appellate Body had previously articulated in its Report in the "US - Carbon Steel" dispute. This was unquestionably the correct approach to applying Article X:2 to a given measure. Having reversed the Panel majority's interpretations and findings, the Appellate Body found that it was unable to complete the legal analysis. This was unfortunate, as it left the dispute between the parties less than fully resolved. In China's view, the Appellate Body's inability to complete the legal analysis in this dispute highlighted systemic deficiencies in the DSU, most notably the inability of the Appellate Body or party to remand a dispute to a panel for a proper application of the relevant provisions of the covered agreements. The present dispute was a case study on how the lack of remand authority prevented the effective resolution of disputes among Members. The Appellate Body's inability to complete the analysis was all the more unfortunate in light of the fact that it was now beyond any reasonable doubt that the measure at issue was inconsistent with a proper interpretation of Article X:2 of the GATT 1994. In a decision issued on 18 March 2014, subsequent to the issuance of the Panel Report to the parties, the United States Court of Appeals for the Federal Circuit had ruled, once again, that US law did not permit the application of countervailing duties to imports from non-market economy countries prior to the enactment of Section 1 of Public Law 112-99. That decision was now final and non-appealable.

7.4. The Federal Circuit's decision established beyond doubt that Section 1 had increased rates of duty and imposed a new or more burdensome requirement on imports in relation to prior US municipal law. Therefore, it was inconsistent on its face with Article X:2 of the GATT 1994, properly interpreted in accordance with the Appellate Body's Report. China called upon the United States to recognize that Section 1 was inconsistent with Article X:2 of the GATT 1994 and to take the appropriate steps to bring this measure into compliance with its WTO obligations. Now that the proper interpretation of Article X:2 was established, the United States should not prolong this dispute by refusing to acknowledge what was now self-evident. The entire case would have been rendered superfluous had the United States enacted and published Section 1 of P.L. 112-99 back in 2006, and subsequently enforced that new measure on a prospective basis. Instead, the US Administration had taken its chances on a novel interpretation of US municipal law, which its own courts had rejected. Rather than accept this outcome, the United States had sought to fix the problem by acting in blatant violation of its obligations under Article X:2 of the GATT 1994. It was long past due for the United States to rectify this mistake. China would continue to raise this issue with the United States through appropriate channels. In the meantime, China welcomed the Report as an important statement of the law concerning the obligations of transparency and due process under Article X of the GATT 1994.

7.5. The representative of the United States said that his country thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding. The United States recalled that there were two main issues in this dispute. First, a challenge to Public Law 112-99, the so-called "GPX legislation", enacted in 2012; second, a challenge to the alleged failure to affirmatively investigate an overlap of remedies with respect to 25 countervailing duty proceedings. On the first issue, China had obtained no WTO findings of inconsistency in two WTO reports. On the second, the very legislation challenged by China had already directed the US Department of Commerce to look at the overlapping remedies issue. And, also at the end of what had been an intensive litigation process, the United States was left wondering why China had considered it fruitful to bring this dispute in the first place. With regard to the 2012 US Legislation and Article X:2 of the GATT 1994, the 2012 legislation had been enacted to confirm that the US countervailing duty law could be applied to countries considered non-market economies for purposes of anti-dumping duty proceedings. Indeed, the US Department of Commerce had been applying the US countervailing duty law to China since 2006, consistent with China's Protocol of Accession. China had challenged that democratically and openly enacted US law as contrary to GATT obligations on transparency and fair enforcement. The United States invited Members to consider how extraordinary those claims had been. It was uncontested that the US Department of Commerce had applied the US countervailing duty law to Chinese imports following notice and comment to all interested parties, including China; that the Department had never been ordered by a US court to change its interpretation and application of the countervailing duty law to China; that the US Congress and President had enacted the 2012 legislation before any court decision to

the contrary; and that, in fact, no change in the actual tariff treatment of any Chinese import had resulted from the enactment of the 2012 legislation.

7.6. Given all of these uncontested facts, it was no surprise that almost all of China's claims in relation to the legislation had been rejected by the Panel or abandoned by China during the Panel proceeding or on appeal. China had abandoned the claim in its panel request under Article X:3(a) of the GATT 1994, which related to uniform, impartial, and reasonable administration; the Panel had rejected, and China had not appealed, a claim under Article X:1 of the GATT 1994, which related to prompt publication; and the Panel had rejected, and China had not appealed, its claim under Article X:3(b), which related to the establishment of mechanisms to ensure the prompt review and correction of administrative decisions on customs matters. The only claim on the 2012 legislation that had remained on appeal was under Article X:2 of the GATT 1994. While the United States recognized both the Panel's and the Appellate Body's efforts to analyse numerous legal and factual issues in relation to this claim, respectfully, the Panel appeared to have set out a legal analysis that made better sense of the text of the GATT 1994 and better reflected the appropriate task for a WTO adjudicative body. Fundamentally, the Panel had understood Article X:2 as being concerned with enforcement of an unpublished change in a trade regime to the detriment of imports. When the Panel compared the 2012 legislation at issue with the pre-existing rates, requirements, or restrictions on Chinese imports, it had found no "advance in a rate of duty or other charge on imports under an established and uniform practice" and no "new or more burdensome requirement, restriction or prohibition on imports". That was no surprise since the Panel had found that, since 2006, the United States had exercised its WTO right to apply CVDs to China and, therefore, had an "established and uniform practice" of applying the countervailing duty law to Chinese imports.

7.7. On appeal, the Appellate Body had reversed the Panel's legal interpretation of Article X:2 and its approach to how a Member's municipal law should be understood for purposes of the comparison under Article X:2. A number of aspects of the Appellate Body's interpretation could be discussed, and indeed the United States recognized that its examination of some aspects of US law was quite detailed. But at the present meeting, the United States wished to focus on two issues that it considered would merit further thought in future proceedings. First, the Appellate Body faulted the Panel for allegedly failing to ascertain "the meaning of the US countervailing duty law prior to Section 1 of PL 112-99 directly through its objective assessment" and as a matter of law.[3] The Appellate Body asserted that this assessment, pursuant to its own findings in "US - Carbon Steel", entailed examining "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".[4] But as the United States and third participants had noted in this appeal, when a WTO adjudicative body examined a Member's municipal law, the meaning must be that which would be given by the municipal law system using the interpretive tools of that system – not the generalized tools described by the Appellate Body without reference to the US legal system itself. It was striking that in 61 paragraphs of analysis of the meaning of the 2012 US legislation and the pre-existing countervailing duty law, the Appellate Body did not once refer to US constitutional law principles applicable to statutory interpretation, despite the extensive reference to those principles in the Panel Report. This was a critical omission because, as the Panel had found, under principles of US constitutional law, an agency interpretation of legislation was lawful and governed unless it was overturned in a binding court decision applying the standard of review articulated by the US Supreme Court.[5] Therefore, the Panel had also concluded objectively that, under US municipal law, the administering agency's interpretation and application of the US countervailing duty law was valid US law as "nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to

[3] Appellate Body Report, paras. 4.100-4.101, 4.104-4.108.

[4] Appellate Body Report, para. 4.123.

[5] Panel Report, para. 7.163 (citing to the US Supreme Court decisions in United States v. Eurodif S.A., 555 US 305 (2009), at 316, and Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 843) ("[U]nder United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous'. This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.").

imports from NME countries, or to give a different interpretation to United States CVD law".[6] Regrettably, the Appellate Body's interpretative approach under Article X:2 had ignored a key facet of the municipal legal system of the Member whose domestic law was being examined. This could not produce a valid comparison under Article X:2.

7.8. A second difficulty with the Appellate Body's approach was that it could lead to the negative consequence of allowing and encouraging WTO Members to bring disputed domestic law issues for resolution in the WTO rather than in another Member's domestic courts. In other words, this approach would seem to charge the WTO dispute settlement system with determining what was to be deemed "lawful" under a Member's domestic legal system using the interpretive tools endorsed by the Appellate Body in "US - Carbon Steel". Such a determination could presumably be made in advance of, and perhaps even contrary to, a municipal court decision on the same issue. If the WTO dispute system could be used to resolve contested issues of municipal law contrary to that Member's understanding and application of its own law, this could raise unsettling questions on when a Member could be deemed to breach its obligations and would be difficult to reconcile with GATT 1994 Article X:3(b), which requires a Member to establish domestic procedures for the prompt review and correction of administrative actions. For this reason, previous panels and the Panel in this dispute had found that "it is the role of domestic 'judicial, arbitral or administrative tribunals', and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law".[7] The Appellate Body ultimately had not made any findings with respect to the 2012 legislation because it could not complete the analysis under its approach. The United States welcomed the lack of findings on the 2012 legislation because, as the Panel had correctly found, as a matter US municipal law, both before and after the 2012 legislation US law had always been that the US Department of Commerce was not prohibited from applying the US countervailing duty law to China.

7.9. With respect to the so-called "double remedies" issue, which had also been at issue in this dispute, the United States was disappointed with the findings in the Panel Report on China's claims relating to the concurrent application of countervailing duties and anti-dumping duties calculated using a nonmarket economy methodology. The United States considered that the Panel's findings did not reflect a correct legal analysis of Article 19.3 of the SCM Agreement, and it had previously expressed concerns with the interpretation underlying this issue. Nonetheless, the United States had implemented the WTO's recommendations in an earlier dispute relating to this issue. Because the United States already looked at this issue and made any necessary adjustments in any determination undertaken after 13 March 2012, the United States had chosen not to appeal this issue in this dispute, in part to help simplify the dispute and ease burdens on the dispute settlement system. With regard to Article 6.2 of the DSU, while the United States regretted the Appellate Body's conclusion that China's panel request complied with Article 6.2 of the DSU, the United States recognized the Appellate Body's efforts in grappling with China's vague and imprecise panel request. The United States appreciated the Appellate Body's rejection of relying on an external source beyond the face of the panel request, in this case another WTO report, to determine whether the request provided a sufficient summary of the legal basis of the complaint. In conclusion, the United States, in this statement, had highlighted some issues of concern in the Reports, particularly in relation to Article X:2, that may have unintended consequences for Members and the dispute settlement system and should be considered further. The United States also noted that none of the findings in this dispute went to the root issue: the provision of subsidies by a WTO Member that were causing material injury to another Member's domestic industries. Those were issues that would, indeed, be worth resolving for the benefit of the world trading system.

7.10. The representative of Japan said that his country thanked the Panel and the Appellate Body for their Reports and hard work on this dispute. This dispute had raised several complex issues of systemic importance and, as an interested third party and a third participant, Japan had been actively contributing to the discussions in the underlying proceedings. As an exercise of its right

[6] Panel Report, para. 7.172.

[7] Panel Report, para. 7.164. See also "US - Stainless Steel" (Korea), para. 6.50 (stating that "the WTO dispute settlement system … was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the WTO Agreement.").

under Article 17.14 of the DSU, Japan wished to offer preliminary observations on one particular issue contained in the Appellate Body Report. Specifically, with respect to the determination of the meaning of municipal law, the Appellate Body had appeared to make a distinction between a legal characterization and an assessment of factual elements when it had stated that "an examination of whether the elements cited by the Appellate Body in 'US - Carbon Steel' are legal characterizations, or involve also factual elements, depends on the circumstances of each case".[8] The Appellate Body had further observed that "the examination of the legal interpretation given by a domestic court or by a domestic administering agency as to the meaning of municipal law with respect to the measure being reviewed for consistency with the covered agreements may be a legal characterization".[9] Japan did not understand the Appellate Body to mean, with this statement, that the examination of these elements could be a legal characterization simply because it involved the "legal interpretation" of municipal law. In any event, as the Appellate Body had explained, "a panel's examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review".[10] For example, the review of municipal law to determine whether what the municipal law required would constitute an act prescribed by a covered agreement, or whether governmental actions taken under municipal law would fall within the scope of the measures as defined in a covered agreement was certainly a legal characterization of that municipal law under WTO law. However, the Appellate Body had also warned that a legal characterization of municipal law "will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements".[11] Thus, the examination of factual elements may be part of, not separate from, legal characterizations of municipal law under the WTO Agreement, and with respect to such factual elements, "the Appellate Body will not lightly interfere a panel's finding on appeal".[12] Japan agreed with the Appellate Body's previous findings which were also reaffirmed in the present report.[13]

7.11. The representative of the Republic of Korea said that his country supported the point made by China concerning the remand authority. In Korea's view, the Appellate Body Report in this dispute was a good example of the need for the remand authority.

7.12. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS449/AB/R and Corr.1 and the Panel Report contained in WT/DS449/R and Add.1, as modified by the Appellate Body Report.

## 8 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

### A. Statement by the Philippines

8.1. The representative of the Philippines, speaking under "Other Business", said that his country had requested that this item be placed under "Other Business" to address the most recent developments in the dispute: "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines" (DS371). Members would have noticed that Thailand had decided not to submit a status report in July 2014. As a result, the dispute had not been placed on the Agenda of the present meeting under item 1, "Surveillance of implementation of recommendations adopted by the DSB". Pursuant to Article 21.6 of the DSU, "… the issue of implementation of the recommendations or rulings shall ... remain on the DSB's Agenda until the issue is resolved". To put it plainly, this dispute was not resolved. The Philippines had consistently and clearly indicated to the DSB that there remained a number of outstanding issues regarding Thailand's implementation. In particular, the Philippines had repeatedly raised its concerns about the Thai Attorney General's decision to prosecute an importer of Philippine cigarettes for declaring customs values that, first, the WTO Panel had ruled Thailand enjoyed no legitimate grounds to reject and, second, that the Thai Customs Board of Appeals had explicitly accepted in a separate ruling heralded by Thailand itself as a measure taken to comply. The Philippines had also repeatedly

[8] Appellate Body Report, para. 4.101.
[9] Appellate Body Report, para. 4.101.
[10] Appellate Body Report, para. 4.99, citing Appellate Body Report, "US - Section 211 Appropriation Act", para. 105.
[11] Appellate Body Report, para. 4.99, citing Appellate Body Report, "China - Auto Parts", para. 225.
[12] Appellate Body Report, "China - Auto Parts", para. 225.
[13] Appellate Body Report, para. 4.99.

addressed its concerns about the WTO-consistency of another ruling by the Board of Appeals regarding entries subject to the DSB's recommendations and rulings. In fact, as had been stated at recent DSB meetings, the Philippines was in the process of assessing information received from Thailand about this ruling. Thus, to revert to the wording of Article 21.6 of the DSU, "the issue is" everything but "resolved". In recent DSB meetings, the Philippines had taken care to emphasize that, for this reason, Thailand's implementation efforts must remain under the DSB's surveillance. The Philippines' statements at recent DSB meetings left no room for ambiguity about the Philippines' ongoing concerns.

8.2. The representative of Thailand said that her country thanked the Philippines for its statement. Thailand wished to reiterate that it fully respected its WTO obligations and that it had taken all actions necessary to implement the DSB's recommendation and rulings in this dispute, as previously stated in its recent status reports and at the previous DSB meetings. In March 2014, Thailand had provided the last outstanding responses to the Philippines' requests for information with respect to Thailand's implementation. As Members were aware, the DSB had been trying to remove unnecessary items from its Agenda. In these circumstances, Thailand did not consider it necessary or helpful to submit a status report repeating again that Thailand had no further pending actions to implement the DSB's recommendations and rulings. This was, of course, without prejudice to any other rights of the Philippines under the DSU. As stated in its status reports and in the previous DSB meetings, if the Philippines had concerns about Thailand's implementation or other matters that had not been addressed in these Panel's proceedings, Thailand remained available to discuss those specific concerns on a bilateral basis, which Thailand believed was the best venue for those issues to be addressed.

## 9 STATEMENT BY THE CHAIRMAN REGARDING THE AB SELECTION PROCESS

9.1. The Chairman, speaking under "Other Business", said that, as he had announced at the outset of the meeting, he wished to make a short statement regarding the ongoing Appellate Body selection process. He drew Members attention to the fact that, on 18 July 2014, Uganda had informed the Membership of its decision to withdraw one candidate from the process. A communication to that effect had been circulated in document JOB/DSB/CV14/5/Rev.1. As a result, there were seven candidates. As Members knew, the Selection Committee would interview the candidates that afternoon and the following day. Subsequently, on 9 and 10 September 2014, the Selection Committee would meet, upon request, with interested delegations who wished to express views on the candidates. As explained in the fax, delegations wishing to meet with the Selection Committee were invited to contact the Secretariat, CTNC Division, to make an appointment. Alternatively, delegations may send comments in writing to the Chair of the DSB, in care of the CTNC Division, by no later than 10 September 2014. As agreed by the DSB, following the interviews and consultations with delegations, the Selection Committee would make a recommendation not later than 15 September 2014, which would be sent by fax to delegations in order that it may be considered by the DSB at its meeting on 26 September 2014.

9.2. The DSB took note of the statement.

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