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(14-2528) Page: 1/24

Dispute Settlement Body
22 January 2014

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 JANUARY 2014

Chairman: Mr. Jonathan Fried (Canada)

Prior to the adoption of the Agenda[1]

Table of Contents

[1] See pages 2 & 3.

Prior to the adoption of the Agenda

The representative of the European Union said that the EU wished to make a statement under "Other Business" in relation to the dispute: "US - Clove Cigarettes" (DS406).

The representative of the United States said that his country did appreciate the fact that the EU had provided the United States with some advance notice and perhaps the EU had even provided some other Members notice of its intentions to make a statement under "Other Business" in relation to the "US - Cloves" dispute. While the United States had taken note of the information that the EU had provided, the United States, nonetheless, must register its concerns with this course of action. In particular, it was the US view that this request did not comport with the DSB's Rules of Procedure: Rules 2, 3 and 4 in particular. Rules 2, 3 and 4 required that a Member make a request to have an item inscribed on the Agenda at least ten days before the meeting. This ten day rule ensured that Members had sufficient time to consider the item, to confer with capital, and to prepare and receive instructions. By not inscribing the item in the regular way, the EU had deprived other Members of the ability to participate in the discussion. Even the parties to the dispute had only learned of the EU's intentions this week. The United States said that it would also point to Rule 25 of the Rules of Procedure, which stated that substantive issues could not be discussed under "Other Business". It would appear that a statement by the EU followed by reactions from other parties would be tantamount to substantive discussion by other Members. Therefore, before the United States was able to react in full to this request, it said that it would welcome further clarification from the EU as to why it was not possible to inscribe this item on the Agenda with respect to the requirement for ten days advance notice and why it had not been preferable to inscribe the item on the Agenda of the next DSB meeting instead.

The representative of the European Union said that the EU did not expect to get into a procedural discussion at this point. The issue was what constituted substantive discussions. There was also a fairly clear rule about "Other Business" and the EU was not asking the DSB to take a decision at the present meeting. The EU was just drawing Members' attention to the ongoing and, to some extent, confidential proceedings. But, the EU felt that it was important that Members were aware about the EU's position on a matter that was ongoing. Delaying it to the next regular meeting of the DSB would not serve the interests of the EU as well as the interests of other Members. In that regard, the EU was just making a point of information, a statement and wondered whether this was really something that would amount to substantive discussion within the meaning of Rule 25 of the DSB's Rules of Procedure. The EU underlined that it was not asking the DSB to take any decision or any action at the present meeting. The EU wished to inform other Members that it would consider inscribing this matter as a separate item if that was really what was necessary.

The representative of the United States said that his country appreciated the further clarification that it had received from the EU. The United States was still in a difficult position because it was hard for it to gauge the nature of what was going to be said under "Other Business" by the EU. Additionally, the United States understood that other Members may speak which, in the US view, seemed to be a debate of issues, which was prohibited under Rule 25 of the Rules of Procedure. The United States said that it had been quite clear on its systemic viewpoint. However, under the circumstances of the present situation – and without prejudice to how this should operate and the fact that Members should receive ten days' notice so that all Members may be prepared – in these narrow circumstances, the United States would permit the Agenda to be adopted as amended and proposed by the EU. The United States said that it would also be making a statement under "Other Business" in reaction to the EU's statement, but it was unfortunate that other Members may not be able to do so.

The Chairman recalled that, in other circumstances of a similar nature, he had reiterated both the guiding philosophy and the language of the rule which, indeed, was quite explicit in saying that substantive matters should not be raised under "Other Business". Nonetheless, he welcomed the spirit of collaboration and flexibility shown by the United States. He proposed that the item be included on the Agenda under "Other Business". The DSB would listen to the EU's statement and a potential statement by the United States and any other responses. The statements may reveal that there was a substantive item to be explored but at that point he would strongly suggest that the DSB not pursue those issues in further detail at the present meeting but rather take a collective view that one or more Members could add it to the Agenda of a future DSB meeting.

The DSB took note of the statements and adopted the proposed Agenda, as amended.

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.133)

B. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.133)

C. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.108)

D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.71)

E. Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.20)

F. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.19)

1.1. The Chairman said that he did not want to sound repetitive but wished to urge those delegations that would report on implementation to focus their remarks in a constructive way on the approaches that might be taken for a mutually satisfactory resolution of the dispute rather than well-known positions of principle on non-implementation. He 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, and proposed to turn to the first sub-item.

A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.133)

1.2. The Chairman drew attention to document WT/DS176/11/Add.133, 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 9 January 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 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, since this was the first DSB meeting held in 2014, her country considered it appropriate to refer to the Annual Report of the DSB, which had been circulated on 1 November 2013 in document WT/DSB/61. She noted that items 9 and 10 of that

Report reflected progress in the implementation of the DSB's recommendations and rulings (surveillance item) and referred to matters raised under Article 21.6 of the DSU. The report listed 20 cases pending before the DSB where there was no compliance as of the end of 2013. Twelve of those, more than half, concerned the United States. Cuba found this alarming since the United States was a country with great economic power and benefitted the most from the WTO dispute settlement system. These cases of non-compliance included Section 211, which remained in force despite the fact that as far back as 2002, the DSB had ruled that Section 211 was inconsistent with the TRIPS Agreement and the Paris Convention. The United States had thus far submitted a total of 133 status reports, none of which had provided any solution to settle this dispute. In fact, these reports were no more than repetitive statements and did not meet the objective of reporting on "progress in the implementation of the recommendations or rulings" as required under Article 21.6 of the DSU. As a result, the intellectual property rights of the owner of a well-known Cuban trademark had been undermined in the United States, a self-proclaimed leader and defender of those rights. According to the WIPO report, "2013 World Intellectual Property Indicators", although world economic recovery since the 2009 crisis had been slow, IP filing activity had increased at an even faster pace than before the crisis (9.2% in 2012, the fastest growth in 18 years). In that context, the report revealed that the United States Patent and Trademark Office (USPTO) had ranked fourth in terms of world growth in the number of filings. Previously, for more than 100 years, it had ranked among the first three in the world. In other words, the United States was also one of the WTO Members that benefitted the most from intellectual property protection and international intellectual property standards. However, it continued to blatantly violate those rights and consistently failed to comply with the DSB's recommendations. Section 211 was found to be inconsistent with WTO rules and the DSB had adopted a recommendation to bring it into conformity with the provisions of the TRIPS Agreement. This illegal legislation undermined the legitimate rights of Cuban trademark owners, in this case the rights of the company CUBAEXPORT, which had been prevented from renewing the registration of the Havana Club trademark in the United States after holding it for more than 30 years. Cuba would continue to request that the United States comply with the DSB's recommendations and rulings and, in particular, that it repeal Section 211, which had been denounced as forming part of the tangle of measures and legal provisions underlying the unjust and illegal US blockade against Cuba. Cuba noted that, in the most recent US status report in this dispute, there were no longer any references to specific draft legislation that would allegedly enable the United States to comply with the DSB's recommendations. Cuba, therefore, reiterated its request that the United States update its status report and submit, in writing, updated information on "its progress in the implementation of the recommendations and rulings" in this dispute.

1.6. 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 noted that, once again, the United States did not report on any progress. 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. The legitimate interests of all Members, big or small, should be equally protected in the multilateral trading system. In the recent Bali Ministerial Declaration, Ministers reaffirmed their commitment to the WTO as the pre-eminent global forum for trade, including implementing trade rules and settling disputes. They also reaffirmed their commitment to the regular work of the WTO. The implementation of the DSB's recommendations and rulings was an integral part of the dispute settlement process. All Members should use best efforts to implement the DSB's recommendations and rulings, in order to meet their obligations under the DSU provisions and to demonstrate their commitment to the multilateral trading system, including maintaining its security and predictability. China would continue to support Cuba's concerns in this dispute and urged the United States to implement the DSB's rulings and recommendations without any further delay.

1.7. The representative of Brazil said that his country thanked the United States for its status report. Brazil noted that, once again, the United States reported the 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.

1.8. 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 regret that there was no change in the situation. India, therefore, renewed its systemic concern about the situation of continued non-compliance, which clearly undermined the credibility and confidence that Members

reposed in the WTO dispute settlement system. India urged the United States to report full compliance in this dispute without any further delay.

1.9. The representative of the Plurinational State of Bolivia said that, as her country had noted for the past 12 years, the US status report did not contain any new information on progress towards solving this dispute. Bolivia, therefore, reiterated its concern about the US failure to comply with the DSB's recommendations and rulings. Bolivia was also concerned about the US lack of political will to resolve this dispute. This situation of non-compliance undermined the credibility and integrity of the multilateral trading system and affected the interests of a developing-country Member. Bolivia reiterated its call on the United States to comply with the DSB's recommendations and rulings by lifting the restrictions imposed under Section 211. Bolivia supported Cuba's concerns.

1.10. The representative of Nicaragua said that his country thanked the United States for its status report. Nicaragua, once again, supported Cuba's position concerning Section 211 and the right 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 also noted that the most recent status report did not mention any of the legislative initiatives (H.R. 214, H.R. 778, H.R. 872, H.R. 873 and S. 647) submitted to Congress. This unfortunately confirmed the lack of political will on the part of the United States to comply with the DSB's recommendations and rulings. Nicaragua was concerned about the repeated failure of the United States to comply with its obligations. Non-compliance undermined the credibility and efficiency of the DSB and the multilateral trading system. It could also set a precedent with consequences for other Members, in particular developing-country Members. Over the years, Nicaragua had noted that in these disputes the United States had been the principal offender. 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.

1.11. The representative of the Dominican Republic said that her country thanked the United States for its status report regarding Section 211. The Dominican Republic supported the concerns expressed by Cuba and, once again, urged the United States to take the necessary steps in order to comply with the DSB's recommendations and rulings. The prolonged situation of non-compliance in this dispute undermined the credibility of the WTO.

1.12. 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 21.1 of the DSU. Mexico referred to the US status report, which stated that relevant legislation had been introduced in the current 113th session of the US Congress. The fact that the United States had submitted legislation showed a willingness to comply, but merely submitting the legislation may not be enough. Mexico requested that the United States provide more details on this matter so that this dispute could move towards a resolution.

1.13. The representative of Argentina said that his country, once again, supported Cuba's request. Argentina also supported the statements made by previous speakers. As Argentina had stated previously, this lack of progress was inconsistent with the principle of prompt and effective compliance with the DSB's recommendations and rulings stipulated in the DSU provisions, in particular since the interests of a developing-country Member were affected. Argentina, once again, urged the parties to the dispute, in particular the United States, to take the necessary measures so as to promptly resolve this dispute.

1.14. The representative of Uruguay said that his country supported the statements made by previous speakers. Uruguay was concerned that the prolonged situation of non-compliance and the lack of new information undermined the credibility of the dispute settlement system. Uruguay hoped that the United States would resolve this situation and that it would provide more information to the DSB, in particular regarding the discussions held in the US Congress.

1.15. The representative of the Bolivarian Republic of Venezuela said that his country supported Cuba on this matter. Venezuela noted that a considerable amount of time had passed since the adoption by the DSB of the recommendations and rulings in this dispute, but the United States had

not yet complied within the "reasonable period of time" stipulated in Article 21.3 of the DSU. At each regular DSB meeting, the United States submitted the same report, stating that its willingness to comply with the DSB's ruling, without actually doing so. This situation not only affected Cuba, but also created a negative precedent for the credibility of the WTO and its ability to resolve disputes. Venezuela, therefore, urged the United States to bring this situation of non-compliance to an end and to report at the next DSB meeting on the actions that it intended to take to resolve this dispute.

1.16. The representative of Chile said that, as it had become customary, his country wished to express its systemic concern about the failure to comply with the DSB's recommendations and rulings. Chile noted that the multilateral rules were applicable to all Members and all Members had to comply with them, without exception.

1.17. 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 comply with the DSB's recommendations and rulings by fully repealing Section 211.

1.18. The representative of Viet Nam said that his country thanked the United States for its status report and its statement made at the present meeting. Viet Nam, once again, renewed its systemic concern about the US non-compliance with the DSB's recommendations and rulings. Viet Nam urged the United States to comply with the DSB's recommendation so as to uphold international public law disciplines and to benefit Cuba, a developing-country Member.

1.19. The representative of the United States said that his country had heard delegations, and in particular Cuba expressing concerns about the US compliance record. The delegate from the United States stated that he did not have the report referenced by one Member in front of him, in which that Member alleged that 12 of the pending cases of non-compliance involved the United States. The United States said that it had submitted a total of only four status reports for the present meeting and wondered what the other disputes to which that Member was referring might be. Cuba's statement that the US compliance record was poor, simply was incorrect. If one looked at the facts of the disputes one would see that for itself. One would see that the facts did not support this assertion. There were a few instances – the four status reports – in which the United States was continuing to work actively towards compliance. But the instances of non-compliance were not representative of the whole. The United States had complied in the vast majority of disputes in which it was a party. The United States had also heard statements at the present meeting from Cuba and other Members about how the US record of non-compliance undermined the WTO and the dispute settlement system. The dispute settlement system was working very well, as evidenced by the statements from Members, including those delivered in the context of Bali. Suggesting otherwise was a clear overstatement. It was inaccurate to suggest that the US record of non-compliance in a few instances had undermined the entire system.

1.20. The last point the United States wished to make was with respect to comments by Cuba and at least one other delegation, that the United States had moved references to specific legislation from the status report into its comments at the present meeting. There was no material difference in the manner in which the United States informed the DSB about this pending legislation. However, the United States would highlight one difference between the information it had provided at the last DSB meeting and at the present meeting: the addition of a new bill this month, H.R. 1917. Finally, with respect to the notion that the United States was not providing the actual status of pending bills, the United States was highly transparent. One could look online and find where in the process each of these bills were, in what sub-committee, how many co-sponsors each bill had – some of them had 15 or 16 – the United States had all of this online. The United States was happy to provide the link to that information in another forum. The United States said that it was highly transparent and encouraged delegations to look at that information.

1.21. The representative of Cuba said that her country considered that it was not appropriate to hear over and over again that bills had been put to Congress without indicating any progress with regard to concrete decisions on these legislative texts for more than the past 12 years. Members respected the DSB for its competence and seriousness. Therefore, Cuba found it unacceptable that on a monthly basis it continued to hear the United States reassure Members that the bills before

Congress demonstrated the US commitment to the dispute settlement system. Such proposals or bills in practice, from what Cuba had seen and in the action of the past 12 years, were cosmetic as nothing had been done over the past 12 years. No single proposal had even been discussed in the bodies to which the bills had been submitted and, therefore, Cuba regretted that it had to ask, once again, just how committed the United States was and questioned the US political will to comply with the DSB's recommendations and rulings. With regard to the comments made by the United States regarding the Annual Report of the DSB, Cuba stated that the Report was contained in document WT/DSB/61. In accordance with that Report, there were 20 pending cases for compliance before the DSB at the end of 2013 out of which 12, more than half, related to the United States. Cuba suggested the United States read the Report, which was an official DSB document. In conclusion, Cuba wished to reiterate what it had stated and what had been repeated by 13 delegations at the present meeting, namely, that the decisions of a multilateral body were meant to be fully complied with, in their totality, and not according to the political convenience of countries. WTO Members were seriously committed to the Organization and were willing to comply and respect its rules, recommendations and decisions.

1.22. The representative of China noted that the US understanding of the situation was different than Cuba's understanding. The United States believed that its non-compliance with the DSB's recommendations and rulings it had encountered was at a low percentage. However, the non-compliance in this dispute, which was just one case for the United States, meant 100% for Cuba which was a Member involved in the dispute. Cuba should be treated equally. Thus, China urged the United States to comply with the DSB's recommendations and rulings and to meet its commitment to the multilateral trading system.

1.23. The representative of the United States said that his country would like to make it clear that this dispute involved the United States and the EU, and not Cuba. The statement just made, which alleged otherwise, was incorrect.

1.24. The Chairman said that there had been a good airing of some of the issues underlying the progress or lack thereof and that he appreciated Members continued engagement on the subject.

1.25. The representative of Cuba said that it was true that this dispute was between the United States and the EU, but it directly involved Cuba and concerned a Cuban trademark. In its initial comments, Cuba had explained how this dispute affected a developing-country Member that was also negatively affected by the US blockade. Cuba, a developing country was affected by Section 211 and requested that Cuba's statement be reflected in the minutes of the present meeting.

1.26. The representative of China said that her country wished to clarify what it had stated. China had stated that Cuba was a Member involved in the dispute and not that Cuba was a party to the dispute.

1.27. 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.133)

1.28. The Chairman drew attention to document WT/DS184/15/Add.133, 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.

1.29. The representative of the United States said that his country had provided a status report in this dispute on 9 January 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 in this dispute. 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 the appropriate statutory measures that would resolve this matter.

1.30. The representative of Japan thanked the United States for its statement and the status report submitted on 9 January 2014. Since the content of the report was the same as the previous reports, Japan's position remained unchanged as expressed in the previous meetings.

1.31. 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.108)

1.32. The Chairman drew attention to document WT/DS160/24/Add.108, 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.

1.33. The representative of the United States said that his country had provided a status report in this dispute on 9 January 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.

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

1.35. 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.71)

1.36. The Chairman drew attention to document WT/DS291/37/Add.71, 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.

1.37. The representative of the European Union said that, in recent DSB meetings, the EU had already reported on authorization decisions taken up to November 2013. On 6 November 2013, the European Commission had adopted two decisions authorizing ten new GM maize and one decision authorizing MON810 pollen[2], following the absence of an opinion from the Appeal Committee. In September 2013, the standing committee had voted on a draft authorization decision for drought-tolerant maize[3] and had rendered no opinion. The draft decision had, therefore, been presented to the Appeal Committee on 21 October 2013, which delivered no opinion and was now following internal procedures. In addition, at the beginning of December 2013, the EFSA had published an opinion on a GM soybean[4], both for food and feed uses. 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.

1.38. The Chairman thanked the EU for the update and for including, in particular, information on developments since the previous DSB meetings in November 2013 and January 2014.

1.39. 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, in which it did provide additional information. The United States hoped that the EU would continue to make progress on this item. As the United States had recalled most recently at the October 2013 DSB meeting, the EU had yet to address the product-specific DSB recommendation and ruling with respect to a variety of

[2] Maize stack events MON89034 x 1507 x MON88017 x 59122 and GM maize MON89034×1507×NK603 as well as GM maize MON810 pollen.
[3] MON87460 maize.
[4] 305423 soybean and MON87705 soybean (complementary statement).

biotech corn that was known as BT-1507. The application for approval of this product had been pending all the way back from 2001. In 2006, the DSB had found that the EU had breached its WTO obligations with respect to this product by not undertaking and not completing approval procedures without undue delay.[5] The United States said that it would also recall that an EU judicial body had issued a decision finding that EU delays with respect to the BT-1507 application breached the EU's own laws as well as the WTO.[6] The United States 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 light of these facts, the United States remained hopeful that the EU would finally take action with respect to the BT-1507 application in accordance with the findings of the EU's scientific authority. Indeed, the United States understood that the EU Commission had prepared a draft EU Council Decision authorizing the cultivation of BT-1507, and the EU Council may vote on the matter in the upcoming weeks. The United States would certainly welcome an approval of this long-standing application. At the same time, this application exemplified the problems with EU measures affecting the approval of biotech products. If the EU Council did take a decision on BT-1507, this vote would take place five years after the Commission had previously submitted a proposal for a Council decision. There were many other pending applications that were facing similar delays. The United States urged the EU, as it had in the past, to take steps to address these matters.

1.40. The Chairman said that he appreciated the detailed update focused on most recent developments and the substantive, and somewhat pointed, comments by the United States.

1.41. 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.20)

1.42. The Chairman drew attention to document WT/DS371/15/Add.20, 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.

1.43. 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 had provided some of these responses to the Philippines. Thailand hoped to provide the remaining responses shortly and would discuss the relevant modalities bilaterally with the Philippines. Thailand also noted that since the last DSB meeting, there had been further bilateral contacts between Thailand and the Philippines on this matter. Thailand looked forward to continuing its discussions with the Philippines and to resolving this matter in an amicable manner.

1.44. The representative of the Philippines said that his country thanked Thailand for its status report and the statement made at the present meeting. In its statement made at the last regular DSB meeting in November 2013, the Philippines had highlighted two concerns regarding the WTO-consistency of Thai measures taken to comply with the DSB's rulings and recommendations in this dispute. The first concern related to reports in the Thai press of 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 second concern highlighted by the Philippines similarly related to customs valuation, and specifically, a decision by the Thai Customs Board of Appeals to reject the declared transaction values for 210 entries from 2002 that were covered by the DSB's recommendations and rulings. As mentioned at the November DSB meeting, on both of these customs valuation issues, the Philippines had put questions to Thailand, as far back as in September 2013. While Thailand had provided replies to other issues, concerning its VAT regime and tax refunds, the Philippines awaited replies on its customs valuation-related questions. Thailand's failure to engage and provide information on the customs valuation-related matters was particularly regrettable, and

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

[6] Pioneer Hi-Bred International, Inc. v. European Commission, Case T-164/10, Judgment of the General Court (Seventh Chamber) (26 September 2013).

heightened the Philippines concerns, given the impact and scale of the matters at hand. To conclude, the Philippines could only re-iterate its call on Thailand to act on its commitment, so often re-affirmed in the DSB meeting, to work with the Philippines to achieve full compliance. As it had stated at the last DSB meeting, it was only through a full and transparent airing of the facts that the parties could hope to achieve a lasting solution to this dispute.

1.45. 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.19)

1.46. The Chairman drew attention to document WT/DS404/11/Add.19, 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.

1.47. The representative of the United States said that his country had provided a status report in this dispute on 9 January 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 recommendations and rulings of the DSB.

1.48. The representative of Viet Nam said that his country thanked the United States for its status report and statement made at the present meeting. Viet Nam recalled that the reasonable period of time mutually agreed by the parties had expired 16 months ago. However, the United States had not taken any action to recalculate and revoke the anti-dumping duty order for the second and third administrative review that was inconsistent with the DSB's decision. Viet Nam wished to express its systemic concerns about the US non-compliance in this dispute and with international public law obligations. 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 discipline and for the benefit of Viet Nam, a developing-country Member.

1.49. The representative of Cuba said that her country supported the statement made by Viet Nam and, once again, urged the United States to take measures in order to implement the DSB's recommendations and rulings in this dispute.

1.50. The representative of the Bolivarian Republic of Venezuela said that his country supported the statement made by Viet Nam at the present meeting. Venezuela shared Viet Nam's concerns regarding the need for the United States to take effective measures so as to end this situation of non-compliance.

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

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

A. Statements by the European Union and Japan

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

2.2. The representative of the European Union said that, once again, the EU requested that the United States to 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 and to submit status reports in 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 so as 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 placing 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 that no more legal disbursements were made pursuant to the Byrd Amendment. Only then would the issue be resolved within the meaning of the DSU and the United States would be released from its obligation to provide status reports in this dispute.

2.5. The representative of Canada said that his country agreed with the previous speakers.

2.6. The representative of India said that his country thanked the EU and Japan for regularly keeping this issue on the DSB's Agenda. India believed that, until the United States stopped the disbursements of WTO-inconsistent duties to its domestic industry, there could not be full compliance with the DSB's rulings and recommendations. India supported the view that, until such time full compliance was achieved, this item should continue to remain under the surveillance of the DSB.

2.7. The representative of Thailand said that his country agreed with India.

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. This 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. The United States further noted that some Members who had spoken at the present meeting, including the EU and Japan, had said that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, which was more than six years ago. Accordingly, the United States did not understand the purpose for which this issue had come up again at the present meeting. With respect to comments regarding further status reports in this matter, the United States failed to see what purpose would be served by further submission of status reports.

2.9. The Chairman said that he had not had an opportunity recently to review matters with the Chairman of the Special Session of the DSB. However, what was heard each month in the DSB was, in effect, a disagreement as to what constituted compliance and the obligation to implement. If this was something to be clarified, then this was part of the ongoing DSU negotiations.

2.10. 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. China continued to prevent foreign suppliers of electronic payment services from doing business in China by imposing a licensing requirement that did not set out any criteria or procedures under which a foreign supplier could be licensed. As a result, China Union Pay – which was China's own domestic champion – was still the only authorized supplier in all of China. This was not consistent with the DSB's findings that China had both market access and national treatment commitments concerning Mode 3 for electronic payment services.[7] China appeared to recognize the need to take

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

regulatory action to comply with the recommendations and rulings in this dispute. In particular, China had recently stated publicly that it was working on the necessary regulation, which presumably would set out the missing licensing criteria and procedures that were just referred to. The United States noted, however, that the reasonable period of time for compliance had expired almost six months ago. Accordingly, the United States called upon China to meet its WTO obligations promptly and to permit foreign suppliers of electronic payment services to do business on fair and open terms on a Mode 3 basis.

3.3. The representative of China said that her country regretted that, once again, the United States had brought this matter before the DSB. As it had stated at previous DSB meetings, China had fully complied with the DSB's recommendations and rulings. China had also further explained that the actions being sought by the United States were beyond the scope of China's compliance obligations in this dispute. 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 DSB's rulings. These demands were based on the wrong interpretation, by the United States, of the DSB's rulings and recommendations, and also reflected a clear misunderstanding of the dispute settlement process. With respect to the market access commitment issues, the Panel's ruling was very limited. The only one that the Panel had found to be inconsistent with Article XVI:2(a) of the GATS was the measure that concerned the provision of certain services in Hong Kong and Macao. China had brought that measure into conformity with the DSB's recommendations and rulings. China wished to refer to its statements made at previous DSB meetings, and would not repeat them at the present meeting. China urged the United States to reconsider the systemic implications of its position. China remained open to considering the US requests as part of a bilateral dialogue. In the 24th US - China Joint Commission on Commerce and Trade in Beijing on 19-20 December 2013, it had been clarified that China was in the process of examining how to make the regulation rules on the market access regarding bankcard clearance. This kind of rule was beyond the scope of China's implementation obligation in this dispute, and could only be discussed through a bilateral dialogue.

3.4. The representative of the United States said that his country thanked China for responding to its remarks and for providing some information on the regulatory process going on in China. The United States appreciated this information and would continue to dialogue on a bilateral basis. The United States did, however, have to disagree quite strongly with China's statement that it had fully complied. The DSB had adopted findings that could not be more clear. The United States said that it would like to quote from the Panel Report. If one looked at paragraph 7.575, it stated that "China has made a commitment on market access concerning Mode 3". If one then looked at paragraph 7.678, it stated that "China has made a commitment on national treatment concerning Mode 3". China currently did not allow foreign EPS suppliers access to the market under Mode 3 due to a licensing restriction that set forth no criteria and no procedure under which to obtain a license. As a result of this, China Union Pay, China's domestic champion, the only domestic supplier, continued to operate while foreign EPS suppliers could not. The United States could not agree with China that a WTO obligation for market access and national treatment meant that China could set forth a restriction under which no foreign supplier of EPS could do business in China, while its own preferred domestic supplier could do so. Therefore, the United States urged China to come into compliance by fully implementing its WTO commitments.

3.5. The representative of China said that her country had no intention to have a substantive debate on whether there was compliance or not in this dispute. But, as the United States had referred to the Panel Report, China had to repeat its position and to refer to the Panel Report. China's reading of the Panel Report was that the Panel had rejected the US claims under Article XVI in respect of all but one of the measures identified by the United States. The one that the Panel had found to be inconsistent with Article XVI:2(a) of the GATS was the measure that concerned the provision of certain services in Hong Kong and Macao, which was obviously different from what had just been alleged by the United States. China had brought that measure into conformity with the DSB's recommendations and rulings. There were no other measures that were the subject of the DSB's recommendations and rulings under Article XVI of the GATS. What the United States appeared to be requesting of China went far beyond the measures that had been at issue in the DS413 dispute. Based on the Panel's finding concerning the classification of the services at issue, the United States appeared to claim 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, as illustrated by the United States in the paragraph they quoted, 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, as the United States appeared to suggest. In all events, the DSB's recommendations and rulings in this dispute had been fully complied with by China. That was China's position on this matter. China, once again, asked the United States to consider whether this discussion should be continued repeatedly.

3.6. The Chairman said that this item was similar to the previous Agenda item regarding a disagreement on implementation. However, in this case, as he understood, should the disagreement continue, Article 21.5 of the DSU remained available to the parties. He noted that the parties to this dispute had, in August 2013, signed a sequencing agreement to follow through should they wish to do so. On the other hand, the fact that both parties continued to discuss the matter at the DSB suggested that a constructive dialogue and bilateral engagement continued. This matter was not a surveillance item and, therefore, the DSB did not necessarily have to revert to it at its next meeting.

3.7. The DSB took note of the statements.

4 UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

A. Request for the establishment of a panel by Korea (WT/DS464/4)

4.1. The Chairman recalled that the DSB had considered this matter at its meeting on 18 December 2013 and had agreed to revert to it. He drew attention to the communication from Korea contained in document WT/DS464/4, and invited the representative of Korea to speak.

4.2. The representative of Korea said that, as stated at the special DSB meeting held on 18 December 2013, Korea had grave concerns about the anti-dumping and countervailing measures imposed by the United States on the large residential washers from Korea. The measures effectively prevented Korean manufacturers from exporting to the United States. Furthermore, Korea considered these measures to be inconsistent with the US obligations under the relevant provisions of the WTO Agreements, as detailed in its panel request that had first appeared at the special DSB meeting in December 2013. Korea would not reiterate those details at the present meeting. While Korea was open to any mutually satisfactory solution with the United States honouring the spirit of the DSU, Korea again respectfully requested that a panel be established pursuant to Article 6 of the DSU, with standard terms of reference, to examine the matters described in its panel request.

4.3. The representative of the United States said that his country was disappointed that Korea had chosen, for a second time, to request the establishment of a panel with regard to this matter. As the United States had explained both to Korea and to the DSB, the measures identified in Korea's request were fully consistent with US obligations under the WTO Agreement. Further, Korea's request purported to address matters, such as possible future determinations under US law, that were not measures and not subject to WTO dispute settlement. The United States was prepared to engage in these proceedings, and to explain to the Panel that Korea had no legal basis for its claims.

4.4. 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.

4.5. The representatives of Brazil, Canada, China, the European Union, India, Japan, Norway, Thailand and Turkey reserved their third-party rights to participate in the Panel's proceedings.

5 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)

5.1. The Chairman 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 speak.

5.2. The representative of Denmark in respect of the Faroe Islands said that, as set out 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. This dispute concerned coercive economic measures imposed by the EU against the Faroe Islands, which was a self-governing territory forming an integral part of the Kingdom of Denmark and was covered territorially by Danish WTO Membership. The coercive measures at stake included the following elements: (a) ban on importation and transhipment of Atlanto-Scandian herring caught under the control of the Faroe Islands; (b) ban on importation and transhipment of Northeast Atlantic mackerel caught under the control of the Faroe Islands; this stock was included in the measure because of its alleged association with Atlanto-Scandian herring; (c) prohibition on the use of EU ports by vessels, including vessels from other WTO Members, that fished for, or transported, Atlanto-Scandian herring or Northeast Atlantic mackerel caught under the control of the Faroe Islands. The EU measures rested on a unilateral determination made by the EU that the Faroe Islands had violated the UN Convention on the Law of the Sea, or UNCLOS, in exercise of its sovereign rights in respect of the management of the Atlanto-Scandian herring. As such, these measures should be of great systemic concern to all WTO Members. The measures were designed to coerce the Faroe Islands into subjugating its sovereign rights to fix catch levels within its maritime national jurisdiction to the will of the EU. For the Faroe Islands, the measures were a matter of grave economic importance.

5.3. The Faroe Islands was a small economy that was heavily dependent on fisheries, including transit and, as appropriate, market access for the fisheries products subject to the challenged measures. The 2012 export value of Atlanto-Scandian herring and Northeast Atlantic mackerel, alone, represented about 8.5% of the total Gross Domestic Product of the Faroe Islands and more than 15% of all exports to third countries, half of which had been exported to the EU. Further, it should not be forgotten that the economy of the EU was roughly 10,000 times bigger than that of the Faroe Islands making these relations the very definition of asymmetry. Given its dependency on fisheries, the Faroe Islands took very seriously the responsible management of its marine resources. Indeed, management decisions on the total allowable catch in relation to the herring and mackerel stocks at issue were determined for those stocks as a whole, based on recommendations of an international scientific body, the International Council for the Exploration of the Sea. Thereafter, in fulfilment of the relevant obligations under the UNCLOS, the relevant coastal States sought to allocate the total allowable catch among themselves by agreement. In negotiating allocation rights, the Faroe Islands was committed to ensuring that it received a fair share. The disagreement between the Faroe Islands and the EU concerned exclusively the allocation of the total allowable catch for Atlanto-Scandian herring, and did not relate to the setting of the total allowable catch for the stock. Regrettably, the EU had taken to negotiating these allocation rights with the Faroe Islands against the threat and subsequent imposition of severe coercive economic measures that stroke at the heart of the Faroese economy.

5.4. Most importantly, the measures were clearly inconsistent with basic provisions of the GATT 1994 and had no justification under WTO law. Faced with this situation, the Kingdom of Denmark in respect of the Faroe Islands had no choice but to resort to dispute resolution under the international rule of law in these circumstances. Metropolitan Denmark was, of course, a Member State of the EU. Nevertheless, the Faroe Islands was not covered by Denmark's EU membership which, amongst other things, meant that the Faroe Islands maintained its own fisheries and trade policy, and this also explained how the EU could ban imports from a territory which was within the realm of the Kingdom of Denmark, the latter of which was a member State of the EU. To phrase it otherwise, the Faroe Islands was a third-country in relation to the EU for the purposes of the WTO, as was evidenced, *inter alia*, by the establishment of a free-trade area between the Faroe Islands and the EU, registered pursuant to Article XXIV(8)(b) of the GATT. In this dispute, the Kingdom of Denmark exercised its rights as a WTO Member in respect of the Faroe Islands. As noted, the Faroe Islands was covered territorially by Danish WTO Membership.

5.5. The representative of the European Union said that the EU took note of Denmark's decision in respect to the Faroe Islands to request a panel on the EU's measures, relating to the Faroe Islands, to ensure conservation of the Atlanto-Scandian herring stock imposed on 20 August 2013. The measures had been imposed after the Faroe Islands had decided to leave the common management of the Atlanto-Scandian herring stock which was discussed every year between the five coastal states. The Faroe Islands had decided to triple its traditional allocation key for the total allowable catch for the year 2013. The remaining four coastal states had regretted that decision. All coastal states, including the Faroe Islands, had agreed to set up a Working Group which was at present examining whether the existing allocation keys for the total allowable catch needed to be revised. Results were expected by the mid-2014. Moreover, throughout this month, there were discussions scheduled between the coastal states on the common management of herring and mackerel for 2014. Therefore, at the present stage, it was still possible to find a negotiated and amicable solution to the underlying dispute. Against that backdrop, the EU considered the request premature and did not agree to the establishment of a panel. The EU reaffirmed its commitment to the dialogue with the Danish authorities in respect of the Faroe Islands in order to find an amicable solution. The EU was convinced that its measures were in conformity with the WTO Agreements and would defend them vigorously if a panel was established.

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

6 UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. Recourse to Article 21.5 of the DSU by Mexico: Request for the establishment of a panel (WT/DS381/20)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 25 November 2013 and had agreed to revert to it. He drew attention to the communication from Mexico contained in document WT/DS381/20 and invited the representative of Mexico to speak.

6.2. The representative of Mexico said that, on 9 July 2013, the United States had published in the Federal Register a measure to comply with the DSB's rulings and recommendations in this dispute. That measure had entered into effect on 13 July 2013, the date of expiry of the reasonable period of time for implementation agreed by the parties. As Mexico had already stated in the past, this new US measure did not comply with the DSB's decision, as it maintained two separate regulatory regimes: (i) the first consisted of highly effective provisions agreed at the international level to protect dolphins in the zone where Mexico fished (Eastern Pacific Ocean), and (ii) the second consisted of an unregulated measure without any enforcement mechanism established outside the Eastern Pacific Ocean where fleets such as the US fleet operated, resulting in a high level of dolphin mortality and causing harm to the marine ecosystem due to the fishing methods used in these fishing zones. Unfortunately, the new measure did not remove discrimination against Mexican tuna, nor did it address the damage caused to the environment and dolphins by fishing fleets from other countries in other oceans. Mexico therefore, considered, contrary to the view expressed by the United States on other occasions, that the new measure adopted by the "dolphin safe" labelling regime was inconsistent with the DSB's rulings and recommendations. For those reasons, Mexico requested, for the second time, the establishment of a panel under Article 21.5 of the DSU with standard terms of reference.

6.3. The representative of the United States said that, as his country had discussed at length with Mexico, and as it had previously informed the DSB, the United States had published a final rule on 9 July 2013 that brought the United States into compliance with the DSB's recommendations and rulings.[8] More specifically, the final rule enhanced the documentary requirements for dolphin-safe labelling by extending the requirement for certification that no dolphins had been killed or seriously injured in the harvesting of the tuna in question to tuna caught in oceans other than the Eastern Tropical Pacific Ocean (ETP). Those changes ensured that consumers were not misled or deceived about whether the tuna in a product labelled "dolphin safe" had been caught in a manner that caused harm to dolphins. The United States was thus disappointed that Mexico had made a second request for the establishment of a panel in this matter. The United States was prepared to

[8] Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products: Final Rule, 78 Fed. Reg. 40997 (July 9, 2013) (to be codified at 50 CFR pt. 216).

defend the amended dolphin-safe labelling requirements and looked forward to explaining before the panel that these regulations were fully consistent with its WTO obligations.

6.4. 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 Mexico in document WT/DS381/20. The Panel would have standard terms of reference.

6.5. The representatives of Canada, China, the European Union, Guatemala, Japan, Korea, Norway and Thailand reserved their third-party rights to participate in the Panel's proceedings.

7 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/518)

7.1. The Chairman drew attention to document WT/DSB/W/518, which contained one new name proposed by the European Union (Belgium) for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/518.

7.2. The DSB so agreed.

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

A. Statement by the European Union

8.1. The representative of the European Union said that the EU wished to take the opportunity to make a statement with regard to the pending compliance/arbitration Panel proceedings in the dispute: "United States - Clove Cigarettes" (DS406). The EU recalled that at the DSB meeting on 23 August 2013, when Indonesia had made its unilateral request under Article 22.2 of the DSU, the EU had made a statement. The EU had noted that there was disagreement between the United States and Indonesia with respect to compliance and recalled that 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. The EU had reserved its rights in that regard. Consistent with that, on 4 September 2013, 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. The EU had explained in its application its systemic concerns with respect to the sequencing and related issues, as well as the specific interest that the EU had in the "United States - Clove Cigarettes" dispute. After a lapse of months, the EU had received the Arbitrator's decision, which had been designated as confidential and could not be circulated to all Members. 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 raised systemic issues as to the interpretation of the DSU and several other important systemic issues of interest to the wider Membership. It appeared that these issues would be dealt with behind closed doors. The EU considered this an egregious breach of its third-party rights, as provided for under Article 10 of the DSU, and the principle of due process. This was a matter of very serious concern and the EU considered that it necessitated further action on its part. The EU intended to raise the issues outlined above in the appropriate manner at the earliest opportunity. In that regard, the EU was of the firm view that Article 21.5 of the DSU was the proper procedure for settling compliance disputes, and that making an Article 22.2 of the DSU request in such a situation, whilst omitting to initiate and pursue compliance proceedings or suspend the arbitration panel proceedings, was inconsistent with Articles 23.1 and 23.2(a) of the DSU. The EU wished to draw these issues to the attention of other interested Members whose views would be welcomed at the present meeting or at a later date. Thus to come back to the procedural discussion at the beginning of the present meeting, the EU had recalled its position already taken at the regular DSB meeting in August 2013, it had updated the Membership on events since that meeting and it had confirmed its strong systemic concerns on the matter.

8.2. The representative of Mexico said that this matter was of considerable interest to Mexico, and that was why Mexico was one of the three Members who had requested to participate in the proceedings as a third party, in particular with regard to the suspension of concessions issues. Mexico pointed out that a considerable number of arbitrations had taken place under Article 22.6 of the DSU. In new arbitration proceedings, Arbitrators had often cited the findings of previous Arbitrators, in particular concerning issues ranging from the burden of proof to an Arbitrator's mandate to calculate the level of nullification or impairment. As a result, the decisions of those arbitrators 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. In fact, in Panel and Appellate Body proceedings, Members routinely made useful contributions as third parties before the Arbitrators, thus making it easier for them to make an objective assessment of the case.

8.3. The Chairman recalled that, at the outset of the present meeting, it had been agreed that Members would listen to the EU which had provided, for information of other Members, a statement of intent to have systemic and substantive issues raised "in the appropriate forum". Members were reminded about the standing rule which was that discussions on substantive issues under "Other Business", without adequate preparation, should be avoided. He encouraged other Members taking the floor to focus their remarks on the information provided and on how and where Members would wish to have a more substantive discussion.

8.4. The representative of China said that, without prejudice to her country's position on the matter, China had no intention to have a substantive discussion at the present meeting. In general, China shared the concerns expressed by the EU over the issue of sequencing. This was a long-standing issue, which had been discussed fully in the DSU negotiations. China believed that a multilateral clarification and improvement on this matter was the best means of resolving this issue. Thus, China called on Members to advance the negotiations in the DSB Special Session with a view to achieving a substantive outcome in the near future.

8.5. The representative of Guatemala said that his country was taking the floor under this Agenda item simply to note its systemic concern about the problem raised by the EU. Guatemala recognized that third-party participation in the Article 22.2 of the DSU proceedings was not clear under the current rules. This issue would have to be resolved by Members in the context of the DSU negotiations. However, there was no ambiguity regarding third-party participation in Article 21.5 of the DSU proceedings and, therefore, it did not seem straight forward that the Arbitrator in the dispute under consideration needed to act with the necessary precaution with regard to the request to participate in the proceedings invoked by some Members. Guatemala would, therefore, agree with the EU's position. In Guatemala's understanding, this action did not contribute to the stability and predictability of the dispute settlement system. This dispute raised serious systemic issues of importance to all Members. Guatemala remained at the disposal of any interested Members to discuss issues related to the enhanced participation of third parties in the dispute settlement system.

8.6. The representative of Brazil said that his country thanked the EU for sharing information on this important issue regarding the sequencing between Article 21.5 and Article 22.2 of the DSU in the "Cloves Cigarettes" dispute. Brazil also recognized the underlying question in this debate, which concerned interpretation, existence and scope of measures taken or not taken to comply with the recommendations of the DSB. In case this issue was placed on the Agenda of the next DSB meeting, Brazil might elaborate further on this matter.

8.7. The representative of Canada said that, if there had been more time, his country might have been inclined as well to react in more detail on the issues raised by the EU. As others had stated, Canada was also prepared to have a discussion in a substantive manner if there was an occasion to do so. In the circumstances though, in order to avoid an unduly long debate, Canada wished to make one brief point and it was mostly just to agree with China and Guatemala. The development cited by the EU involved, in their case, the issue of sequencing and others had raised the issue of third-party participation in Article 22.6 of the DSU proceedings. These developments may be a reminder that Members had become a little bit complacent in their belief that *ad hoc* solutions were substitutes for permanent solutions to certain lacunae in the current DSU. Canada wished to reiterate the point that had been made by China and Guatemala that both of these issues were under discussion in the DSB Special Session. This was perhaps a reminder that Members should

make serious efforts to bring those discussions to a conclusion so that permanent solutions could be found so as not to depend on the current *ad hoc* solutions.

8.8. The representative of Japan said that his country took note of the procedural concerns expressed by the United States about the ten-day advance notice and issues raised under "Other Business". Japan agreed that the ten-day advance notice rule, which was set out in the Rules of Procedure for meetings of the DSB must be observed so as to ensure the procedural fairness and equal opportunities for all Members. Since the EU had raised the issue of sequencing, as a result of exchanging views with the United States prior to the adoption of the Agenda, Japan wished to briefly provide general observations as a supporter of sequencing. Japan recognized that a complaining Member had the legitimate right to have recourse to Article 22.6 of the DSU where relevant conditions under the DSU were satisfied. However, a practice developed to the effect that the parties to a dispute concluded an *ad hoc* agreement on the procedures under Articles 21 and 22 of the DSU to address the issue of the so-called sequencing. Under that practice, "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings", the parties committed themselves to have recourse to the compliance proceedings under Article 21.5 of the DSU prior to the arbitration under Article 22.6 of the DSU. These procedural arrangements would certainly have implications for the time-frame of dispute settlement proceedings, but provided a practical way forward by securing a legal certainty at that very critical stage in a dispute. Japan had more comments which it would provide in detail at a later stage. To the extent that "there is disagreement" within the meaning of Article 21.5 of the DSU, Japan found little reason to depart from this well-established practice.

8.9. The representative of India said that his country thanked the EU for bringing this issue before the DSB. The points which the EU had raised at the present meeting were very substantive and were under discussion in the DSU negotiations. India was a proponent of sequencing but this was an issue that was still under debate in the DSU negotiations. The second issue which the EU had raised was about the participation of third parties in an Arbitration proceeding. This was also a debatable issue under the DSU negotiations. India was aware that under Rule 25 of the Rules of Procedure for DSB meetings, substantive discussions of issues under "Other Business" should be avoided. Therefore, India would reserve its detailed comments once this issue was placed on the Agenda of the next DSB meeting. India also agreed with Canada that it was the right time for Members to move from *ad hoc* arrangements to clear rules so as to provide more predictability and security to the dispute settlement system.

8.10. The representative of Indonesia said that her country welcomed the EU's statement made at the present meeting concerning the dispute: "United States – Measures Affecting the Production and Sale of Clove Cigarettes" (DS406). Indonesia regretted that this ongoing dispute was a topic for discussion in the DSB. Indonesia had done everything it could to resolve the DS406 dispute as expeditiously as possible. However, Indonesia, a developing-country Member, lacked the resources of some Members that could drag a dispute for many years in the hope of wearing down its opponent. In this dispute, Indonesia believed that it had acted within its right as a WTO Member. Furthermore, Indonesia believed that nothing in the DSU precluded a complainant from having direct recourse to Article 22 of the DSU. This was especially true in this case where the responding Member, the United States, regularly conceded that it had taken no step of any kind to implement one or more of the DSB's rulings and recommendations. Why should a Member in a case, such as this, have to go before a compliance panel, pursuant to Article 21.5 of the DSU, and bear the burden of showing that the DSB's rulings and recommendations had not been complied with when nothing had been done. If the DSU was subject to multiple interpretations and the EU or others saw that as a problem, then Members needed to give priority to the conclusion of the DSU negotiations. But in the meantime, Indonesia was trying to defend its interests. Concerning the participation of third parties, Indonesia would maintain its position that third-party participation did not apply under Article 22 of the DSU.

8.11. The representative of the United States said that the United States feared that precisely what had been discussed when the EU had requested to add this item to the proposed Agenda had occurred and that delegations were having a substantive discussion under "Other Business" in violation of Rule 25 of the Rules of Procedure. In the future, to avoid this, the EU should request that this item be put on the DSB's Agenda ten days in advance. The United States noted that a lot of Members had read prepared statements, which they had been able to prepare in advance. There were other Members, however, who had not been given adequate notice or time to prepare a

statement. They also may have had very strong views on these important systemic issues, but may not have been comfortable stating these views off the cuff. In the interests of fairness and transparency, these Members also should have been given the same opportunity to prepare.

8.12. Putting all that aside, the United States said that it felt compelled to respond to some of the points raised by Members for both systemic reasons and in the context of this dispute, as they were important to the United States. As a primary matter, the United States said that it wanted to address the sequencing issue. This was a situation where the United States had originally received a proposal from Indonesia to enter into a sequencing agreement and then Indonesia had stated that it was not interested in sequencing and backed out. Entering into a sequencing agreement would have been the preferred situation for the United States, especially in a situation where it had been clear that the Members disagreed with whether the United States had brought itself into conformity with the DSB's recommendations and rulings. It was unfortunate that things were where they were, but the United States did have to respond to what had been stated by other Members. Even though the United States did disagree with what Indonesia had done, the United States did believe that it was permissible to do so under the DSU, contrary to what some other Members had said at the present meeting. The United States also disagreed with the notion that, once a proceeding was brought under Article 22.6 of the DSU, one could not look at issues of compliance. The "EC - Bananas III" Report was instructive on that point. The United States encouraged Members to look at paragraph 4.8, in which the Report stated that in order to make a determination, it was important to look at the nature and extent of compliance before considering the level of nullification and impairment. There was no reason why Members could not structure an Article 22.6 proceeding this way. On the question of third-party participation, the United States was glad that the EU had recognized that the Arbitrator's decision was confidential. The United States thought that it was unfortunate that Members were having a conversation about the substance on that. In trying to respect the confidentiality of that ruling, the United States would note that it believed that comments from the EU regarding third-party rights were inappropriate. There was no textual basis for this. On the substance of the dispute and as to what Indonesia had stated in its statement – that the United States had conceded that it had not taken measures to comply – nothing could be further from the truth. The United States encouraged all Members to look at its statement made at the meeting of the DSB in August 2013 where the United States had stated that it had come into compliance. It was quite clear from the record.

8.13. The representative of Indonesia said that her country wished to reserve its right to provide more elaborated comments on this matter. At the present meeting, Indonesia would not respond to any further comments.

8.14. The Chairman said that all were rule-abiding Members including with the rules that governed their own deliberations. He recalled what delegations had agreed at the outset of the present meeting and although some policy positions had been stated in substantive terms, what had been put on the table could be interpreted as information about positions that would be taken in the appropriate forum. Two or three suggestions had been made that these issues were being discussed in the DSB Special Session in the context of the DSU negotiations. Delegations had also suggested moving from *ad hoc* to permanent solutions. He invited delegations to consider whether they wished to place this issue or set of issues on the Agenda of the next DSB meeting. It was in that spirit that he had taken all the comments made by delegations, including many who had indicated that they would elaborate further in the appropriate forum.

8.15. The representative of China said that her country wished to comment on how to discuss items under "Other Business". According to the DSB's rules of procedure, representatives may suggest amendments to the proposed Agenda, or additions to the Agenda under "Other Business". When considering and approving a proposed Agenda, representatives shall provide the Chairperson and the Secretariat, as well as the other Members directly concerned, whenever possible, with an advance notice regarding any items that they wished to raise under "Other Business". Discussions on substantive issues under "Other Business" shall be avoided. However, sometimes it was not clear whether a discussion was substantive or not. Thus, Members should be cautious in introducing additional rules regarding the time for advance notice or the rules for discussing matters under "Other Business".

8.16. The Chairman thanked China for its further reflections. He said that, first, requesting ten days advance notice was the same as putting an item on the Agenda, which Members were free to do. An item may be placed on the Agenda for information and a statement regarding this matter

could also be circulated in advance. This would provide the courtesy, as one delegation had observed, of giving everyone an opportunity to comment. Second, in terms of substance, the Chairman was entrusted with a certain responsibility. As the Chairman, he was tolerant but could have been stricter. In that regard, there had to be some exercise of judgement. It was up to Members to reflect on whether they wanted to bring these issues back to the DSB or, as the EU had stated, in another appropriate forum.

8.17. The representative of the European Union said that the EU still failed to see what it should have done differently in terms of the procedure. The EU had simply made a statement at the present meeting. The EU had always considered that substantive issues under Rule 25 of the Rules of Procedure referred to situations where the DSB was called upon to act on a substantive matter. The EU failed to see why a statement could not be made under "Other Business".

8.18. The Chairman said that, in light of the discussion, he would undertake some consultations after the meeting to determine if delegations were interested to have a discussion or consultations or informal session to discuss procedural matters. He noted that, even at the present meeting, there were four items on the Agenda at the request of a Member, with a statement circulated and an opportunity to see other statements in advance. This was a normal procedure for the DSB, even for information exchange.

8.19. The representative of the United States said that, in response to the EU, if a Member put an item on the Agenda, any interested Member would have ten days to get in touch with that Member. They would have ten days to learn what the intervention would be about and then to get in touch with capital and draft instructions if it was an issue that they cared about. The problem here was that there were many Members at the present meeting who had not had the time or opportunity to do so and the United States believed that such an opportunity should be afforded to all.

8.20. The DSB took note of the statements.

9 STATEMENT BY THE CHAIRMAN REGARDING THE SELECTION PROCESS FOR A NEW AB MEMBER

9.1. The Chairman, speaking under "Other Business", said that, as Members were aware, he had circulated a fax on 20 January 2014 on behalf of the Selection Committee constituting a report on the ongoing process to appoint an Appellate Body member. In that communication, on behalf of the Committee, he had proposed that the DSB decide, either at the present meeting or as soon as practicable thereafter, to open the process for further nominations. He had also set out, on behalf of the Committee, a proposed time-line for receiving nominations, and for consultations and deliberations by the Selection Committee that was established on 24 May 2013. Since the circulation of the fax, several delegations had indicated that they needed time to reflect further on the procedures for moving forward with the selection process. Under the circumstances, but bearing in mind the need to avoid undue delay in the selection process and given that the next regular DSB meeting was not scheduled until 26 February 2014, he intended to hold a special DSB meeting on 7 February 2014 to consider the matter. He intended to submit to all Members formally and, thus, with the required period of notice, a draft decision for consideration at that meeting. In that regard, he aimed to circulate a draft text of such a decision by fax on 27 January 2014, which would enable him to issue an Airgram convening the meeting on 28 January 2014. The draft decision would obviously be based on the elements outlined by the Selection Committee reflected in his fax of 20 January 2014 containing the Selection Committee's recommended course of action. But, any draft he prepared would have to take account of the views delegations may wish to express at the present meeting and any further views delegations may wish to express to the Chair directly or through the Secretariat between now and 27 January 2014. That was what he intended to do subject to further views that delegations may wish to express at the present meeting. Since he had received a few questions on this matter, he wished to emphasize that the view of the Selection Committee in developing this recommendation was that this course of action constituted a continuation of the selection process that it had embarked upon in May 2013. Therefore, the Selection Committee, in this recommendation, did not consider it necessary for Members to re-nominate the candidates who were, had been and continued to be under consideration. Nor would it be the Selection Committee's intention to re-interview those four candidates. The Selection Committee hoped that this would be acceptable to all, but as always the floor was open for comments.

9.2. The representative of Australia said that her country was very disappointed to learn that the Selection Committee had been unable to agree on a nominee for the Appellate Body who it believed would attract the consensus of the WTO Membership. At the same time, Australia had some serious concerns with the proposal to re-open the process. Australia thanked the Chairman for providing more notice regarding a decision for taking the process forward. Australia observed that taking a decision on such an important issue would not have been reasonable in the time-frame provided in the Chairman's fax of 20 January 2014 for reasons that had already been discussed at the present meeting regarding adequate notice for proper consideration, especially for such an important issue. Australia agreed that a special DSB meeting with appropriate notice should be convened, and would agree to the 7 February date. Alternatively, the matter could be placed on the Agenda of the next regular DSB meeting. With regard to the substance of the issue, the credibility of the Appellate Body was fundamental to the integrity of the WTO and the rules-based multilateral trading system that it represented. In that regard, Australia was deeply concerned about any suggestions that nominations would be considered on the basis of factors unrelated to the qualifications for Appellate Body membership set out in Article 17.3 of the DSU. Specifically, candidates should represent an appropriate balance of expertise in the covered agreements, independence, and representation of the WTO Membership. Australia had put forward a candidate in good faith, with 30 years of trade law experience, including on subject matters that comprised a majority of the Appellate Body's workload. In the past, Australia had joined consensus around candidates based on the contribution that it considered they could make to the work of the Appellate Body; not, for example, as representatives of their countries, but as persons with recognized authority in law and international trade. To Australia, some comments had indicated that the phrase "broadly representative of Membership in the WTO" meant that this vacancy was for a specific region to fill. This was not Australia's reading and Australia would not want to see that view become entrenched for Appellate Body membership. While the overwhelming concern of the process was to provide highly qualified Members for the Appellate Body, the requirement for the Appellate Body to be "broadly representative of Members in the WTO" itself could canvas many types of representation, including, geographical spread, various legal systems (whether civil or common law), different economies and levels of development, as set out in WT/DSB/1, paragraph 5. This should not mean that existing AB members must, as a matter of course, be replaced by new AB members from the same geographical region and there was no past practice indicating this. In conclusion, before considering its position on the proposal to re-open nominations for the Appellate Body vacancy, Australia would be seeking further information regarding the process that had led to this unusual situation.

9.3. The representative of Kenya said that his country thanked the Chairman for his statement. All Members recognized and appreciated that the WTO, successor to the GATT, was their collective, cherished Organization that had served Members well since its inception. The WTO had walked a long walk since 1995 and had successfully managed to withstand any challenges and landmines encountered on its way. Its principles of transparency, most-favoured-nation treatment, decision-making process through consensus and organizational structures envisaged in its top three organs, and in particular the DSB, continued to give the organization a unique character that had instilled confidence in the Membership. Kenya wished to make some observations and comments on the Chairman's report and on the recommendation of the Selection Committee that had been circulated. The Selection Committee, which had been established on 24 May 2013, had taken about eight months to make this recommendation to Members. The long waiting period for those countries that had candidates had obviously created some anxious moments and yet the whole process had ended up in disarray. It had created an environment that facilitated rumours to make their rounds and for the guess work to thrive. This scenario was not good for the health of the WTO which all Members trusted and believed in. Kenya did recognize that the Bali Ministerial Conference had come in-between, but the delay had been unnecessarily long. Kenya had also noted that the Committee had recognized the diverse and embracive experience and expertise as well as the relevant skills and shared commitment that the four candidates had showed but yet there was no conclusion. This was disappointing and Kenya was reflecting on the draft report and the recommendation made and would revert with further comments. In conclusion, merit as well as the creation of balance and diversity were some of the key ingredients to be observed in the whole process for the WTO to be truly global, to be a truly global body that served all, strong or weak, big or small.

9.4. The representative of Egypt said that his country thanked the Selection Committee for its continued efforts in this process. It had been noted that a few months had passed which had witnessed extensive deliberations to reach a recommendation. Nevertheless, the preparatory work

for the Bali Ministerial had left no room. In addition, selecting only one candidate out of the four highly-qualified candidates proved difficult. Egypt was looking forward to completing this process at the present meeting by announcing the name of the selected candidate, based on the DSU provisions and past practice of taking decisions by consensus. However, Egypt had not expected the current suggestion of receiving further nominations. While it highly appreciated receiving additional clarification, Egypt also hoped that it would not set a precedent, confusing or complicating the future work of the Selection Committees established under the WTO rules. Article 17.3 of the DSU set clear criteria in relation to the composition of the Appellate Body, reflecting the determination of the drafters to maintain the efficiency, impartiality, stability and predictability of the system. Egypt, being both an African country and an Arab country, believed that the diversity of membership in the Appellate Body, particularly the legal systems and geographical distribution in a broad sense enriched the experience of the WTO system. Egypt reaffirmed its commitment to the WTO system and expressed its trust in the work of the Selection Committee. Egypt was confident that the Selection Committee and the WTO Membership would continue to work together with the aim of maintaining the objective nature of this process.

9.5. The representative of Cameroon said that his country was trying to understand the difficulties encountered by the Selection Committee to select one out of the four candidates for the Appellate Body. The Chairman had indicated that the four candidates were excellent but the Selection Committee would give further opportunity for other Members to propose new candidates in order to try to find a consensus candidate. His delegation would reserve its position on this matter pending its consultations with the capital. Cameroon believed that it was important to preserve a regional balance in the Appellate Body and to ensure transparency regarding the selection process in trying to find the right individual.

9.6. The representative of India said that his country thanked the Chairman for his statement. He noted that some of the questions had already been answered, but India sought certain clarifications regarding the fax of 20 January 2014. The Chairman had just clarified that the four candidates that were already on the table would continue to remain under consideration. The Chairman had mentioned that those candidates would not be interviewed again and that only new candidates would be interviewed by the Selection Committee. The composition of the Selection Committee had been specified in document WT/DSB/1, where it comprised the Chairs of different Councils. In 2014, the Chairs of those Councils would change. In that regard, India wanted to know whether a new Selection Committee would be established with new Chairs or if the 2013 Selection Committee would continue its work.

9.7. The Chairman said that he was taking note of the comments and questions being raised and once all delegations wishing to speak had spoken, he would make a few comments and try to respond on behalf of the Selection Committee.

9.8. The representative of Japan said that his country thanked the Selection Committee for its efforts. However, given the current situation that Mr. Unterhalter's term had already expired and that the Appellate Body had one vacancy at present, it was very regrettable that the Selection Committee had concluded that it could not recommend a new Appellate Body member to the DSB. On the other hand, under the situation that none of the candidates would, at present, enjoy the support of the Membership, Japan was of the view that it was a realistic approach to extend the current process and to ask Members to nominate additional candidates. Japan had heard similar views from some Members who had nominated candidates. If the current process continued, Japan wished to add one point which India had also raised. Although the continuation of the current Selection Committee would be inconsistent with the procedures under WT/DSB/1 and past practices, such continuation would also be a realistic approach. Therefore, Japan believed that a DSB decision, in line with the fax of 20 January 2014, should include a sentence to underline the extraordinary situation. In that regard, Japan would provide proposed language to the Chairman through the Secretariat.

9.9. The representative of the United States said that his country shared the views expressed by others at the present meeting that it was regrettable that this process had not resulted in a selection to date, but supported the Selection Committee in its ongoing difficult task ahead. What had been suggested in the fax to reopen the nomination period had been done before and it appeared to the United States that this may be a reasonable way forward. That said, India had raised an important question. Japan also had raised an important comment on language and Australia had raised important comments. This showed that more time was needed to consider and

look at the draft decision closely. The United States understood that the Chair would provide delegations that opportunity and the United States thanked him for that.

9.10. The representative of Brazil said that, as several Members had given their opinion, Brazil would comment briefly. Brazil noted with concern that the Membership had not, thus far, been able to reach consensus on a candidate for the Appellate Body. Given that the candidates were well qualified, it was truly regrettable that consensus had not materialized. The entire Membership would benefit in having, as soon as possible, a complete, competent and independent Appellate Body. Brazil considered that the importance of the issue and the consequences of a new nomination process justified, as the Chairman had outlined, the formal insertion of the item on the DSB's Agenda so as to allow Members enough time to reflect upon the matter and consult their capitals. Brazil also considered that all Members may make their objections to specific candidates known to the Selection Committee in the course of consultations. In fact, that was the moment they should be made rather than at the moment of a possible re-appointment when only exceptional circumstances could justify them. Although it was understood that the DSU required consensus to appoint Members to the Appellate Body, it was also expected that Members show common engagement towards an acceptable solution as long as the professional requirements foreseen in Article 17.3 of the DSU were observed.

9.11. The representative of China said that her country regretted to have heard that none of the four candidates would enjoy the support of the Membership. The opening of the process for additional nominations was not expected. In future, perhaps some additional rules could be developed with respect to how the Selection Committee reviewed the candidates and made a recommendation. China recalled that in the 2013 selection process for the Director-General, there were nine candidates and procedures for the selection were agreed by Members. In China's view, it would be helpful to consider how to learn from the DG selection process.

9.12. The Chairman said that he wished to offer one or two observations. First, he wished to share with all sincerity how deeply each and every member of the Selection Committee, including the Director-General himself, had regretted the delay. The Selection Committee wished to have concluded its work in a more timely fashion and the original target had been the end of November 2013. The DSB had directed the Selection Committee to develop a recommendation by 7 November 2013 so that the DSB could take a decision at its meeting on 20 November 2013, which was ultimately held on 25 November 2013. Taking into account the Ministerial Conference in Bali and the holiday season, the Selection Committee had met as quickly as it conceivably could and as early following Bali as it could. Second, by way of re-assurance, he observed that at the very outset, in September/October 2013 (which was the period of time the DSB had directed the Selection Committee to conduct the consultations) the Selection Committee had had a joint reading of Article 17 of the DSU and the criteria. Thus, every member of the Selection Committee had been explicitly and fully aware of the elements of merit, and of the notion of representativeness that many had cited. Some delegations had cited properly that that was the criteria of the membership of the Appellate Body, not a test for any individual member. One looked at the institution because it is the Appellate Body that should be broadly representative. Third, the Selection Committee was also fully aware throughout the process from the outset, going back to WT/DSB/1, that the recommendation for a new AB member should be made jointly by the Chairs of the various Councils and the DG "after appropriate consultations". This was reiterated in the DSB decision of 24 May 2013. In that regard, both the inherent qualities of the candidates and the views of the Membership of the WTO were relevant.

9.13. Another aspect of the proposed course of action, which was not codified yet because he had undertaken to give delegations a draft decision, was why it was recommended that the process continue rather than start over? The Selection Committee had concluded that at present, a freeze frame snapshot in time, it was unable to identify a candidate that might enjoy consensus. The Selection Committee believed that each of the candidates may, over the coming days and weeks, allay whatever questions or observations may have been asked of them and thus even the current candidates' statures in the process may evolve. It was really for that reason that the Selection Committee's recommendation was to maintain continuity. One way to ensure consistency in how interviews were conducted in consultations was to keep the same membership. This was not unprecedented. This had been done in 1999 following the untimely death of Mr. Christopher Beeby, where the DSB had decided to continue the existing committee notwithstanding the annual rotation that would otherwise occur. This was in the interest of saving time. In his personal view, with a new committee there would be an obligation to conduct

interviews of existing candidates and to hold a complete set of consultations. If many new candidates were to come forward in addition to the existing four, this may slow down the process further. None of the Selection Committee members, including himself, was saying that they must continue. The Selection Committee was at the hands of the Membership and should it be the collective view of the Membership to follow an annual rotation, in effect, the process would have to await the appointment of the new Chairpersons of the WTO Bodies which would only be in March 2014. Another month would be lost. These were the factors that Members may also wish to consider. The aim was not to respond to the report of the Selection Committee, which embodied a narrative recommendation, but rather to a draft of a decision that would be taken by the DSB, which he would circulate on 27 January 2014. Delegations with views on the content and substance of such a recommendation or draft decision should submit their views to him directly or through the Secretariat so that a draft could be circulated for Members' further reflection, comments and consultation with capitals, in a timely manner.

9.14. The DSB took note of the statements.

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