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**Dispute Settlement Body**
**18 June 2014**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 18 JUNE 2014

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

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## 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.138)

B. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.138)

C. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.113)

D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.76)

E. Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.25)

F. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.24)

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

### A. United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.138)

1.2. The Chairman drew attention to document WT/DS176/11/Add.138, 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 5 June 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. Of these bills, at least four would repeal Section 211. This included: (1) H.R. 214, which had been referred to the House Subcommittee on Trade; (2) H.R. 872, which had been referred to the House Subcommittee on Immigration and Border Security, and had 16 co-sponsors; (3) H.R. 873, which had been referred to the House Subcommittee on Immigration and Border

Security, and had 17 co-sponsors; and (4) H.R. 1917, which had been referred to the House Subcommittee on Courts, Intellectual Property and the Internet. At least two of these bills would modify Section 211. This included: (1) H.R. 778, which had been referred to the House Subcommittee on Western Hemisphere, and had 19 co-sponsors; and (2) S. 647, which had been referred to the Senate Committee on the Judiciary and had seven co-sponsors. 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 Article 31, Section 3 (Interpretation of Treaties), of the Vienna Convention on the Law of Treaties stipulated that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The purpose of the WTO dispute settlement system was clearly set forth in Article 3.2 of the DSU, the first sentence stated that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". Article 3.3 of the DSU clearly stated the objective of prompt compliance: "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". However, February 2014 marked the 12th year of the US failure to comply with the DSB's recommendations and rulings in this dispute. Section 211, passed by the US Congress to invalidate the intellectual property rights of Cuban right holders on US territory remained in force. Cuba, once again, reiterated that the current US laws governing the economic, commercial and financial blockade against Cuba were not enough to have an impact in the area of intellectual property rights and hence Section 211 was adopted to legally underpin the theft of recognized Cuban trademarks such as the brand name "Havana Club". Furthermore, the last sentence of Article 21.6 of the DSU stipulated that the Member concerned had an obligation to provide a status report in writing of its progress in the implementation of the recommendations or rulings. However, the most recent US status report circulated on 5 June constituted an outright violation of Article 21.6 of the DSU. The lack of regulations in the DSU to ensure effective compliance with the DSB's recommendations and rulings provided an incentive for the United States to continue to ignore the DSB's decisions. The adverse effects of unresolved disputes were not limited to the parties involved. In failing to meet its obligations, the United States was undermining a system based on rules, procedures and practices developed by all and for all. Reacting with indifference to long-standing violations such as these had serious systemic implications for the functioning and credibility of the dispute settlement system. Once again, Cuba urged the United States to report on progress and to take the appropriate steps to put an end to this dispute.

1.6. The representative of the Russian Federation said that her country believed that the dispute settlement system provided stability to the multilateral trading system. Russia urged the parties to this dispute to find a solution through all the instruments available under the WTO Agreement. Russia believed that this situation of non-compliance undermined Members' confidence and the credibility of the DSB and the WTO.

1.7. 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 that the United States had not reported any progress. India remained concerned about this situation of prolonged non-compliance in this dispute, as this undermined the credibility of the WTO and the confidence that Members reposed in the dispute settlement system. India urged the United States to report full compliance in this dispute without any further delay.

1.8. The representative of Mexico said that his country urged the parties to the dispute to take the necessary steps in order to comply with the DSB's recommendations and rulings, in accordance with Article 21.1 of the DSU. Mexico thanked the United States for its status report. In Mexico's view, it would be useful to have more information regarding the legislative texts referred to by the United States.

1.9. The representative of Angola said that his country thanked the United States for its status report regarding Section 211. Angola noted that this matter had been discussed for many years without any resolution. As a result, Cuba continued to be adversely affected by the lack of progress in this dispute. Angola believed that the credibility of the dispute settlement system and the multilateral trading system depended on its ability to promptly resolve disputes, while preserving Members' rights. Failure to do so would undermine the system and affect Members, in particular developing-country Members. All Members had the same rights and were, therefore, required not only to comply with their obligations, but also with decisions taken by the WTO bodies. In Angola's view, it was regrettable that the DSB, which was one of the main achievements of the multilateral trading system, continued to be undermined because of the measures taken by one Member. In that regard, Angola reiterated its previously stated position with regard to Cuba's claims and requested the United States to comply with the DSB's recommendations and rulings.

1.10. The representative of Zimbabwe said that his country took note of the US status report. Zimbabwe thanked Cuba for its statement made at the present meeting. Zimbabwe noted that the DSB was meeting again, as it did every month, to consider the non-compliance by the United States with the DSB's rulings and recommendations in this dispute. The continued US failure to comply seriously undermined the integrity of the DSB as well as the efficacy and effectiveness of its rulings. For a number of years now, Zimbabwe, along with other WTO Members, had been calling on the United States to stop violating its WTO rules and to meet its obligations. Zimbabwe, therefore, strongly supported Cuba and urged the United States to comply with the relevant DSB's rulings and recommendations.

1.11. The representative of Bolivarian Republic of Venezuela said that her country supported the statement made by Cuba at the present meeting. Venezuela reiterated its concern about the US status report which, in addition to being monotonous and repetitive, did not contain any new information on progress in this dispute. In Venezuela's view, the prolonged non-compliance by the United States showed the US intention to continue to maintain the economic blockade against Cuba, a developing-country Member. Venezuela urged the United States to put an end to this flagrant violation of WTO rules by repealing Section 211. Venezuela found this situation of non-compliance to be unacceptable since it undermined the interests of a developing-country Member. It also undermined the credibility of the dispute settlement system, the multilateral trading system and the DSB's ability to resolve disputes.

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

1.13. The representative of Jamaica said that her country noted that the circumstances of this dispute had not changed and that no progress had been reported since the previous DSB meeting Jamaica wished to refer delegations to its statement made at the 23 May 2014 DSB meeting. Jamaica remained concerned about the lack of progress in this dispute since the adoption of the DSB's recommendations and rulings, which had taken place more than 12 years ago. Once again, Jamaica, along with other Members, called for a prompt, just and lasting solution to this dispute.

1.14. The representative of Uruguay said that his country thanked the United States for its status report and the statement made at the present meeting. In Uruguay's view, the report was more detailed than usual. However, there was no change with regard to the content of the report. Uruguay urged the United States to resolve this matter so that the item could be removed from the DSB's Agenda.

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

1.16. The representative of Nicaragua recalled that the objective of the WTO was trade liberalization in order to benefit all Members, in particular developing and least-developed countries. It was, therefore, not acceptable that this dispute, which had been on the DSB's Agenda for more than ten years, remained unresolved, thereby adversely affecting the economic and commercial interests of Cuba, a country with a small economy. Nicaragua, once again, thanked the United States for its status report and regretted that the report did not contain any new information. Such lack of content remained unchanged and reflected the US lack of political will to resolve the matter. Non-compliance in this dispute undermined the efficiency/credibility of the DSB and the multilateral trading system. It could set a negative precedent for other Members, in particular developing-country Members. Nicaragua failed to understand how a developed-country Member could request other Members to comply with their obligations and, at the same time, fail to comply with its own obligations. Nicaragua supported Cuba's statement and urged the United States to meet its obligations by bringing the measure at issue into compliance with the DSB's recommendations and to find a mutually satisfactory solution to this dispute.

1.17. The representative of Ecuador said that his country supported the statement made by Cuba. Ecuador, once again, recalled that Article 21 of the DSU expressly referred to prompt compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. In the dispute on "United States – Measures Relating to Zeroing and Sunset Reviews: Recourse to Article 21.5 of the DSU by Japan", the Appellate Body stated, "The time-frame within which compliance must be effected is addressed in Article 21 of the DSU. Article 21.1 of the DSU provides that '[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'. The reference to 'essential' underscores the importance of the obligation to comply with the DSB's recommendations and rulings. The reference to 'prompt' compliance emphasizes the need for the timely implementation of DSB recommendations and rulings. The timing of implementation is also addressed in Article 21.3 of the DSU … According to this provision, implementation of the recommendations and rulings of the DSB must be done 'immediately', unless it is 'impracticable' to do so. In other words, the requirement is immediate compliance. However, Article 21.3 of the DSU recognizes that immediate compliance may not always be practicable, in which case it foresees the possibility of the implementing Member being given a reasonable period of time to comply … the reasonable period of time is a limited exemption from the obligation to comply immediately. [In short] … 'the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at the latest'. Indeed, any conduct of the implementing Member that was found to be WTO-inconsistent by the DSB must cease by the end of the reasonable period of time. Otherwise, that Member would continue to act in a WTO-inconsistent manner after the end of the reasonable period of time, contrary to Articles 3.7, 19.1, 21.1, 21.3 and 21.5 of the DSU".

1.18. Ecuador noted that this matter of "prompt compliance" or "effective compliance" was a long-standing concern for many developing-country Members. It was a matter that transcended and went well beyond other strictly procedural concerns. In light of the discussions in previous years, in the period between June and November 2012, a large group of developing countries had submitted proposals to the DSB Special Session, together with relevant revised legal texts which concerned, *inter alia*, the issue of "effective compliance". Ecuador believed that these were essential for the smooth functioning and credibility of the dispute settlement system. The process of "clarifying" and "improving" the DSU should eventually produce a concrete outcome in which substantive issues were necessarily addressed, in particular those that affected the interests of developing-country Members.

1.19. The representative of El Salvador said that her country thanked the United States for its status report. Like the previous speakers, El Salvador was concerned about the lack of compliance in this dispute. This situation of non-compliance adversely affected the interests of a developing-country Member with a small and vulnerable economy. El Salvador urged the parties to this dispute to find a solution to this dispute as quickly as possible.

1.20. The representative of Brazil said that, like the previous speakers, his country remained concerned about the lack of real progress in this dispute. Brazil called on the United States to bring its measures into conformity with WTO rules as soon as possible.

1.21. The representative of the Plurinational State of Bolivia said that, as his country had stated for more than 12 years, the US status report did not report on any progress towards compliance with the DSB's recommendations and rulings. Bolivia, therefore, reiterated its concern about the systemic implications of the US failure to comply with the DSB's recommendations and rulings in this dispute, in particular since it concerned the interests of a developing-country Member. Bolivia urged the United States to comply with the DSB's recommendations and rulings and to remove the restrictions imposed under Section 211. Bolivia supported the concerns raised by Cuba at the present meeting.

1.22. The representative of Dominica, speaking on behalf of the OECS countries, thanked the United States for its status report and Cuba for its statement. Like previous speakers, the OECS countries supported Cuba in this matter. The OECS countries remained concerned about the lack of progress and the continued US failure to comply with the DSB's recommendations and rulings. This was of particular concern because non-compliance in this dispute had an adverse effect on the economic interests of a small, developing-country Member. Non-compliance in this dispute also undermined the dispute settlement mechanism, which was a key pillar of the WTO and the multilateral trading system. Therefore, the OECS countries urged the United States to promptly comply with the DSB's rulings and recommendations and for the parties to find a solution to end this dispute.

1.23. The representative of Viet Nam said that his country thanked the United States for its status report. Viet Nam noted that, once again, the status report did not contain any progress regarding the implementation of the DSB's recommendations. Viet Nam urged the United States to comply, without any further delay, with the DSB's recommendations and rulings so as to preserve the multilateral trading disciplines and to benefit Cuba, a developing-country Member.

1.24. The representative of South Africa said that her country wished to refer to its previous statements stressing its systemic concerns that this non-compliance with the DSB's recommendations and rulings undermined the integrity of the DSB, an important enforcement pillar of the WTO. South Africa was also concerned that non-compliance perpetuated significant negative economic consequences for a particular developing-country Member and had ramifications for access to the dispute settlement system by the lesser-resourced Members. South Africa, therefore, urged the United States to bring its legislation into compliance with the DSB's rulings and recommendations.

1.25. The representative of the United States said that his country regretted that some Members had suggested that the US Administration was not providing sufficient detail. Members, including Mexico, had asked the United States to provide more information and the United States had noted, in its statement made at the present meeting, six bills that had been introduced in the current Congress. Some of these bills would modify Section 211 while others would repeal it outright. The United States noted that all of these bills were publicly available from the time of introduction. In fact, it was possible to track the progress of any particular bill through the legislative process using available online tools. Therefore, any delegation interested in reviewing the specifics of these bills may do so by using the public material made available by the US Congress online. In response to the comments about systemic concerns about the dispute settlement system, the facts simply did not support Members assertions or justify such systemic concerns. As it had explained on several occasions at the DSB, and thus, would not repeat again at the present meeting, the United States did not believe that those concerns were well-founded.

1.26. The representative of Cuba said that in response to the statement made by the United States, Cuba wished to reiterate that the DSU required that status reports on progress in the implementation of the DSB's recommendations and rulings must be submitted in writing. Members should not be referred to seek new information on the alleged progress in the implementation of the DSB's recommendations and rulings on the Internet. On previous occasions, the United States had already mentioned the existence of certain bills before Congress or the Senate. However, in the course of the 12 years of non-compliance, neither of the two US legislative entities had been able to adopt even one bill that would provide a solution to this dispute. It seemed that the United States had serious institutional limitations. The US status reports submitted for more than 12 years demonstrated that none of the bills were adopted. The position of the US Congress regarding the bills concerning Section 211 had been maintained invariably over the years. Some of the bills were favourable to the repeal of Section 211 and others were not. However, none of the bills had moved forward or made progress. They had been

sent back to different committees, but no discussion or vote had taken place thereon. This clearly indicated that this was not an issue of priority for Congress or the US Administration. Regarding the second comment made by the United States that the systemic concerns lacked any merit, Cuba noted that providing security and predictability to the multilateral system, as set out in the DSU, had systemic implications. Thus, the US failure to promptly comply with the DSB's recommendations and rulings had negative systemic implications. Cuba questioned how much more time was needed for compliance and noted that 12 years had already passed with no compliance in this dispute. Cuba underlined that the DSB's recommendations and rulings could not be complied with on a selective and discriminatory manner. Members had to comply with all recommendations and rulings. The United States, or any other Member, could not pick and choose how to comply with the DSB recommendations and rulings. Cuba asked the United States to put forward other arguments in order to demonstrate that there were no systemic implications in this non-compliance situation.

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.138)

1.28. The Chairman drew attention to document WT/DS184/15/Add.138, 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 5 June 2014, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.30. The representative of Japan said that his country thanked the United States for its statement and status report submitted on 5 June 2014. Japan referred to its previous statements in which it had indicated its wish that this issue should be resolved as soon as possible.

1.31. 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.113)

1.32. The Chairman drew attention to document WT/DS160/24/Add.113, 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 5 June 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 its status report and its statement made at the present meeting. The EU referred to its previous statements on its wish to resolve this case as soon as possible.

1.35. 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.76)

1.36. The Chairman drew attention to document WT/DS291/37/Add.76, 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 May 2014. The EU Standing Committee on the food chain and animal health of 24 April 2014 had voted on a draft decision for authorization of a maize[1], as well as on a draft decision for the authorization of a soya[2], both for food and feed uses. The Committee had rendered no opinion on either of the draft decisions. Three more draft decisions concerning authorizations of other soy products[3] had been presented for voting at the Standing Committee of 23 May 2014, which had rendered no opinion. The five draft decisions had been presented to the Appeal Committee for voting on 10 June 2014, which had rendered no opinion. The European Commission would initiate the last stage of the procedure. As had been stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings. The GMO regulatory regime was working normally as evidenced by the approval decisions and other actions towards approval decisions just mentioned. The details on the relevant products were set out in the EU's written statement.

1.38. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. As it had explained at past DSB meetings, the United States had substantial concerns regarding EU measures affecting the approval of biotech products. The United States noted that it was already half way through 2014, and the EU had not approved a single new biotech product yet this year. This was despite the fact that the EU's own food safety authority had issued positive safety assessments for approximately ten pending products. Furthermore, at least six of these biotech products had been considered by the relevant EU regulatory committee and then subsequently by an EU appeals committee. As the EU had described at the present meeting, those actions were ongoing. However, as the EU had also noted, due to opposition from certain EU member States, these EU committees had failed to make decisions. Under the EU's own legislation, the European Commission was required to act without delay to approve biotech products in the event that votes in the regulatory committee and the appeals committee did not result in a decision. But, thus far, the EU Commission had failed to act. The United States urged the EU to address these outstanding biotech product applications. More generally, the United States urged the EU to take steps to address the fact that EU delays, as well as EU member State bans on products approved at the EU-level, were causing substantial restrictions on trade.

1.39. 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.25)

1.40. The Chairman drew attention to document WT/DS371/15/Add.25, 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.

1.41. The representative of Thailand said that, as indicated in its most recent status report, Thailand had no further actions outstanding to implement the DSB's recommendations and rulings in this dispute. In that regard, Thailand had nothing further to report to the DSB at the present meeting. Thailand, however, remained available to continue discussions with the Philippines on a bilateral basis on any other issues of concern to the Philippines. Thailand looked forward to positively continuing any further bilateral discussions with the Philippines in an amicable and satisfactory manner.

[1] T25 maize.
[2] MON87708.
[3] MON87705 soybean, 305423 soybean and BPS-CV127-9 soybean.

1.42. The representative of the Philippines said that his country thanked Thailand for its status report and its statement made at the present meeting. The Philippines disagreed that Thailand had completed all steps necessary to achieve compliance. The Philippines had consistently noted a number of outstanding issues in this dispute. Some concerned the WTO-inconsistency of compliance measures declared by Thailand; others concerned Thai acts and omissions that undid declared compliance measures. This resulted in Thailand's failure to fully comply with the DSB's recommendations and rulings. For as long as this was the situation, in the Philippines' view, there were only two options: (i) to continue surveillance in the DSB; or (ii) to revert to dispute settlement proceedings. In hopes of avoiding a return to dispute settlement, the Philippines was working to complete its assessment of the information provided by Thailand concerning a ruling by the Thai Customs Board of Appeals regarding entries covered by the DSB's recommendations and rulings. As it had stated at the previous DSB meeting, based on its current understanding, the Philippines remained concerned that the BoA ruling was WTO-inconsistent on multiple grounds. Furthermore, the Philippines was assessing whether all bilateral avenues to resolving the other outstanding issues had been fully explored. Pending these assessments, the Philippines reserved all its rights under the DSU.

1.43. The representative of Thailand said that her country took note of the Philippines' comment that it was assessing Thailand's response regarding particular shipments. Thailand looked forward to bilaterally discussing this and other aspects of the Philippines' concerns.

1.44. The DSB took note of the statements.

### F. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.24)

1.45. The Chairman drew attention to document WT/DS404/11/Add.24, 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.

1.46. The representative of the United States said that his country had provided a status report in this dispute on 5 June 2014, in accordance with Article 21.6 of the DSU. As it had noted at past DSB meetings, the US Department of Commerce had published a modification to its procedures in February 2012 in order to implement the DSB's recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. That modification addressed certain findings in this dispute. The United States would continue to consult with interested parties as it worked to address the recommendations and rulings of the DSB.

1.47. The representative of Viet Nam said that his country thanked the United States for its status report and the statement made at the present meeting. Viet Nam recalled that the reasonable period of time mutually agreed by the parties to this dispute had expired one year ago. However, the United States had not taken any action to recalculate and revoke the anti-dumping duty for the second and third administrative review, which was inconsistent with the DSB's recommendation. 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 disciplines and to the benefit of Viet Nam, a developing-country Member.

1.48. The representative of Cuba said that her country, once again, noted that this situation of non-compliance affected a developing-country Member. Cuba, therefore, reiterated the importance of effective compliance, in particular since the interests and vital resources of a developing-country Member were involved. The US status report and the statement by Viet Nam showed that this was yet another situation of non-compliance and that no progress had been made. Cuba urged the United States to take necessary measures in order to comply with its WTO obligations.

1.49. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela shared the concerns expressed by Cuba regarding the need for the United States to fully comply with the DSB's recommendations and rulings.

Venezuela, therefore, strongly urged the United States to take the necessary measures to finally resolve this dispute.

1.50. 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 EU and Japan. He then invited the respective representatives to speak.

2.2. The representative of the European Union said that, once again, the EU requested that the United States stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call to the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports pertaining to this dispute.

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

2.4. The representative of India said that his country thanked the EU and Japan for regularly keeping this issue on the DSB's Agenda. India noted that the United States continued the WTO-inconsistent disbursements to its domestic industry. India agreed with the EU and Japan that the Byrd Amendment should continue to remain subject to the surveillance of the DSB until the United States ceased to administer it. Until such time this matter was resolved, the United States was under an obligation to provide status reports to the DSB.

2.5. The representative of Canada said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Canada agreed with the EU, Japan and others that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

2.6. The representative of Thailand said that his country thanked the EU and Japan for continuing to bring this item before the DSB. Thailand supported the previous speakers' statements and continued to urge the United States to cease the disbursements and fully implement the DSB's rulings and recommendations.

2.7. The representative of Brazil thanked the EU and Japan for keeping this item on the DSB's Agenda. As an original party to the dispute, Brazil considered that disbursements after the repeal of the Byrd Amendment were not in order. As it had expressed in previous DSB meetings, Brazil was of the view that the United States was under obligation to submit status reports in this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue be resolved within the meaning of the DSU and would the United States be released from its obligation to provide status reports.

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 on 8 February 2006, which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Furthermore, the United States recalled that Members, including the EU and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, which was more than six and a half years ago. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter,

as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Indeed, as the United States had expressed at past DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings. The United States had in the past noted that Members speaking under this item had followed the same approach in disputes where they had been the responding party and had not continued to provide status reports where the complaining party had disagreed over compliance. Indeed, despite its intervention at past DSB meetings, as well as at the present meeting, the United States was pleased to note that Canada had, through its actions in the FIT disputes (DS412/DS426), expressed the same systemic view as the United States. In the FIT disputes in which Canada was the responding party, it had taken the view that it was not required to provide a further status report or make an oral statement to the DSB concerning the issue of implementation once it had announced compliance. The United States agreed, and for the very same reason, the United States was not required to provide status reports in relation to this dispute in which the necessary action had been taken many years ago.

2.9. The DSB took note of the statements.

## 3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

### A. Statement by the United States

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

3.2. The representative of the United States said that his country continued to have serious concerns that China had failed to bring its measures into conformity with its WTO obligations. The situation had not changed since the previous month or since the United States had first begun raising this matter at the DSB. In particular, China continued to maintain a ban on foreign suppliers of electronic payment services ("EPS") by imposing a licensing requirement on them while providing no procedures for them to obtain that license. As a result, China's own domestic champion remained the only EPS supplier that could operate in China's domestic market. China's measures could not be reconciled with the DSB's findings that China's WTO obligations included both market access and national treatment commitments concerning Mode 3 for EPS.[4] The United States took note of China's statements in prior DSB meetings that China was working on the necessary regulations to allow for the licensing of foreign EPS suppliers, an implicit acknowledgement by China that it still had steps to take to fulfil the market access and national treatment commitment that were set out in its Schedule. The United States had been engaging with China at many levels to seek the timely issuance of these regulations, but they had still not yet been issued nearly 11 months after the expiry of the reasonable period of time in this dispute. As such, the United States continued to urge China to move forward with these regulations and to allow the licensing of foreign EPS suppliers in China, consistent with its WTO obligations.

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

3.4. The representative of the United States said that, as it had stated before in the DSB, the United States strongly disagreed with China's statement and assertion that it had complied in this dispute. The DSB's rulings and recommendations clearly stated that "China has made a commitment on market access concerning mode 3"[5] and that "China has made a commitment on

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

[5] Idem, at para. 7.575.

national treatment concerning mode 3".[6] Despite this clear language, China 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 the license. As a result, China Union Pay, the only domestic supplier, continued to operate while foreign EPS suppliers could not. China knew, as all did, that it had WTO commitments here. As the United States had said before, China had recognized that it must take action to provide access to foreign EPS suppliers through regulations. The United States urged China to move forward with these regulations and allow the licensing of foreign EPS suppliers in China consistent with China's WTO obligations.

3.5. The representative of China said that it was well established that the dispute settlement process focused on the consistency of specific, identified measures with the relevant provisions of the covered agreements. In this dispute, 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 measure that the Panel had found to be inconsistent with Article XVI:2(a) of the GATS was a 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. Having brought that measure into conformity with the DSB's recommendations and rulings, China had no further implementation obligations with respect of the Panel's market access findings. There were no other measures that were the subject of the DSB's recommendations and rulings under Article XVI of the GATS. The Panel's finding concerning the classification of the services at issue, and its identification of corresponding market access commitments, was merely a precursor to its evaluation of whether the measures identified by the United States were inconsistent with China's obligations under Article XVI. These findings had not given rise to independent compliance obligations, as the United States appeared to suggest. A responding Member fully discharged its compliance obligations when it brought the specific measure into conformity with the covered agreements, as China had done in this dispute.

3.6. The DSB took note of the statements.

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

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

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

4.2. The representative of Antigua and Barbuda said that, as was the case in May, since the previous DSB meeting, the United States had not made any offer to Antigua and Barbuda in the settlement of this dispute. However, the United States had responded to a query from Antigua and Barbuda to remark that the United States had no "appetite" for allocating any material resources to resolve this matter, and that the citizens of Antigua and Barbuda should be satisfied with the offer of a few technical training sessions and other minor accommodations including participation in certain world bodies organized by the United States in which Antigua and Barbuda was, of course, free to participate at any time regardless of this dispute. It was perplexing to Antigua and Barbuda that the United States would take the position that compliance with its international legal obligations was contingent on whether the government had an "appetite" for doing so and the implication that such compliance was optional. Antigua and Barbuda, as well as other Members, would be very interested in any elaboration that the United States may have on its non-compliance and the legal basis behind it. At this stage, Antigua and Barbuda was dismayed that it had not received any settlement offer from the United States that would reflect in any way the nature and scope of the legal and economic violations. Thus far, Antigua and Barbuda had not been compensated for the economic damage tantamount to even one years' worth of the value of the suspension of concessions awarded to Antigua and Barbuda by the DSB, ten years after the ruling. Antigua and Barbuda had been open, proactive, creative, and conciliatory in offering solutions and yet still nothing had been forthcoming from the other side. Further, Antigua and Barbuda was flabbergasted that the United States believed it could ignore the requirements of Article 21.6 of the DSU in this dispute. The facile excuses presented in the past were completely without merit, and the United States, as well as every other Member, knew it. Antigua and Barbuda understood

[6] Idem, at para. 7.678.

that this was all orchestrated to frustrate Antigua and Barbuda to cause it to tire and to slink away into oblivion. On the one hand, Antigua and Barbuda was told to fight and pursue its rights, but on the other, Antigua and Barbuda was being denied the fruits of those rights once fairly earned. No credible reason had been advanced as to why the United States was entitled to flaunt a clear and unambiguous decision rendered by the DSB in a dispute over international trading obligations. This was not Antigua and Barbuda's fight alone, it properly concerned the credibility of the entire trading system where the impression may be conveyed that the large and powerful could dominate the small and weak. Either all Members must honour their obligations or eventually no Member would. Which way would it be?

4.3. The representative of the United States said that his country remained committed to resolving this matter. The United States had met with Antigua at many different levels of the US government, it had made multiple generous settlement offers to Antigua in the context of the GATS process that the United States had initiated to withdraw the gambling concession at issue, and remained committed to a constructive dialogue with Antigua to the present day. Antigua had used rather inflammatory language at the present meeting in characterizing the status of the discussions between the United States and Antigua, as well as in characterizing the positions that each party to the dispute had taken and calling into question whether the United States had made any serious settlement offers. In this context, it was worth noting that the United States had worked for months with Antigua on a settlement package in 2008 and had thought that the parties had reached agreement, only to have Antigua subsequently repudiate it. The United States had also offered Antigua in 2013 a broad range of useful suggestions to settle this dispute, only to have Antigua ignore the US offer for a long period of time before just last month indicating that it was not acceptable. Although the United States understood that Antigua may not have found this most recent proposal acceptable, the United States continued to await a constructive answer or a realistic counter-proposal from Antigua in response. It was clear that the United States had tried repeatedly to resolve this dispute with Antigua, and the United States considered Antigua's suggestions to the contrary to be not based on any facts. Indeed, it was notable that the US efforts to find a resolution through the GATS Article XXI process had succeeded with every Member except Antigua. Antigua had also suggested that the United States should submit status reports with respect to this dispute. The United States did not consider this was necessary or appropriate. The United States had invoked the GATS Article XXI procedure to withdraw this erroneous concession, and that process was the proper forum for further discussion of this matter. Despite the difficulties that the United States had had working things out with Antigua in the past, it continued to hope to find a solution to this dispute. In particular, the United States looked forward to a constructive, positive engagement with Antigua's new government.

4.4. The representative of Dominica, speaking on behalf of OECS countries, said that, as the OECS countries had stated previously, a well-functioning rules-based multilateral trading system that was fair-balanced, equitable and addressed the needs, concerns and interests of all its Members, in particular the smallest and the weakest and the most vulnerable, was critical for the long-term credibility and relevance of the WTO. Such a system was needed by the smallest and the weakest who lacked the economic and political might to advance and defend their interests in what would otherwise be the law of the jungle. For OECS countries, the existence of such a system was one of the key benefits for the WTO Membership. The key element of the multilateral trading system was a fair and equitable function of the dispute settlement mechanism. The Panel and the Appellate Body rulings in favour of Antigua and Barbuda in this dispute concerning measures affecting the cross-border supply of gambling and betting services were, or at least were meant to be, a clear demonstration that the WTO and the multilateral trading system were closer to being fair and equitable. The smallest and the weakest could come away with a positive ruling. The inability thus far for those rulings to be translated into implementation and/or for Antigua and Barbuda to obtain a fair settlement of the case was, however, a mark against the notable achievement of the system, one which needed to be addressed by Members. The OECS countries, therefore, called for a speedy resolution of this long-outstanding dispute in line with the DSB's rulings and recommendations and more importantly in line with the principles, objectives and goals of the WTO and its agreements.

4.5. The representative of Grenada said that his country was somewhat disheartened by the inability to see a resolution of this matter so long after the DSB's ruling. Grenada understood the frustration of Antigua and Barbuda and noted that Antigua and Barbuda's statement sent a message regarding the way in which the DSB's work was being interpreted by small states, and in particular so by all constituencies. Grenada had noted the US response in relation to its willingness

to comply with the decision. In that regard, Grenada urged the United States to double its efforts in trying to bring a smooth resolution to what, in Grenada's view, was a test of the multilateral trading system. He said that, as the Ambassador to the WTO for Grenada, coming back to the work of the DSB for the second time, and not seeing a resolution of this matter, certainly did not auger well for Members' productivity. Grenada believed that Members should make themselves available so that this did not degenerate into acrimonious finger-pointing and exchanges of statements. That would not do any justice to this process. Grenada wished to see this matter resolved, certainly within the next three months. However, Grenada was not in a position to place time-frames on either of the parties to this dispute. This was a matter that continued to separate the work of the WTO from constituency building, certainly in the Caribbean, regarding Members true intentions to improve the well-being of their constituencies. It was worth reciting the warnings from Antigua and Barbuda's statement regarding the test of the trading system that either all Members conformed or none. Grenada supported the statements made by Antigua and Barbuda and by Dominica on behalf of the OECS countries. Grenada wished to see more Members express the need to see the resolution of this matter in the way that it had been intended by the founders of the multilateral trading system. Grenada believed that if this matter was not resolved, it would in fact continue to cause a separation of the small states that worked tirelessly and beyond their capacity constraints to participate actively in the WTO's work. Grenada wished to see this matter promptly resolved.

4.6. The representative of Jamaica said that her country supported the statement made by Antigua and Barbuda. It had been nine years since the DSB had adopted its recommendations in this dispute. For nine years, Members had been waiting for the full implementation of the DSB's ruling in favour of Antigua and Barbuda, and thus the resolution of this dispute. Jamaica remained deeply concerned about the failure to resolve this matter in line with the DSB's recommendations. In this regard, Jamaica recalled its statements made under this Agenda item at previous DSB meetings. As Jamaica had previously indicated, this dispute was of great significance to developing countries and in particular the SVEs, which relied on the credibility of the rules-based multilateral trading system. Jamaica, once again, urged the United States to take the necessary steps to meet its obligations.

4.7. The representative of Nicaragua said that her country, like other delegations, regretted that the lack of progress in this dispute affected the trade of another small economy. The submission of the same status reports did not amount to compliance with the DSB's recommendations and rulings. Members were required to provide the DSB with information on progress in the implementation of the DSB's recommendations and rulings. Nicaragua urged the United States to take steps so as to promptly resolve this matter and remove this item from the DSB's Agenda.

4.8. The representative of India said that his country thanked Antigua and Barbuda for inscribing this item on the Agenda of, and for its statement made at the present meeting. India sympathized with Antigua and Barbuda. The WTO dispute settlement system was conceived as a system where all Members, irrespective of their size and status, could see their rights protected. Therefore, any act of prolonged non-compliance eroded Members trust in the system. This dispute was also a classic example that highlighted the urgent need for attention on the issue of compliance in the context of the DSU negotiations. India urged the two parties, in particular the United States, to urgently resolve this issue in a mutually satisfactory manner.

4.9. The representative of Brazil said that his country thanked Antigua and Barbuda for including this item on the DSB's Agenda. Brazil regretted that a mutually agreed solution had not yet been found. Brazil also believed that the WTO dispute settlement system could only fully accomplish its objectives if it benefited all Members, regardless of their size or level of development. Bearing that in mind, Brazil encouraged both parties to the dispute to engage in effective negotiations with a view to reaching a satisfactory solution to this long-standing dispute, in accordance with the DSB's rulings on this matter.

4.10. The representative of Cuba said that her country supported the statement made by Antigua and Barbuda. A number of delegations had expressed their support for Antigua and Barbuda which, over nine years, had been waiting for the United States to comply with its legal obligations in this dispute. However, Cuba noted that there had been no progress in the resolution of this dispute. Therefore, a vital sector was affected in one of the smallest economies. Cuba urged the United States to promptly comply with its obligations and carry out the necessary actions, including providing compensation to Antigua and Barbuda.

4.11. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Antigua and Barbuda, as well as the statements made by the previous speakers. Venezuela noted the flagrant violation of the DSB's rulings and recommendations by a Member. The failure by the United States to comply with the DSB's recommendations and rulings was a violation of the rules of the multilateral trading system and undermined the credibility of the DSB as the appropriate forum for the resolution of trade disputes. Venezuela regretted that the DSB was seriously affected by the repeated non-compliance by one Member. As it had stated on previous occasions, what was more serious was that the prolonged US non-compliance affected the delivery of services by a developing-country Member and greatly impacted its economy. Venezuela supported Antigua and Barbuda, a member of the ALBA alliance. Venezuela urged the United States to promptly comply.

4.12. The representative of Argentina said that his country thanked Antigua and Barbuda for inscribing this item on the DSB's Agenda. Argentina also thanked Antigua and Barbuda for its statement which kept the DSB abreast of developments in this matter. However, Argentina regretted that, once again, no progress had been made. Argentina, therefore expressed its concern about the systemic implications of protracted failure to comply with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Argentina recalled that Article 21.1 of the DSU was clear in this respect and stated that, "prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Therefore, Argentina urged the parties to this long-standing dispute to redouble their efforts to reach a fair and equitable solution.

4.13. The representative of Trinidad and Tobago said that his country thanked Antigua and Barbuda for its statement and for providing an update under this Agenda item. Trinidad and Tobago wished to refer to its previous statements made under this Agenda item, in particular at the DSB meetings on 26 February, 25 April and 23 May 2014. Trinidad and Tobago recalled the statement made at the Trade Policy Review of the Organisation of Caribbean States (OECS) held on 17 June by H.E. Ambassador Dr. Patrick Antoine of Grenada, in which he had stated that the gaming issue under this Agenda item affected not only Antigua and Barbuda but all 9 members of the OECS. In addition, Ambassador Antoine had stated that Antigua and Barbuda had yet to receive a reasonable offer from the United States in order to arrive at an amicable settlement of this dispute. At the level of CARICOM, which also included OECS members, the Heads of Government had also pledged their full support to Antigua and Barbuda in its endeavours to obtain compliance by the United States with respect to the DSB's ruling in this dispute. As Antigua and Barbuda was one of the smallest economies in the world, Trinidad and Tobago supported the concerns raised in their statement made at the present meeting. Furthermore, as this dispute was more than a decade old, Trinidad and Tobago, once again, urged the United States to seek to engage Antigua and Barbuda in urgent, meaningful, and constructive negotiations in order to arrive at a mutually acceptable settlement.

4.14. The representative of China said that his country thanked Antigua and Barbuda for inscribing this item on the DSB's Agenda. China fully understood the concerns of a vulnerable economy regarding the continued non-compliance in this long-standing dispute. China encouraged the parties to this dispute to engage in consultations, in order to resolve the dispute as soon as possible.

4.15. The representative of South Africa said that her country had, at the present meeting, already stressed its systemic concerns that non-compliance with the DSB's rulings undermined the integrity of the enforcement pillar of the WTO. In addition, South Africa remained seriously concerned that non-compliance perpetuated negative economic consequences for a particular small, developing-country Member. Fundamentally, for South Africa, the ability of smaller and vulnerable economies to access the dispute settlement system, including the right to benefit from prompt compliance with the DSB's recommendations and rulings, was critical to the integrity and legitimacy of the WTO as a whole. Therefore, South Africa urged both parties to this dispute to actively engage so as to reach a mutually satisfactory settlement of this matter.

4.16. The representative of the United States said that, in response to the comments just heard, it bore repeating that the United States remained open to working with Antigua to find a solution to this dispute. The United States agreed that the focus should be on this task instead of pointing

fingers at each other. The United States encouraged Antigua to provide a realistic counter-proposal in the near future.

4.17. The DSB took note of the statements.

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

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

5.1. The Chairman drew attention to the communication from the Russian Federation contained in document WT/DS474/4, and invited the representative the Russian Federation to speak.

5.2. The representative of the Russian Federation said that her country requested the establishment of a panel to examine this matter, with standard terms of reference, as provided for in Article 7.1 of the DSU. This request followed Russia's efforts to find a solution with the EU over an extended period, including through formal WTO consultations that had been held by the Russian Federation with the EU in February and April 2014. Unfortunately, the matter had not been resolved during the consultations. Certain anti-dumping measures and the cost adjustment methodologies were still in place and continued to severely hamper trade. In addition to its negative economic impact, the cost adjustment methodology used by the EU also raised very important systemic concerns. The Russian Federation considered that the measures in question had been adopted and were applied by the EU in violation of a number of WTO Agreements. The Russian Federation continued to await information from the EU about new developments but, at the present meeting, had no choice but to request the establishment of a WTO panel to rule on this matter.

5.3. The representative of the European Union said that the EU took note of the request, but considered the allegations unfounded. The WTO rules on anti-dumping aimed to ensure fair trade. The EU had implemented and applied those rules, including those on input cost adjustments, in full compliance with the WTO Agreements. The EU thus opposed the establishment of a panel. The EU wished to make a few comments on the substantive points made by Russia. The price for gas on the domestic Russian market, which was the principal cost element in certain industries, was found to be distorted in a number of cases. The anti-dumping measures were not directed against low-priced imports where those low prices were the result of true comparative or natural advantages. However, the low gas prices in Russia had been artificially created by government policies and were not a natural advantage. Finally, the basic AD Regulation and practice did not discriminate against Russia. This policy was applied consistently to deal with input cost distortions.

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

## 6 CHINA – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES

### A. Report of the Panel (WT/DS440/R and WT/DS440/R/Add.1)

6.1. The Chairman recalled that at its meeting on 23 October 2012, the DSB had established a Panel to examine the complaint by the United States pertaining to this dispute. The Report of the Panel, contained in document WT/DS440/R and Add.1, had been circulated on 23 May 2014 as an unrestricted document. He noted that the Panel Report was before the DSB for adoption at the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

6.2. The representative of the United States said that his country was pleased to request the DSB to adopt the Report of the Panel in this dispute. The Report was important and of a high quality, and the United States thanked the Panel, and the WTO Secretariat assisting them, for their work in producing the Report. This dispute involved China's imposition of significant levels of anti-dumping (AD) and countervailing duties (CVD) on certain automobiles from the United States. After an extensive examination, the Panel had correctly found that China's AD and CVD measures had serious substantive and procedural deficiencies under WTO rules. The Report was important in at least three respects. First, the Report was important both for US exporters and Chinese consumers

of US automobiles, which were faced with AD duties ranging from 2% to 21.5% and CVD duties ranging from 6.2% to 12.9%. China was the second largest export market in the world for US-made autos, and the significant duties that China had imposed on US autos unjustifiably restricted US exports to this important market. The United States noted that these duties did not only affect American producers, but also Japanese and German producers that manufactured vehicles in the United States for export to China. Second, this dispute was important because it was one of a series of disputes involving what appeared to be a systemic misuse by China of AD and CVD measures. In November 2012, and again in September 2013, the DSB had adopted very similar findings with regard to China's AD and CVD measures on a high-tech US steel product and on chicken broiler products, respectively. This was the third panel to have considered US claims that China's AD and CVD measures on US products involved pervasive breaches of essentially the same WTO obligations. The United States also noted that other Members were pursuing similar claims involving other AD and CVD measures adopted by China. The United States continued to hope that China would respond to this series of disputes by making the systemic changes necessary to begin operating its AD and CVD regimes in accordance with WTO rules. Third, this Report also had important systemic findings that would benefit all Members. For example, the Report confirmed that WTO rules required that determinations of dumping and subsidization must be based on an objective examination, and must be supported by facts and evidence. The Report confirmed the importance of transparency, and the obligation of investigating authorities to disclose essential facts used to determine dumping margins. The Report also confirmed that authorities must ensure that interested parties were provided non-confidential summaries of confidential information, crucial for the meaningful defence of their interests. The Report underscored that an analysis of price effects must be based on positive evidence and involve an objective examination, while a determination that imports caused injury to the domestic industry must be supported by facts and evidence on the administrative record. The United States also noted – as was not surprising in a report covering such a broad range of issues – that the United States did not agree with certain limited findings that had been made by the Panel. For example, the Panel had not upheld the US claim that China had skewed the injury analysis by excluding domestic producers that did not support the investigation. But the Appellate Body had previously confirmed that an injury analysis must not be based on a biased subset of the domestic industry. The United States understood that this Panel finding related only to the unique facts of this dispute. The Panel also had not found an inconsistency in China's failure to disclose essential facts and provide public notice regarding the AD and CVD duty rates for unknown US exporters. Reconciling this finding with prior panel and Appellate Body reports was difficult. Again, the United States understood that this finding was tied to the unique facts of the dispute. But these claims had not been at the core of the pervasive procedural and substantive flaws found by the Panel. For the reasons it had set out at the present meeting, the United States was pleased to propose that the DSB adopt this important Report. As had been noted, the United States hoped that China would begin to address its systemic problems so as to ensure that all of its AD and CVD investigations comported with its WTO obligations.

6.3. The representative of China said that his country thanked the Panel and the Secretariat for their work in this dispute, as well as the third parties for their participation in the Panel's proceedings. China welcomed that the Panel supported China's claims regarding certain issues in this dispute. In particular, the Panel had agreed with all of China's defences on the issue of MOFCOM's domestic industry definition. The Panel had also endorsed MOFCOM's investigative procedures as striking an appropriate balance between the rights of parties and administrative efficiency, and for its neutrality and openness. With respect to non-confidential summary, the Panel had agreed with China's argument that the percentage changes without absolute values could be sufficient to satisfy the non-confidential summary requirements. Regarding all other rates, the Panel had agreed with China that MOFCOM had undertaken adequate efforts to reach out to unknown US exporters. China thought that it was clear that the issue where China prevailed went directly to the systemic and procedural aspects of the AD/CVD processes. China regretted that the Panel had concluded that the measures at issue were inconsistent with the AD and SCM Agreements. China understood that the Panel Report would be adopted at the present meeting. China wished to notify the DSB that the measures at issue had been terminated on 15 December 2013, and that MOFCOM had issued an announcement terminating these measures on the same date. Thus, China did not need to take any further action to implement the recommendations and rulings in this dispute. China wished to also respond to the US assertion of the so-called systemic misuse by China of AD and CVD measures. China totally disagreed with the United States. First, such reasoning ignored the fact that each WTO dispute called for an independent assessment of the particular facts of the dispute. Indeed, there was relevant WTO jurisprudence supporting the notion that each WTO case must be viewed on its own merits, both

factually and legally, and WTO Members must be assumed to be acting in "good faith" in administering their measures. Second, if the US logic stood, China believed that there were lots of systemic problems in the US trade remedy practices. The United States, not China, was the Member that had been challenged at the WTO in 47 out of the 102 disputes citing the AD Agreement, and in 32 out of the 102 disputes citing the SCM Agreement. For example, as all Members knew, the United States had consistently been targeted by WTO Members for its "zeroing" practices and had been found to be inconsistent with WTO rules. WTO Members had been forced to initiate numerous disputes against the United States and, in fact, China had just initiated yet another zeroing dispute in DS471. Another example was that the Appellate Body, in DS379, had found that the United States had failed to identify public bodies in a WTO-consistent manner, and had failed to properly address the double remedy issue. Several other pending disputes also involved such issues. Third, China was by far a more frequent target than a user of AD/CVD measures. As a developing-country Member, although China's investigation authorities were quite young, China had always endeavoured to conduct trade remedy investigations in a manner consistent with WTO rules. Where China had been found to be inconsistent in certain disputes, it had fully implemented the DSB's rulings and recommendations by the end of reasonable period of time.

6.4. The representative of the United States said that his country took note of China's statement that it had terminated the AD and CVD measures on automobiles from the United States. With the withdrawal of the AD and CVD duties on US autos, it would appear that no more action was necessary for China in respect of the findings and recommendations in the Panel Report. The United States was pleased with this development and would continue to monitor any duties applied to US autos exports. However, the United States reiterated its view that China would benefit from taking broader action – beyond mere termination of the AD and CVD measures – to address the systemic problems that had been highlighted by the series of dispute settlement reports that had found that numerous AD and CVD measures imposed by China had breached its WTO obligations. In multiple disputes, including "China - GOES" and "China - Broiler Products", the Panel and Appellate Body had found China's AD and CVD measures inconsistent with its WTO obligations for many of the same reasons as the Panel Report being adopted at the present meeting. Instead of acknowledging this, China had attempted to change the subject by raising disputes related to US AD measures. These were not the measures that were at issue in the Panel Report being adopted at the present meeting. Instead of raising these unrelated issues, the United States would encourage China to address the systemic problems with its AD and CVD regime.

6.5. The DSB took note of the statements and adopted the Panel Report contained in WT/DS440/R and Add.1.

## 7 EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

### A. Report of the Appellate Body (WT/DS400/AB/R) and Report of the Panel (WT/DS400/R and WT/DS400/R/Add.1)

### B. Report of the Appellate Body (WT/DS401/AB/R) and Report of the Panel (WT/DS401/R and WT/DS401/R/Add.1)

7.1. The Chairman proposed that the two sub-items be considered together. He then drew attention to the communication from the Appellate Body contained in documents WT/DS400/12 – WT/DS401/13, transmitting the Appellate Body Reports, "European Communities – Measures Prohibiting the Importation and Marketing of Seal Products", which had been circulated on 22 May 2014 in documents WT/DS400/AB/R – WT/DS401/AB/R. He reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that, "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

7.2. The representative of Canada said that his country thanked the Appellate Body, the members of the Panel, and the WTO Secretariat for their work over the past 18 months. Canada appreciated

their efforts in assisting the parties to achieve a resolution to this dispute. Canada also thanked Norway for its valuable cooperation as a co-complainant in this dispute. Like Canada, Norway had been detrimentally affected by this unjust ban. For years, Canada had raised concerns about the EU's ban on seal products. Canada's position had always been that its eastern and northern seal harvests were humane, sustainable, and well-regulated activities that provided an important source of food and income for coastal and Inuit communities. Canada was therefore pleased that the Appellate Body and Panel Reports had confirmed Canada's long-standing position that the EU's ban on imports of Canadian seal products was inconsistent with the EU's international trade obligations. In fact, the EU seal regime violated the most fundamental principles of these obligations, the most-favoured-nation and national treatment obligations of the GATT 1994. It was nonetheless very disappointing to Canada that the Appellate Body and the Panel had concluded, on the basis of a very broad reading of Article XX(a) of the GATT, that this regime was necessary to protect public morals. The Appellate Body's reasoning on public morals was of concern for several reasons. First, the Appellate Body had opted to ignore the presence of the term "to protect", when used in relation to "public morals" under Article XX(a), despite previous jurisprudence that had indicated that this word reflected a requirement on a responding Member to identify the existence of a risk in order to successfully invoke Article XX(b), a provision that was textually and conceptually very similar to Article XX(a). The Appellate Body's interpretive approach implied that a WTO Member that chose to invoke public morals to defend a violation of its WTO obligations was not required to demonstrate that there was a genuine risk to the public morals it wished to protect.

7.3. Second, the Appellate Body appeared to have concluded that there was also no requirement on a responding Member to identify the specific content of the public morals standard at issue when invoking the exception to justify a measure. This omission broadened the scope of the exception well beyond what Canada believed WTO Members could reasonably have expected. Finally, the Appellate Body had concluded that there was no need for consistency in the levels of protection chosen by the responding Member when public morals, something that was highly subjective and open to interpretation, were being used to justify a trade-restrictive measure. In Canada's view, when the public morals exception was invoked on animal welfare grounds, particularly with respect to the welfare of animals located outside the jurisdiction of the responding Member, it was very relevant for a panel to consider the animal welfare standards applied by that Member in similar situations to establish the relationship between the alleged public moral and the relevant standard for animal welfare. Given that the EU had argued that animal welfare was a strong public morals issue for its citizens, it would have been both appropriate and necessary for the Panel to consider animal welfare standards applied in similar situations in the EU to assess whether the public morality defense was reasonably and credibly invoked. The Panel's failure to do so was a major flaw in its analysis. For these reasons, Canada was disappointed that the Appellate Body had chosen to uphold the Panel's specific findings on public morality and animal welfare. This was all the more significant given that the EU seal regime did little or nothing to prevent seal products derived from seals killed inhumanely from being put on the EU market or to address the so-called EU public concerns about seal welfare. Indeed, the Appellate Body had found that the EU had not shown how the manner in which the EU seal regime treated seal products derived from Indigenous hunts, as compared to seal products derived from "commercial" hunts, could be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. It had also found considerable ambiguity in the "subsistence" and "partial use" criteria of the Indigenous Communities exemption, thus indirectly confirming what Canada had always maintained, that seal products derived from what in fact should be properly characterized as "commercial" hunts had unfettered access to the EU market under this exemption.

7.4. As a result of the Appellate Body's findings, Members were free to apply a more lenient level of protection for animal welfare domestically, while imposing an impossibly stringent level of protection for products derived from animals harvested in other jurisdictions. This applied even when, from a moral standpoint, the situations were very similar, provided that the animals in question were different. Therefore, Canada considered that the consequences of the Appellate Body's interpretive reasoning should be of great concern to all Members. As a result of long-term and well-funded campaigns against Canada's seal harvest, including the consistent repetition of myths and misinformation about that harvest, EU public decision-makers had instituted this ban. Members should consider carefully the potential ramifications for the world trade system where interest group campaigns created the appearance of a "moral concern" that incited legislators to act in response to political pressure. Canada had already seen this in California, where the import of foie gras had been banned. Certain interest groups had also opposed genetically modified

organisms based, in part, on purported ethical grounds. Similarly, such groups condemned the production methods of other crops, like palm oil, or questionable labour practices in the fisheries sector in some parts of the world, notably, shrimp in South East Asia. To be clear, Canada understood that WTO rules must accord a certain degree of deference to Members in choosing how to address their policy objectives. However, policy objectives related to public morals, a highly subjective concept, should be anchored in a genuine and demonstrable concern about a clearly identifiable risk to the public morality of the citizens of the Member invoking this exception. On the other hand, the Appellate Body's findings in relation to this exception had set a negative precedent that could lead to an expanded application well beyond the intent of the framers. That said, the Appellate Body nonetheless had found that the EU seal regime had been applied in a manner that constituted arbitrary and unjustifiable discrimination and, for that reason, the EU would need to take compliance action as a result of the adoption of the Report at the present meeting. Canada was prepared to work with the EU and Norway on compliance and looked forward to a fruitful discussion in that respect. Finally, on a procedural matter that Canada knew was important to some Members, Canada acknowledged that the Appellate Body Reports in this dispute had been circulated after the 90-day period provided for in Article 17.5 of the DSU. Canada noted, however, that the principal cause of the delay in the circulation had been a request from the parties themselves to delay the oral hearing for logistical reasons. The Division had set this reason out in a letter sent to the parties on 24 March 2014. The DSB had had numerous occasions, both formal and informal, to discuss how to deal with the strict constraints imposed by Article 17.5 of the DSU. Canada continued to consider that it was important that every effort be made to circulate reports within the timelines prescribed by the DSU. But Canada also acknowledged that there were legitimate circumstances in which this was simply not possible. That this was the case in this dispute was only a reminder, once again, of the need for Members to redouble efforts to reconcile the competing pressures of the strict legal constraints imposed by the DSU with the increasing complexity of disputes brought before the Appellate Body.

7.5. The representative of Norway said that his country thanked the members of the Appellate Body division, the members of the Panel and the Secretariat staff for the considerable time and effort that they had devoted to the resolution of this dispute. In addition, Norway thanked its co-complainant, Canada, for its very useful cooperation throughout the process. Norway welcomed the fact that the Appellate Body had agreed with the Panel that the EU seal regime was discriminatory and not justifiable under Article XX of the GATT 1994, and thus incompatible with the EU's WTO obligations. Norway was also pleased that the Appellate Body had reversed the intermediate legal findings that the Panel had made under the chapeau of Article XX, and that it had gone on to complete the analysis based on the correct legal test. Importantly, the Appellate Body had found that the EU had not demonstrated that the discriminatory aspects of the EU seal regime could be reconciled with, or indeed, was even related to, the policy objective of addressing the EU public moral concern regarding seal welfare. At the same time, Norway was disappointed that the Appellate Body had not reversed the Panel's conclusion under subparagraph (a) of Article XX of the GATT 1994. In Norway's view, the Panel had been mistaken in concluding that the EU seal regime contributed to the specific public moral concerns of the EU. The EU had borne the burden of proof on this point. However, the evidence that had been submitted by the EU, as Norway saw it, did not substantiate the existence of such moral concerns in the EU public. Moreover, there were alternative measures reasonably available to the EU that, in Norway's view, would be more effective in contributing to the objective. Norway believed that when all relevant factors were weighed and balanced, as required by the Appellate Body in the case law, the EU seal regime could not be considered "necessary" to protect the specific public moral concerns of the EU. Finally, Norway was surprised that the Appellate Body had reversed the Panel's finding, and had found that the EU seal regime was not a technical regulation as set out in Annex 1 of the TBT Agreement. For Norway, this dispute had not just been about seal products. More importantly, it had been about Norway's right to harvest in a sustainable manner from its living marine resources, and to market the products from hunting and fishing. Seals were a top predator of fish and the stock of seals was abundant in the marine ecosystem. It required control in the interest of protecting seals from over-population; fish from depletion; and, hence, human interest in fish stocks. Norway harvested marine species at all levels of the ecosystem, and seals were harvested subject to rigorous animal welfare regulations as well as quotas set with the best available scientific evidence, using an ecosystem-based approach. Norway had brought this dispute to seek to avoid that the EU seal regime set a precedent for trade in products from resources that were harvested in a responsible and sustainable manner. Norway looked forward to the EU's swift compliance with the recommendations and rulings in the Reports.

7.6. The representative of the European Union said that the EU thanked the members of the Appellate Body, the panelists, and the Secretariat for their work in this case. The EU acknowledged the time and efforts dedicated to this dispute. The EU was pleased with the Appellate review insofar as it had confirmed that the ban on the importation and marketing of seal products was justified on moral grounds relating to animal welfare concerns on the killing of seals. The EU also welcomed the further guidance provided by the Appellate Body on the characterization of measures as a technical regulation and the reversal of the Panel's findings in that respect. The EU regretted that the Appellate Body had found the exception for hunts conducted by Inuit and other indigenous communities (IC exception) not to be designed and applied in a manner that met the requirements of the chapeau of Article XX of the GATT 1994. The EU remained committed to respecting and protecting the interests of all Inuit people and other indigenous communities independent of where they lived. However, the EU noted that the Appellate Body had reached its findings on a legal standard and reasoning which was different from the one adopted by the Panel and which was useful in providing further guidance for the next steps. Pursuant to Article 21.3 of the DSU, the EU had an obligation to inform the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings within 30 days after the date of adoption of the reports. As a DSB meeting was not scheduled during that time period, a special DSB meeting should normally be convened for that purpose.[7] To avoid the need to hold a special DSB meeting only for that purpose, the EU planned to inform the DSB by means of a written communication within the prescribed 30 days, and then to reconfirm the information on implementation at the next regular DSB meeting scheduled for 22 July 2014, unless a special DSB meeting was convened in the meantime.

7.7. The representative of the United States said that this dispute and the Reports being adopted at the present meeting raised a number of important systemic issues that should be of interest to Members. The United States was a third party in this dispute and appreciated some of the challenges faced by the Panel and the Appellate Body in producing their Reports. Many of the issues involved and the claims and arguments of the parties had been quite complex and nuanced, and the United States appreciated the hard work by both the panel and the Appellate Body in grappling with those issues. One key issue that had been addressed in the dispute was whether the measure at issue was a technical regulation. The Appellate Body's finding that the measure at issue was not a technical regulation was welcomed and fully supported by the text of the TBT Agreement. The measure did not lay down product characteristics or a process or a production method that was related to product characteristics. Therefore, the measure did not come within the first sentence of the definition of a technical regulation as set out in Annex 1 of the TBT Agreement. The measure concerned the characteristics of the type of hunt involved, not the characteristics of the product itself. Two identical final products with exactly the same characteristics would be treated differently based not on those characteristics, but on the fact that one product involved a certain type of hunt while the other involved a different type. Thus, the United States welcomed the Appellate Body’s analysis and its reversal of the Panel’s finding. With respect to the non-discrimination claims under Articles I and III of the GATT 1994, the findings by the Panel and Appellate Body were more troubling. In particular, the United States was not fully persuaded by the Appellate Body's finding that the national treatment provisions of the TBT Agreement were to be interpreted differently from the national treatment provisions of the GATT 1994 in light of the fact that these two provisions contained identical wording. These findings appeared to ensure that a measure could be found consistent with Article 2.1 of the TBT Agreement, yet inconsistent with the identically worded Article III:4 of the GATT 1994. Indeed, these findings raised the very real possibility, as had been demonstrated in this dispute, that Article 2.1 of the TBT Agreement would become superfluous, and the legal approach developed in the recent TBT disputes would become just an historical footnote. The Appellate Body Report sought to respond to this concern in part by stating that "the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994". However, there had been such examples that were provided during the appeal. One such example was provided by the TBT Agreement text itself and that was – the preamble referred to "measures necessary to ensure the quality of" a Member's exports. There was no parallel provision in Article XX of the GATT 1994. It was also difficult to understand how a "detrimental impact" on imports from one Member compared to another Member could by itself be sufficient to find that those imports were being treated less favourably. One would expect that any measure would affect

[7] Footnote 11 of the DSU.

some products differently from others. Yet that different treatment would not amount to discrimination unless one also looked at the reason why there was such a difference in treatment.

7.8. On the other hand, with respect to the analysis under Article XX(a) of the GATT 1994, the Panel and Appellate Body had carefully considered and addressed a number of difficult issues involving what was a public moral for purposes of that provision and what it meant to protect a public moral. In that analysis, the Panel and the Appellate Body had considered and had declined to accept a number of arguments that would have significantly departed from the text of Article XX(a). Members needed to have the ability to delineate their approach to public morals in accordance with the particular context of their own domestic system. The findings that were being adopted at the present meeting affirmed that ability and should be generally welcomed by Members. Finally, the United States said it would like to comment on an important systemic issue that had been raised in the context of this appeal and something that Canada had also raised. This had been raised not by the Report itself, but by the Appellate Body's 24 March 2014 letter to the DSB Chair, in which it indicated that it "will not be able to circulate its reports within the 90-day timeframe provided for in the last sentence of Article 17.5 of the DSU". While the 90-day deadline in the DSU text was categorical, Members had an understanding of the workload challenges faced by the Appellate Body, and had been willing to agree to receive a report after this deadline and provided in writing their commitment to treat the report as if it had been circulated within the 90-day deadline when they had been meaningfully consulted with by the Division handling a particular appeal. Equally important, such consultation and agreement, when noted in the Appellate Body's communication and by the parties, provided transparency to the DSB in relation to the observance of the rules in the DSU. For those reasons, the Appellate Body had regularly consulted with and obtained the agreement of Members to issue reports after 90 days between 1997 and 2011. The United States had been taking a close look at the facts earlier that week and had found that during those years, the Appellate Body had obtained the parties agreement in 14 consecutive disputes – the first 14 disputes where the circulation of the report had exceeded 90 days from the date of appeal. Unfortunately, it was the US understanding that the Division hearing this appeal had deviated from this well-established practice. It was regrettable that the agreement of the parties to circulate its reports after the 90-day deadline had not been obtained and that transparency to the DSB had not been provided. As Canada had mentioned, part of the rationale for delaying the Report might have been because the parties had suggested changing the date of the hearing, but this highlighted that the parties would have readily agreed to the issuance of the Report after the deadline. This deviation from past practice was extremely troubling, and the United States was concerned that it may repeat itself in the near future, in particular in light of the fact that the Appellate Body may face a higher than normal workload in the year to come. The United States hoped that the Appellate Body and Members could engage in a dialogue on this issue in the weeks ahead to come to a solution that respected the mandatory deadline set out in the text of the DSU and provided the DSB with transparency with respect to the agreement of the parties and timing of the issuance of Appellate Body reports while at the same time ensuring that the Appellate Body had the time to produce high-quality reports. In that regard, the United States believed that the well-established practice until 2011 had served WTO Members and the Appellate Body well.

7.9. The representative of Guatemala said that his country thanked the Panel, the Appellate Body, the WTO Secretariat and the AB Secretariat for the Reports that were being considered at the present meeting. Guatemala wished to comment on the fact that the Appellate Body Report had been circulated outside the 90-day time-frame. As Guatemala had stated on previous occasions, it was clear that Article 17.5 of the DSU did not allow for exceptions. This was a mandatory provision that needed to be complied with. Guatemala was also aware of the fact that, on some occasions, the Appellate Body would need additional time, due to various reasons, in order to issue its reports. Therefore, Guatemala believed that consultations between the parties and the Appellate Body, as well as the need to ensure transparency on extending of time-frames, were crucial. As far as Guatemala was concerned, consultation with the parties to the dispute did not mean obtaining agreement of the parties in order to extend the time-frame of 90 days. Furthermore, Article 17.14 was clear – the Appellate Body reports would be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decided by consensus not to do so. In light of this provision, the lack of agreement of the parties to the dispute as to whether or not to extend the 90-day time-frame in Article 17.5 of the DSU would not affect in any way or prevent the adoption of the report, unless the DSB decided by consensus not to adopt it.

7.10. The representative of Norway said that with regard to the 90-day time-frame, his country supported Canada's statement on this matter. Norway wished to also address the issue of transparency raised by the United States. Norway agreed that transparency was important in case the Appellate Body was not in a position to circulate a report within the 90-day time-frame stipulated in Article 17.5 of the DSU. In this dispute, Norway noted that the Appellate Body in its Report had provided the reasons why the Report under consideration had been circulated outside the 90-day time-frame. In addition, two communications regarding this matter had been circulated to Members during the appeal process.

7.11. The representative of Japan said that his country supported the points raised by the United States with regard to the systemic issue related to the 90-day time-frame. Japan reiterated the importance of consultations between the Appellate Body and Members under such circumstances in order to produce high-quality reports.

7.12. The representative of the European Union said that the EU largely agreed with what Guatemala had just stated. The EU did not see any link between Articles 17.5 and 17.14 of the DSU.

7.13. The representative of the United States said that his country thanked the other Members that had weighed in on this issue. The statements from Guatemala and the EU, as well as statements that the United States had heard from Japan, Norway and Canada illustrated that this was an issue that was of importance to Members from a systemic stand point. It was important that as Members were going to be potentially dealing with a series of Appellate Body reports coming out in the upcoming year, it was important to find time to engage in a fulsome discussion on this issue so that they could discuss the systemic implications and find the best way forward that promoted transparency as well as the other objectives that the United States had mentioned in its statement.

7.14. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS400/AB/R and the Panel Report contained in WT/DS400/R and Add.1, as modified by the Appellate Body Report; and the DSB adopted the Appellate Body Report contained in WT/DS401/AB/R and the Panel Report contained in WT/DS401/R and Add.1, as modified by the Appellate Body Report.

## 8 CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR/CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

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

8.1. The representative of Japan said that his country was compelled to make a statement on this matter under "Other Business", due to the fact that Canada had sent its notification (WT/DS412/19) to declare its compliance on 5 June 2014, and that Japan was unable to inscribe this matter on the Agenda of the present meeting. Canada had failed to place this matter on the Agenda and to report to the DSB on the status of the implementation in this dispute. As a result, Japan had only an opportunity to express its views under "Other business". Japan deeply regretted Canada's decision not to submit its status report on this matter, since the dispute had not yet been resolved. Japan could not agree with the content of Canada's notification. In fact, Japan found it difficult to understand how Canada could claim the completion of its compliance, since there had been no additional action taken by Canada since the last DSB meeting or even after Japan had agreed to modify the reasonable period of time on 24 March 2014. Japan had not received any formal explanations from Canada on its sudden reversal of position. In light of such a disappointing development, Japan urged Canada to explain how Canada could claim it had complied in the absence of any actions of replacing the domestic content requirements in the FIT Program. Japan wished to express its systemic concern that Canada's declaration of compliance with no action would undermine the confidence in the dispute settlement system. In order to make sure that Canada had fully complied with the DSB's recommendations and rulings, Japan was considering all available steps and reserved any rights under the DSU.

8.2. The representative of the European Union said that the EU wished to raise, under "Other Business", a procedural point in relation to the surveillance by the DSB of implementation actions in the context of the DS426 dispute. Being an "Other Business" item, the EU would try its best not

to comment on substantive points relating to that dispute, although it was very tempted to do so. The EU noted with surprise the fact that Canada had neither submitted a status report nor inscribed an item on the Agenda of the present meeting. Instead, Canada had sent a written communication to the EU, dated Thursday 5 June, 2014, the day on which the reasonable period of time had expired, stating that "Canada considers that it has complied with the recommendations and rulings of the DSB in these disputes". Canada supported this statement by reference to actions taken by the Ontario authorities in June and August 2013, about one year ago. Without prejudice to the assessment of the actions of the Ontario authorities, the EU was disappointed that Canada had not chosen to place this item on the Agenda of the present meeting. That would have enabled Canada to inform all Members transparently about its position and, importantly, to allow for a discussion in full respect of the multilateral function of the DSB to keep under surveillance compliance matters. This was irrespective of whether Canada considered to have complied or not with the DSB's recommendations and rulings in this case. The EU recalled that, at its previous meeting, the DSB had agreed, and Canada had not opposed, to revert to the issue of Canada's compliance in the DS426 dispute. Moreover, the late submission of Canada's communication had made it difficult for the EU to request the addition of an item concerning DS426 on the Agenda of the present meeting. The letter with Canada's formal assertion that such actions achieved compliance with the DSB's recommendations and rulings had been sent late on 5 June 2014 and could be considered by the EU only on 6 June, the date on which the Agenda closed. It was not clear to the EU why Canada had chosen to wait until the last moment of the reasonable period of time to present its views, considering that the actions referred to in Canada's letter had taken place in June and August 2013, and had already been mentioned in all of Canada's status reports during the reasonable period of time. The EU noted that the DSB was a key element of the multilateral trading system. Discussing matters regarding the compliance by Members with its recommendations and rulings was one of the DSB's essential functions. Given Canada's apparent unwillingness to contribute to the fulfilment of the DSB's role in this case, the EU had already announced that it would request that an item on DS426 be included on the Agenda of the next DSB meeting. That should give Canada an opportunity to explain why it had declared full compliance, while explicitly admitting that the legislative procedure that had been initiated to bring about compliance was aborted due to political circumstances, leaving the core local content provisions of the legislation in force. That should furthermore give Canada an opportunity to clarify whether its most recent decisions regarding this dispute were the model under which Canada wished to do business in the future in the DSB. If yes, Canada was taking a very dangerous step towards undermining the credibility of the whole system.

8.3. The representative of Canada said that his country was surprised to hear Japan and the EU suggest that Canada was required to provide a status report in the "Canada - FIT" disputes at the present DSB meeting. As Canada had indicated at the May DSB meeting when the issue of reverting to DS412 and DS426 at this meeting had been raised, the expiry of the reasonable period of time in these disputes was on 5 June 2014, prior to the circulation of the Agenda for the present meeting. At that time, Canada had indicated that if there was compliance prior to the June meeting, there would be no need to revert to the item. Other delegations had agreed with Canada that a status report would not be required if there was a clear and categorical notification of that compliance to all Members. On 5 June, the expiry date of the reasonable period of time, Canada had sent a written communication to Japan and the EU setting out its notification of compliance within the reasonable period of time. That written communication had also been provided to the Chair of the DSB for circulation to all Members, which had been done in document WT/DS/412/19 – WT/DS/426/19. As a result, there was no obligation on Canada to provide a status report at the present meeting, for which the Agenda had been circulated on 6 June 2014. This was consistent with the provisions of the DSU and with the practice of the DSB in pre-authorized retaliation circumstances. Canada did not agree with the points made by Japan and the EU at the present meeting. With respect to the comments by the EU and Japan about the content of the 5 June 2014 communication from Canada, Canada did not intend to enter into a substantive discussion of the matter under the "Other Business" item.

8.4. The DSB took note of the statements.

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

9.1. The Chairman, speaking under "Other Business", said that, as he had announced at the outset of the present meeting, he wished to make a statement concerning the process for appointment of one Appellate Body member. As delegations were aware, thus far two new

candidates had been nominated for the vacant position in the Appellate Body. The nominations had been made by Kenya and Mauritius. He recalled that candidates from Cameroon and Egypt, nominated in 2013, would remain under consideration in the current selection process. He further recalled that, pursuant to the DSB decision contained in document WT/DSB/63, a Selection Committee had been established to carry out the selection process. As delegations were aware, the Selection Committee was composed of the Chairs of the General Council, the Goods Council, the Services Council and the TRIPS Council, as well as of the Director-General and the Chair of the DSB. He also recalled that the DSB had agreed to request the Selection Committee to conduct interviews with all candidates and to hear the views of delegations in July and September 2014, in order to make its recommendation by no later than 15 September, so that the DSB could take a decision on appointment at its regular meeting on 26 September 2014. After the expiry of the 30 June deadline, he said that he would be in contact with the Selection Committee to confirm the process that would be followed and to agree on a time-table for interviews, as well as to set aside time to hear the views of delegations on the candidates before making a final recommendation. As soon as the time-table for the process was agreed, he would send a fax to delegations updating them on the process and he would ask the Secretariat to make the necessary arrangements to set up appointments for the Selection Committee to hear the views of delegations. As in the past, delegations were also free to make their views known to the Selection Committee in writing. Any such written communications should be sent to the Chairman of the DSB in care of the Council/TNC Division. The deadline for written comments would be communicated to delegations by fax shortly after 30 June 2014. Consistent with past practice, delegations wishing to meet with the candidates were invited to contact directly the Missions of the respective nominating Members in order to make appropriate arrangements.

9.2. The DSB took note of the statement.

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