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Dispute Settlement Body
19 June 2015

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 19 JUNE 2015

Chairman: Mr. Harald Neple (Norway)

Prior to the adoption of the Agenda, the item related to Viet Nam's statement with regard to the dispute: "United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam" was withdrawn from the Agenda at the request of Viet Nam.

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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.150)

B. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.150)

C. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.125)

D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.88)

E. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.36)

F. European Communities – Measures prohibiting the importation and marketing of seal products: Status report by the European Union (WT/DS400/16/Add.3 – WT/DS401/17/Add.3)

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". Under this Agenda item, he 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. He further reminded 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.150)

1.2. The Chairman drew attention to document WT/DS176/11/Add.150, 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 8 June 2015, in accordance with Article 21.6 of the DSU. Several bills introduced in the current US Congress would repeal Section 211. Other previously introduced legislation would modify Section 211. The US Administration would continue to work on solutions to implement the DSB's recommendations and rulings and resolve this matter with the European Union.

1.4. The representative of European Union said that the EU thanked the United States for its most recent status report and 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 the Appellate Body had circulated its Report in this dispute in January 2002. The Report had concluded that Section 211(a)(2) and Section 211(b) violated the national and most-favoured-nation treatment obligations under the TRIPS Agreement and the Paris Convention. More specifically, the Appellate Body had found that: (i) as regards original owners and trademarks, Section 211 was inconsistent with Article 4 of the TRIPS Agreement; (ii) under the TRIPS Agreement, Members had an obligation to provide protection to trademarks. Consequently, various provisions of Section 211 concerning successors-in-interest and original owners had violated the principles laid down in Article 2 of the TRIPS Agreement in conjunction with Article 2 of the Paris Convention (1967) and Article 3 of the TRIPS Agreement; and (iii) in relation to trademarks, Section 211(a)(2) and Section 211(b) were inconsistent with Article 4 of the TRIPS Agreement. In its conclusions, the Appellate Body had recommended that the DSB "request the United States to bring its measure, found in this Report … to be inconsistent with the TRIPS Agreement, into conformity with its obligations under that Agreement". Subsequently, the DSB adopted the Appellate Body Report in February 2002. Cuba noted that the 150th US status report was the same as the previous ones and provided no information indicating progress towards compliance with the DSB's recommendations and rulings in this dispute. Under Section 211, the Bacardi company had begun to market rum in the United States as of 1997 using the trademark "Havana Club", which belonged to "Havana Club Holding", a joint venture created in 1993 between the French company Pernod Ricard and the Cuban company Habana Ron. This constituted an infringement of the registration of this Cuban rum trademark, which had been renewed in 1996 by the Cuban-French joint venture for a period of ten years in the United States. Consequently, in September 2000, a Panel had been established to examine the complaint brought by the European Communities in representation of the interests of the joint venture Havana Club Holding. Cuba had made countless efforts over the years and had demanded compliance by the United States with the DSB's rulings and recommendations in this dispute. In spite of this, Section 211 remained intact and in force. The Cuban-French joint venture had also continued in vain to pursue legal action in the US courts. On 21 December 2010 and 20 March 2011, Cuba had reiterated to the United States, via diplomatic notes, the need for the Department of State to intervene so that the Office of Foreign Assets Control could grant the company, Cubaexport, the licence that would enable it to renew the Havana Club rum trademark in the United States. These efforts were also not fruitful. The failure to comply with the DSB's rulings was of serious concern to Cuba and to a considerable number of other WTO Members. The fact that the United States had been able to avoid fulfilling its legal obligations for such a long time showed that the dispute settlement mechanism, besides being extremely costly, was ineffective in terms of ensuring that its rulings were implemented. Cuba, once again, requested the United States to implement the DSB's recommendations and rulings in this dispute by promptly repealing Section 211.

1.6. The representative of Jamaica said that her country thanked Cuba, the United States and the EU for their statements and updates. Jamaica noted that the circumstances of this dispute had not changed and that no progress had been reported since the previous DSB meeting. As it had done in the past, Jamaica expressed its concern about the continued US failure to implement the DSB's recommendations adopted in 2002 regarding Section 211. The protracted failure by the United States to take the necessary steps to comply with its obligations under the DSU provisions was incompatible with the requirement for prompt implementation of the DSB decisions. This was of particular concern in cases such as this where the failure to honour an obligation had a negative impact on the economic interests of a developing-country Member. Jamaica reiterated its deep concern about the systemic implications of any disregard for DSB decisions. Such disregard could undermine the overall integrity of the dispute settlement system, which remained a key pillar of the WTO. Jamaica believed that after 13 years since the adoption of the DSB's recommendations, it was more than reasonable for Members to expect that this matter would be resolved and finally removed from the DSB's Agenda.

1.7. The representative of Mexico said that since the circumstances of this dispute had not changed, Mexico wished to refer to its statements made under this Agenda item at previous DSB meetings.

1.8. The representative of Nicaragua said that his country supported the statements made by Cuba and other delegations and regretted that the US status report contained no new information

on progress in the implementation of the DSB's recommendations and rulings. Nicaragua reiterated its concern about the systemic consequences of the US non-compliance which had a negative impact on Cuba, a country with a small economy. Furthermore, this non-compliance undermined the credibility of the DSB and the multilateral trading system. Nicaragua urged the United States to bring its measures into compliance with the DSB's recommendations and rulings and to end this long-standing dispute.

1.9. The representative of the Plurinational State of Bolivia said that, for the past 12 years, the United States continued to submit the same status report, which did not contain any information on progress in this dispute. Bolivia, once again, expressed its concern about the US failure to comply with the DSB's recommendations and rulings. The US failure to comply in this dispute had negative implications for a developing-country Member. Bolivia urged the United States to comply with the DSB's recommendations and rulings and supported the concerns expressed by Cuba at the present meeting.

1.10. The representative of Brazil said that her country thanked the United States for its status report in this dispute. Brazil regretted that the US status report did not contain any information on progress in this dispute. Brazil shared the concerns expressed by the EU, Cuba and other delegations regarding the lack of compliance in this dispute. In light of new political developments, Brazil urged the United States to adopt meaningful measures towards compliance. Such compliance would certainly strengthen the multilateral rules.

1.11. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Cuba at the present meeting. Venezuela noted with concern that the 150th US status report was repetitive and did not provide any information on the actions the United States had taken to comply with its obligations in this dispute. Venezuela, like previous speakers, was concerned about the systemic implications of the continued failure by the United States to comply with the DSB's recommendations and rulings which had been adopted more than a decade ago. This non-compliance undermined the confidence Members had in the dispute settlement system. Venezuela believed that the dispute settlement system was one of the greatest achievements of the multilateral trading system. In Venezuela's view, the lack of compliance in this dispute also undermined the ability of the dispute settlement system to resolve disputes. Venezuela called on the United States to end this non-compliance by repealing Section 211 and to inform the DSB at its next meeting of the measures it intended to take to resolve this matter.

1.12. The representative of Zimbabwe said that his country thanked the United States for its status report. Zimbabwe, once again, regretted that there was no new development in this dispute. This continued stalemate was a result of US non-compliance with the DSB's rulings and recommendations. Such non-compliance undermined the integrity of the DSB and had far-reaching economic implications for the affected small developing-country Member. In that regard, Zimbabwe joined the previous speakers who had supported Cuba and urged the United States to comply with the DSB's rulings and recommendations.

1.13. The representative of the Russian Federation said that his country regretted that it had to, once again, express its concern about the lack of progress in this long-standing dispute. The lack of compliance in this dispute attracted the attention of Members as it was an example of non-compliance with, and disregard for, the DSB's recommendations and rulings. Russia believed that due and timely implementation of the DSB's recommendations and rulings by all Members was essential for maintaining mutual trust and credibility of the WTO system. As it had previously stated, Russia urged the parties to this dispute to address the outstanding issues and to resolve this dispute as soon as possible.

1.14. The representative of Peru said that her country joined the previous speakers who had expressed concern about the lack of concrete progress in the implementation of the DSB's recommendations and rulings in this dispute, which affected the interests of a developing-country Member.

1.15. The representative of India said that his country took note of the US status report and its statement made at the present meeting. India noted that the United States did not report any progress. India, once again, was compelled to stress that the principle of prompt compliance was missing in this dispute. India joined the previous speakers in renewing its systemic concerns about the continuation of non-compliance as this undermined the confidence Members placed in a predictable, rules-based multilateral system, especially in the context of a developing-country Member seeking compliance. Continued non-compliance by Members eroded the confidence and the credibility of the WTO dispute settlement system. India urged the United States to report compliance to the DSB without further delay.

1.16. The representative of China said that his country thanked the United States for its status report and the statement made at the present meeting. The prolonged situation of non-compliance in this dispute was highly inconsistent with the principle of prompt compliance under the DSU, in particular since the interests of a developing-country Member were affected. China urged the United States to implement the DSB's rulings and recommendations without any further delay.

1.17. The representative of Viet Nam said that her country thanked the United States, the EU and Cuba for their statements. Viet Nam noted that this matter had not been resolved for more than a decade. Viet Nam shared the concerns expressed by Cuba and the previous speakers regarding the US non-compliance in this dispute. Viet Nam urged the United States to step up its efforts and to fully comply with the DSB's recommendations and rulings.

1.18. The representative of the Dominican Republic said that his country thanked the United States for its status report in this dispute regarding the inconsistency of Section 211 with the TRIPS Agreement. The Dominican Republic, once again, urged the United States to step up its internal procedures so as to comply with the DSB's recommendations and rulings. This prolonged situation of non-compliance in this dispute undermined the credibility of the DSB.

1.19. The representative of El Salvador said that her country thanked the United States for its status report and Cuba for its statement made at the present meeting. El Salvador, like other delegations, noted with concern the lack of compliance in this dispute which affected the interests of a small and vulnerable developing-country Member and the multilateral trading system as a whole. In light of the new bilateral relationship between Cuba and the United States, El Salvador hoped that the United States would promptly comply with the DSB's recommendations and rulings.

1.20. The representative of Argentina said that his country thanked the United States for its status report. Argentina, once again, regretted that the US status report did not contain any new information on progress in this dispute. As Argentina had stated in the past, this lack of progress was inconsistent with the principle of effective and prompt compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Argentina, therefore, supported Cuba as well as the previous speakers and urged the parties to this dispute, the EU and in particular the United States, to adopt the necessary measures to finally resolve this dispute.

1.21. The representative of Ecuador said that her country supported the statement made by Cuba. Ecuador, once again, recalled that Article 21 of the DSU referred specifically to the prompt and effective compliance with the DSB's recommendations and rulings, in particular, since the interests of a developing-country Member were concerned. Ecuador hoped that the United States would step up its current work and efforts and promptly comply with the DSB's recommendations and rulings by repealing Section 211.

1.22. The representative of Angola said that his country thanked the United States for its status report regarding Section 211. Angola supported the statement made by Cuba regarding the lack of progress in this dispute. Angola also recognized the good will that the United States had displayed thus far as well as the actions it had undertaken to find a solution to this long-standing dispute. However, Angola was concerned about the continued non-compliance with the DSB's recommendations in this dispute, which affected the economic interests of Cuba, a small and vulnerable developing-country Member. Angola called on the parties to this dispute to find a fair and appropriate solution to this dispute so as to safeguard the credibility of the dispute settlement system and the confidence Members placed in that system. Angola, like previous speakers,

supported Cuba and urged the United States to comply with the DSB's recommendations and rulings as soon as possible.

1.23. 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.150)

1.24. The Chairman drew attention to document WT/DS184/15/Add.150, 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.

1.25. The representative of the United States said that his country had provided a status report in this dispute on 8 June 2015, 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.

1.26. The representative of Japan said that his country thanked the United States for its statement and its status report submitted on 8 June 2015. Japan, once again, requested that this long-standing dispute be resolved as soon as possible.

1.27. 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.125)

1.28. The Chairman drew attention to document WT/DS160/24/Add.125, 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.

1.29. The representative of the United States said that his country had provided a status report in this dispute on 8 June 2015, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.30. 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 made under this Agenda item and said that it would like to resolve this dispute 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.

D. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.88)

1.32. The Chairman drew attention to document WT/DS291/37/Add.88, 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.

1.33. The representative of the European Union said that, in recent meetings, the EU had already reported on authorization decisions and other actions towards approval decisions taken up to May 2015. More generally, and as stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.34. 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. The United States noted that dozens of biotech applications remained pending in the EU approval system. One of these applications had been pending for well over a decade. The ongoing backlog and delays remained a serious impediment to trade in biotech products. The United States was further concerned about an EU proposal for major change in the EU approval measures. If adopted, that measure would result in even greater disruptions in trade in agricultural products. As the United States had previously stated, the EU Commission had proposed to adopt an amendment to EU biotech approval measures that would allow individual EU member States to ban the use of biotech products within their territory, even where the EU had approved the product based on a scientific risk assessment. One or more EU member State bans would serve as a major impediment to the movement and use of biotech products throughout the entirety of the EU, and the United States was concerned about the relationship of such a proposal to the EU's obligations under the SPS Agreement. The United States urged the EU to ensure that its biotech approval measures operated in accordance with the EU's own laws and regulations and its obligations under the SPS Agreement. To the extent that the EU considered revisions to its biotech approval measures, the EU should ensure that these revisions were consistent with the EU's WTO obligations and should notify these revisions to the SPS Committee pursuant to Article 7 of the SPS Agreement.

1.35. The representative of the European Union said that the proposal that the United States had just referred to was not related to the implementation of the DSB's adopted recommendations and rulings and it therefore fell outside the responsibilities of the DSB under Article 21.6 of the DSU. There was no basis for a discussion in the DSB on this issue.

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

E. United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.36)

1.37. The Chairman drew attention to document WT/DS404/11/Add.36, 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.

1.38. The representative of the United States said that his country had provided a status report in this dispute on 8 June 2015, in accordance with Article 21.6 of the DSU. As the United States had noted at past DSB meetings, in February 2012, the US Department of Commerce had modified its procedures in a manner that addressed certain findings in this dispute. The United States would continue to consult with interested parties as it worked to address the other recommendations and rulings of the DSB.

1.39. The representative of Viet Nam said that her country thanked the United States for its statement and its status report in this dispute. Viet Nam was pleased to address the issue of implementation in the DS404 dispute. As Members would recall from the previous DSB meetings, Viet Nam considered that the actions found by the Panel in the DS404 dispute to be WTO-inconsistent should be addressed in the context of US implementation in the DS429 dispute. Specifically, the WTO-inconsistent margins of dumping found in each of the reviews at issue in the DS404 dispute must be revised based on a WTO-consistent methodology in order for the United States to take the WTO-consistent remedial action required by the DS429 dispute, specifically to conduct a re-determination of the sunset review on frozen warm water shrimp from Viet Nam and to re-examine individual company requests for revocations based on the sustained absence of dumping. Viet Nam believed that the United States was prepared to fully implement the DS404 dispute in this context and looked forward to being able to address the DSB after the expiry of the reasonable period of time for implementation in the DS429 dispute and announce that the DS404 dispute had been fully implemented.

1.40. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela noted the importance of prompt implementation of the DSB's rulings and recommendations. Failure to do so undermined the system, the credibility of

the DSB and its ability to resolve disputes. Venezuela called on the United States to take the necessary measures to end this situation of non-compliance.

1.41. The representative of Cuba said that her country supported the statement made by Viet Nam. Cuba, once again, called on the United States to comply with the DSB's recommendations and rulings in this dispute. Cuba also called on the United States to reach an agreement with Viet Nam regarding the reasonable period of time for implementation of the DSB's recommendations and rulings in this dispute.

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

F. European Communities – Measures prohibiting the importation and marketing of seal products: Status report by the European Union (WT/DS400/16/Add.3 – WT/DS401/17/Add.3)

1.43. The Chairman drew attention to document WT/DS400/16/Add.3 – WT/DS401/17/Add.3, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning the EU measures prohibiting the importation and marketing of seal products.

1.44. The representative of the European Union said that the EU continued to work on the implementation of the DSB's recommendations and rulings in this dispute and was making its best efforts to complete the implementation before the expiry of the agreed reasonable period of time on 18 October 2015. As already reported at the previous DSB meetings, the European Commission had submitted a proposal to the Council and the European Parliament for amending those aspects of EC Regulation No. 1007/2009 on trade in seal products that had been found to be discriminatory. In particular, it proposed to remove the exception for maritime resource management hunts and provided for certain modifications to the exception of indigenous communities. The proposal continued to be discussed by the legislators. Once the amendment to the Regulation on trade in seal products was adopted, subsequent changes would be made to Commission regulation No. 737/2010. As already reported at the previous DSB meeting, the European Union was confident that the very constructive cooperation with Canada on the access of Canadian Inuit products to the EU market would soon result in the setting up of the necessary attestation system for Canadian Inuit to start using the IC exception.

1.45. The representative of Norway said that his country thanked the European Union for its status report on the implementation of the DSB's recommendations and rulings in this dispute. As it had stated at the previous DSB meeting, Norway had noted the proposal for an amendment of the Basic Seal Regulation. Norway continued to follow with interest the legislative process in the European Union. In that regard, Norway reiterated its view that Norway's seal hunt was well-regulated, conducted in a humane manner and contributed to the sustainable management of its living marine resources. Norway was disappointed that this had not been taken into account by the European Union when formulating the proposed amendment. Norway trusted that the European Union would fully implement the DSB's recommendations and rulings within the agreed reasonable period of time.

1.46. The representative of Canada said that her country thanked the European Union for its fourth status report regarding the implementation of the DSB's recommendations and rulings in this dispute. As it had previously indicated in its statement made at the 20 May 2015 DSB meeting, Canada continued to engage with the European Union to operationalize the indigenous communities exemption, with the objective of ensuring practical market access for Canadian Aboriginal seal products. In that regard, Canadian officials had submitted a formal application for the Nunavut Territorial Government, one of Canada's northern territories, to become a Recognised Body under the existing EU seal regulations. Canada understood that the application was undergoing its final technical review and that a decision would be taken very soon. Canada was hopeful that this would be the case, and that Nunavut could secure Recognised Body status in the very near future. Canada had also been following closely the debate concerning amendments to the EU Seal Regime. Canada expected that any such amendments would be implemented consistently with the DSB's recommendations and rulings, and in a manner that did not adversely affect Inuit and other indigenous communities, particularly in light of the ongoing Nunavut

application. Canada, once again, reiterated that Canada's seal harvests were humane, sustainable and well-regulated activities that provided an important source of food and income for coastal and Inuit communities.

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

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

A. Statements by the European Union and Japan

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

2.2. The representative of the European Union said that the EU recalled that the authorized level of retaliation against the United States had been adjusted as from 1 May 2015. The regulation containing the EU measures had been published on 30 April 2015 and had been circulated to the DSB. The EU, once again, requested the United States to 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 on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports in this dispute.

2.3. The representative of Japan said that, since the distributions under the CDSOA had been continuing, Japan, once again, urged the United States to stop the illegal distributions in order to resolve this long-standing dispute. As stated at previous DSB meetings, Japan was of the view that the United States was under an 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 shared the concerns raised by the EU and Japan. The WTO-consistent disbursements continued unabated to the US domestic industry. The latest data available[1] in the Annual Report of the US Customs and Border Protection for the fiscal year 2014 indicated that about US$70 million was disbursed to the US domestic industry. India was concerned that non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. In India's view, this item should continue to remain on the DSB's Agenda until such time that full compliance was achieved in this dispute.

2.5. The representative of Canada said that her country wished to refer to its statements made under this Agenda item at previous DSB meetings. Canada's position on this matter had not changed.

2.6. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Brazil, as one of the parties to these disputes, was of the view that the United States was under an obligation to discontinue any disbursements made pursuant to the Byrd Amendment. The fact that disbursements currently being made were related to investigations initiated before the repeal of the Act in February 2006 did not mean that they were excluded from compliance obligations. Since the DSB had confirmed the illegal nature of the disbursements under the Byrd Amendment more than 10 years ago, any disbursement to petitioners must be discontinued. Only then would compliance be achieved in this dispute.

2.7. The representative of the United States said that, as his country had noted at previous DSB meetings, the Deficit Reduction Act, which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000, was enacted into law in February 2006. 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 the EU, Japan, and other Members had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, over seven and a half years ago. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed

[1] http://www.cbp.gov/sites/default/files/documents/FY2014%20Annual%20Report%20wHolds.pdf

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 these very WTO Members had demonstrated repeatedly when they were a responding party in a dispute, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. With respect to the EU's recent announcement that it would continue to apply duties, the United States regretted that the EU had decided to continue to apply its suspension of concessions and was disappointed with this decision. Indeed, previously the EU had made clear that its purpose in suspending concessions was to "induce compliance". As the United States had taken all steps necessary to comply with the DSB's recommendations and rulings, the United States failed to see how the continued suspension of concessions could further that purpose. As the United States had observed previously, the DSB had only authorized the suspension of concessions or other obligations as provided in the Award of the Arbitrator. The United States continued to review the action by the EU and would not accept any characterization of such continued retaliation as consistent with the DSB's authorization.

2.8. The DSB took note of the statements.

3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

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

3.2. The representative of the United States said that his country reiterated its serious concerns regarding China's failure to bring its measures into conformity with its WTO obligations, despite numerous interactions between the United States and China in the DSB and elsewhere. China continued to impose its ban on foreign suppliers of electronic payment services ("EPS") by requiring a license, while at the same time failing to provide specific procedures for obtaining that license. The United States had taken note of the recent decision by China's State Council to open the EPS market to qualified suppliers. However, specific regulations to implement the State Council's decision had still not been issued. As a result, one Chinese enterprise continued to be the only EPS supplier able to operate in the domestic market. As required under its WTO obligations, China must adopt immediately the implementing regulations necessary for allowing the operation of foreign EPS suppliers in China. The United States continued to look forward to the prompt issuance of those regulations.

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. China hoped that the United States would reconsider the systemic implications of its position.

3.4. The DSB took note of the statements.

4 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

A. Statement by the Philippines

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

4.2. The representative of the Philippines said that Thailand had repeatedly informed the DSB that it had done all it was required to do to secure full compliance with the DSB's recommendations and

rulings in this dispute. Nonetheless, a series of outstanding compliance issues remained. As at previous DSB meetings, the Philippines wished to highlight two of these issues due to their particular systemic impact on the DSB's rulings and the Customs Valuation Agreement overall. First, the Philippines remained deeply concerned about the Thai Attorney General's decision to prosecute an importer of Philippine cigarettes for alleged under-declaration of customs value. The WTO panel had ruled that Thailand enjoyed no legitimate grounds to reject the customs values that Thailand now sought to criminalize. In addition, Thai Customs Board of Appeals (or "BoA") had explicitly accepted those customs values, in a ruling heralded by Thailand itself as a measure taken to comply. Thailand's actions with the criminal prosecution directly undermined the implementation obligation placed on it by the DSB's recommendations and rulings. In systemic terms, there could be no doubt that the disciplines of the Customs Valuation Agreement applied whenever a WTO Member engaged in the customs valuation of goods, including in the enforcement of domestic Customs provisions. Despite this evident WTO-inconsistency, in its statements made at the previous DSB meetings over the past three months, Thailand had explained that it "will take steps to ensure" the WTO-consistency of the criminal prosecution. While it appreciated the sentiment behind these repeated statements, the Philippines has yet to receive an explanation about precisely what steps Thailand would take to ensure the WTO-consistency of the criminal prosecution and asked Thailand to deliver expeditiously on its assurance, particularly in light of what the Philippines understood to be a July meeting to which the Thai public prosecutor had summoned the importer. Second, the Philippines was also deeply concerned about a separate Thai BoA ruling rejecting transaction value for 210 entries from Indonesia that were covered by the DSB's rulings and recommendations in the original proceedings in this dispute. Thailand had submitted the BoA ruling as a declared measure taken to comply. However, as the Philippines had previously noted, the ruling was riddled with WTO-inconsistencies, and set out a methodology that perpetuated Thailand's application of WTO-inconsistent conduct with respect to customs valuation of related party transactions. In addition, as explained at the previous DSB meetings, the position that Thai Customs had recently taken in pending domestic judicial proceedings concerning the BoA ruling was disturbing. Thai Customs had explicitly advised the Thai court that it did not need to follow the WTO ruling because it supposedly bound only the Philippines, as the party that had brought the dispute, and not Thailand. The Philippines reiterated its appeal to Thailand to rise to its role as a responsible and important WTO Member, and to prove that its commitment to full compliance was real. If that was not possible, the Philippines reserved its right to revert to dispute settlement procedures.

4.3. The representative of Thailand said that his country noted the Philippines' statement and concern. Thailand referred to its previous statement made at the 20 May 2015 DSB meeting that it had taken all actions necessary to implement the DSB's recommendations and rulings. This was without prejudice to any other rights of the Philippines under the DSU provisions. With regard to the issue of the criminal prosecution as stated by the Philippines, Thailand believed that the outcome could not be prejudged. As a responsible WTO Member, Thailand would continue to take the necessary steps to ensure that all actions that may be taken would be consistent with the WTO law. Thailand wished to reiterate that it had always been, and remained, fully available to discuss the concerns of the Philippines bilaterally, as well as the necessary steps mentioned by the Philippines.

4.4. The DSB took note of the statements.

5 EUROPEAN UNION AND ITS MEMBER STATES – CERTAIN MEASURES RELATING TO THE ENERGY SECTOR

A. Request for the establishment of a panel by the Russian Federation (WT/DS476/2)

5.1. The Chairman drew attention to the communication from the Russian Federation contained in document WT/DS476/2, and invited the representative of the Russian Federation to speak.

5.2. The representative of the Russian Federation said that his country requested the establishment of a panel, with standard terms of reference as provided for in Article 7.1 of the DSU, to examine this dispute. This request followed Russia's efforts to find a solution with the EU, including through formal WTO consultations with the EU in June and July 2014. Unfortunately, the matter had not been resolved during the consultations and the measures were still in force. Russia considered that the measures in question had been adopted and were applied by the EU in

violation of numerous provisions of the WTO Agreements. In that regard, Russia had no choice but to request the establishment of a panel to examine this matter.

5.3. The representative of the European Union said that the EU took note of Russia's request for the establishment of a panel. The EU was confident that its Third Energy Package was fully consistent with its WTO obligations and was ready to defend its legislation if a panel was established. Mindful of its duty to engage in WTO dispute settlement procedures in good faith, the EU wished to state at the present meeting that it deemed the Russian request for the establishment of a panel to expand impermissibly the scope of the dispute from the one set by the request for consultations. The EU was aware that no precise and exact identity must exist between the measures and claims contained in the request for consultations and in the request for the establishment of a panel. Still, the EU considered that the panel request expanded manifestly the scope of the dispute, changing the essence of the complaint. Indeed, the request for consultations did not mention some of the key measures identified in sections 2 and 3 of the panel request, concerning respectively "Capacity allocation measures" and "projects of Common Interest". Nor did the request for consultations provide any indication of the claims Russia now made in those two sections. The EU regretted the step taken at the present meeting by Russia to request the establishment of a panel almost a year after the first round of consultations was held. The EU opposed the establishment of a panel at the present meeting.

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

6 EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

A. Request for the establishment of a panel by China (WT/DS492/2 and Corr.1)

6.1. The Chairman drew attention to the communication from China contained in document WT/DS492/2 and Corr.1, and invited the representative of China to speak.

6.2. The representative of China said that, in 2006 and 2009, the EU had twice modified its goods Schedule following modification renegotiations with some Members, which resulted in a substantial increase of the EU's bound rates on certain poultry meat products. Tariff-rate quotas were instituted as part of those two modifications. The EU had allocated most of the tariff-rate quotas to some other Members based on agreements with them. Other WTO Members, including China, were given extremely small shares of the tariff-rate quotas. The measures concerned caused serious harm to the interests of Chinese poultry meat producers and exporters. Before the EU had modified its concessions, Chinese enterprises had invested over CNY 2.8 billion to construct or renovate processing facilities and laboratories and had purchased additional equipment in an effort to comply with the EU's import regulatory requirements. These processing facilities had provided employment to more than 50,000 workers. As a consequence of the EU's modification of its tariff concessions on certain poultry meat products, Chinese exporters were now faced with extremely high tariff rates, and were experiencing severe reduction of purchase orders, a dramatic decline of export sales, and losses of market shares. The exporting enterprises had suffered grave losses and many workers had lost their jobs. China had sought consultations with the EU on multiple occasions. However, the EU had not provided a solution to China's concerns. In line with the DSU provisions, China had, on 8 April 2015 requested consultations with the EU so as to resolve the dispute regarding these measures. Consultations with the EU were subsequently held in Geneva on 26 May 2015. However, these consultations had not resolved this dispute. In light of the forgoing, China requested the DSB to establish a panel to resolve this dispute. China hoped that, by resorting to the WTO dispute settlement system, the EU would correct its measures that were WTO-inconsistent and would properly address China's concerns.

6.3. The representative of the European Union said that the EU took note of China's decision to request the establishment of a panel to examine the EU's modifications of concessions on certain poultry meat products, which had been established in 2007 and 2013 respectively. The modifications were established after the EU had initiated rebinding exercises for its GATT concessions pursuant to Article XXVIII of the GATT 1994 and after negotiations with the substantial suppliers, i.e. Brazil and Thailand. Based on the relevant import statistics, China did not have substantial supplying interest in any of the rebinding exercises under Article XXVIII of the GATT 1994. In the second rebinding exercise, China did not even come forward within the relevant

90-day period to signal its interest as a substantial supplier. The EU had scrupulously followed the procedures of Article XXVIII of the GATT 1994 during both exercises and had explained this also to China. The EU had held constructive consultations with China as recently as on 26 May 2015. Therefore, at this stage, the EU considered China's request premature and did not agree to the establishment of a panel at the present meeting. The EU reaffirmed its commitment to a dialogue with China in order to find an amicable solution. In any event, the EU was convinced that its measures were in conformity with the WTO Agreements and the EU would defend them vigorously if a panel was established.

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

7 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. Report of the Appellate Body (WT/DS430/AB/R) and Report of the Panel (WT/DS430/R and Add.1)

7.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS430/10 transmitting the Appellate Body Report on: "India – Measures Concerning the Importation of Certain Agricultural Products", which had been circulated on 4 June 2015 in document WT/DS430/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

7.2. The representative of the United States said that his country was pleased to propose the adoption of the Panel and Appellate Body Reports in this dispute involving India's non-science-based import restrictions on various agricultural products. As an initial matter, the United States thanked the Panel, the Appellate Body, and the Secretariat assisting them for their hard work in this dispute, which the United States trusted would assist the parties in resolving this dispute through the lifting of those WTO-inconsistent and trade-restrictive measures. The measures at issue imposed a country-wide ban on the imports of various agricultural commodities as soon as the exporting country reported an outbreak of avian influenza (AI) to the World Animal Health Organization (OIE). India's measures had precluded the United States and other Members from exporting various agricultural products to India. These trade restrictions covered products such as poultry meat, a product which the United States had a record of exporting over 7 billion pounds a year safely and without incident. The Reports being adopted at the present meeting upheld the claims of the US that India's broad, trade restrictive measures breached several key obligations under the SPS Agreement.[2] The United States said it would like to emphasize that in bringing this dispute, the United States was not suggesting that appropriate AI controls were unnecessary. To the contrary, AI was an animal disease with serious economic consequences. Because the disease was endemic in wild bird populations, every Member, including India and the United States, was susceptible to occasional AI outbreaks in its commercial poultry stocks. The United States fully supported the work of the international community, as reflected in OIE standards, to adopt appropriate, science-based measures to control AI while allowing safe trade in agricultural products. The fundamental problems with India's measures was that were not based on a scientific risk assessment or international standards, they were far more trade restrictive than necessary to achieve the goal of not transmitting AI through traded products, precluded regionalization, and unjustifiably discriminated against foreign products and favoured domestic products. The United States said it would like to draw attention to several key findings included in these Reports.

7.3. First, the Panel had found, and the Appellate Body had affirmed, that India's measures were not based on a risk assessment in breach of Articles 5.1 and 5.2 of the SPS Agreement. The Appellate Body, in sustaining the findings under Articles 5.1 and 5.2, had rejected India's argument that an Article 5.1 breach could not be sustained without a separate finding under Article 2.2 of the SPS Agreement. This finding was important in affirming the centrality of conducting a risk assessment to develop SPS measures based on scientific principles and evidence.

[2] Agreement on the Application of Sanitary and Phytosanitary Measures.

The United States did have some concerns, however, with the approach taken by the Appellate Body in its analysis under Article 2.2 of the SPS Agreement. In particular, the United States had explained that India's failure to conduct a risk assessment supported the US argument that India's measures were not "based on scientific principles", as required by Article 2.2. The Appellate Body Report, however, did not contain any discussion of whether or not India based its measures on "scientific principles" pursuant to Article 2.2. In the US view, India did not and could not.

7.4. Second, the Panel had found, and the Appellate Body had upheld, that India had breached Article 3.1 of the SPS Agreement because India's measures banning imports were not based on the relevant international standards, which in this dispute were those of the OIE. The Panel had found that the OIE's standards did not recommend import prohibitions, but rather provided for safe trade through the application of conditions that mitigated any risk from those products. The Panel had found that the OIE's standards allowed for importation from zones and compartments free of avian influenza, not just countries. This finding was particularly important given that Members may experience occasional AI outbreaks that affected only specific regions, and not their entire territory. The Appellate Body had correctly rejected India's claim that the Panel had somehow committed legal error by consulting with the OIE regarding the proper understanding of the OIE's standards.

7.5. Third, the Panel had found, and the Appellate Body had upheld, that India's measures were in breach of Article 5.6 of the SPS Agreement because they were more trade restrictive than necessary to achieve India's appropriate level of protection. The Panel and Appellate Body had found that the OIE's standards achieved a high level of protection and were less trade restrictive than blanket import prohibitions. This finding highlighted that Members, in devising SPS measures, should consider scientifically-based international standards so as to avoid unnecessary barriers to trade.

7.6. Fourth, the Panel had found that India's measures were in breach of both sentences of Article 2.3 of the SPS Agreement. The Panel had properly recognized, and India had not appealed, that India's measures constituted a disguised restriction on international trade in breach of Article 2.3. The Panel had also recognized that India's measures discriminated against imported products, and in two different ways. The Panel had recognized, and India had not appealed, that India's imposition of import prohibitions on products from anywhere in an exporting country following an AI incident was discriminatory given that India's domestic restrictions applied only to a small area following an AI incident. The Panel had also found, and the Appellate Body had upheld, that India's imposition of import prohibitions based on low pathogenicity avian influenza, or LPNAI, was discriminatory given its lack of a surveillance system capable of reliably detecting LPNAI incidents and thus of triggering LPNAI-based restrictions on domestic products.

7.7. Fifth, the Panel had found, and the Appellate Body had upheld, that India had breached its obligations with respect to regionalization under Articles 6.1 and 6.2 of the SPS Agreement. This was the first dispute in which a report had addressed these important provisions. These findings made clear that India's rejection of the concept of regionalization with respect to AI was not consistent with its WTO obligations. The Panel and Appellate Body Reports served to highlight the importance of regionalization, both in general and with respect to AI in particular. Countries should not maintain measures that applied to the whole territory of a Member when an AI incident was limited to a particular region. While it welcomed these findings overall, the United States did have certain concerns with a portion of the Appellate Body Report addressed to Article 6. The Article 6 analysis began with a lengthy abstract discussion, before it reached the issues on appeal and without tying that discussion to the issues on appeal.[3] The Appellate Body even expressed "concerns" in relation to certain findings by the Panel not raised in the appeal.[4] In the view of the United States, issues not raised in the appeal were not on appeal, and a thorough, considered, and persuasive interpretation of the WTO Agreements was more likely to result where parties and third parties had engaged on the issues of legal interpretation actually at issue on appeal. Moreover, particularly at a time when workload issues were increasingly affecting the time-table for the resolution of disputes, a focus on those issues that had been appealed, and on questions that needed to be addressed in resolving arguments raised on appeal, would facilitate the efficient functioning of dispute settlement process.

[3] "India – Agricultural Products" (AB), paragraphs 5.129 – 5.144.
[4] Idem, paragraphs 5.142 – 5.143.

7.8. In that regard, regrettably, the United States must also recall a familiar procedural matter. The Appellate Body had continued a trend of not circulating its report within 90 days, as mandated in Article 17.5 of the DSU, without consultation. The United States noted that India and the United States, at the Appellate Body's request, had agreed to delay this appeal beyond the busy end of year period. Having made such an effort to assist the Appellate Body in managing its workload, the United States was particularly disappointed by the fact that this Report had not been issued within 90 days. The United States was further concerned with two other developments. First, the appeal in the "US-Shrimp II" dispute (DS429), which involved a panel report issued after the Panel Report in this dispute, was allowed to jump ahead of the appeal in this dispute. Second, the Appellate Body had continued its recent deviation from its pre-2011 practice and had failed to consult with the parties or seek their agreement when it became clear that it would be unable to meet the DSU deadline. If Members' efforts to facilitate the Appellate Body's workload by delaying appeals were met with other appeals jumping ahead or a lack of consultation, Members may in the future have some hesitancy before agreeing to delays in filing appeals. Accordingly, the United States continued to encourage Members and the Appellate Body to work together to find a solution to this matter, such as a return to past practice. In conclusion, the United States said it would like to return to the Panel and Appellate Body's Reports themselves, and to highlight that their findings and conclusions comprehensively demonstrated that categorical import prohibitions were not appropriate in addressing the risks from avian influenza. The Reports being adopted at the present meeting had important implications for Members' measures addressed to AI, as well as for SPS measures in general. The United States, once again, thanked both the Panel and the Appellate Body for the high-quality Reports.

7.9. The representative of India said that his country thanked the members of the Appellate Body and the Secretariat assisting them for their work in these proceedings. This dispute involved the interpretation of various provisions of the SPS Agreement, some for the very first time. India was carefully examining the various implications of the Appellate Body Report and the modified Panel Report in this dispute. India had appealed against certain errors of law and legal interpretation developed in the Panel Report with respect to various provisions of the SPS Agreement. This dispute involved the US challenge of India's measures concerning a prohibition on imports of various agricultural products into India, especially poultry products, from countries reporting certain types of Avian Influenza (AI). India considered these measures critical for the protection of the health and safety of not only animal life but also human life. India wished to make some general observations on the Panel and Appellate Body findings in relation to the interpretation of various provisions of the SPS Agreement. India had maintained before the Panel and the Appellate Body that its measures were in conformity with the relevant standard and that the Panel had committed errors in the interpretation of the OIE Code, which was the relevant international standard in this case. The Panel, *inter alia*, in its finding pursuant to Article 3.1 and Article 3.2 of the SPS Agreement had concluded that Chapter 10.4 of the OIE Code did not provide for any import restriction upon occurrence of Notifiable Avian Influenza (NAI), which included High Pathogenic Notifiable Avian Influenza (HPNAI) and/or Low Pathogenic Notifiable Avian Influenza (LPNAI). At the heart of this dispute was the legal interpretation of Chapter 10.4 of the OIE Code, which was the relevant international standard in this case. The implication of the Panel Report, confirmed by the Appellate Body, was that even when the exporting country had not made any request to the importing country to recognize its zones and/or compartments, WTO Members imposing country-wide import prohibitions on poultry and poultry products upon an occurrence of HPNAI and/or LPNAI in poultry would be acting inconsistently with the provisions of the SPS Agreement and the OIE Code. Such an interpretation, in India's view, had serious implications for the interpretation of the SPS Agreement and the text of the OIE Code. Further, this had systemic implications for Members as they would not be able to take legitimate steps, including import prohibitions on a country wide basis, to prevent the entry and spread of the AI virus upon occurrence of NAI thereby putting the lives of animals and humans at risk. India was disappointed that the Appellate Body had not recognized the flexibility that the OIE Code provided for Members to impose import prohibitions on a country wide basis.

7.10. India was also disappointed that the Panel and Appellate Body, while concluding that the OIE Code did not envisage country wide import prohibitions, only took into account the terms NAI-free zones or compartments or HPNAI-free zones or compartments and did not take into consideration the presence of other terms such as NAI-free country or HPNAI-free country in the OIE Code. Further, India considered that there was a difference between measures that were required to be taken for allowing trade in poultry products (risk mitigation conditions) on a compartment or zone-wide basis referred to by the Appellate Body vis-à-vis an explicit prohibition

on banning imports on a country-wide basis. It was troubling to find that the Panel had failed to see this distinction and the Appellate Body had confirmed it. The Panel Report was fraught with ambiguities and lack of clarity and, interestingly, the Appellate Body had acknowledged this on more than one occasion. For example, with respect to the interpretation of the OIE Code the Appellate Body observed that "... we wish to make a preliminary observation regarding the Panel's focus on the question of whether the OIE Code 'envisages the imposition of import prohibitions'. It appears that the language used by the Panel created some ambiguity regarding its findings on the scope and meaning of the recommendations it examined in Chapter 10.4 of the OIE Code, and may have led to some misunderstanding between the parties on appeal". However, India was deeply disappointed that having acknowledged several instances of ambiguity in the Panel Report, the Appellate Body had confirmed the findings of the Panel in this regard. India did not understand how the Panel analysis could be construed to be limited to import prohibitions where there was no applicable recommendation under the OIE Code, or where the risk mitigation conditions prescribed in the applicable recommendation had not been met. The Panel and the Appellate Body reading of the OIE Code was troubling since it did not take into account the plain reading of the OIE Code, namely, that there was no explicit bar on the prohibition of imports on a country-wide basis. The mere existence of risk mitigation conditions that could be taken was insufficient and incorrect, in India's views, to come to a conclusion that import prohibition in its absence was prohibited by the OIE Code. This could not be the intention of the existing provisions of the OIE Code as agreed upon by Members.

7.11. Regarding the relationship between Articles 2.2 and Article 5 of the SPS Agreement, while India welcomed the Appellate Body's reversal of the Panel analysis with respect to eggs and poultry meat under Article 2.2 of the SPS Agreement once again highlighting the deficiency in the Panel Report, India was nonetheless concerned about the ultimate interpretation of Articles 2.2, 5.1 and 5.2 of the SPS Agreement that had been developed by the Appellate Body. While acknowledging that the terms used in Article 2.2 and Articles 5.1 and 5.2 were not identical, and that, therefore, their respective scopes may not be entirely coextensive, the Appellate Body had gone on to hold that the "preferred means" for complying with the basic obligations under Article 2 was through the "particular routes" or "specific obligations" set out in Article 5. This, however, did not directly answer the question as to whether the "preferred means" was the only recognized means to comply with Article 2.2. It was also not clear as to whether consideration of evidence relating to the specific risks against which an SPS measure sought to protect, was identical to a "risk assessment" under Article 5 of the SPS Agreement. If the Appellate Body's ruling was that it was indeed identical, India was concerned that Article 2.2 had been made redundant by such an interpretation. The interpretive guidance provided by the Appellate Body in relation to Articles 2.2 and 5.1 of the SPS Agreement appeared to have wide ranging implications for all Members, in relation to the domestic processes and practices for the mandatory conduct of risk assessments and the resource capacity of Members to undertake such complex risk assessments. The Appellate Body in paragraph 5.27 of its Report held that "In our view, it follows that any assessment of whether an SPS measure is maintained without sufficient scientific evidence or is not based on scientific principles would encompass an inquiry into evidence adduced by the parties regarding the particular risks that such measure is said to protect against, and to whom the risk is posed (e.g. humans, animals, plants, and/or the environment)". The Appellate Body's analysis that establishing that there existed a rational or objective relationship between the SPS measure and the scientific evidence for purposes of Article 2.2 would, in most cases, be difficult without a Member demonstrating that such a measure was based on an assessment of the risks, as appropriate, to the circumstances pointed out to the problematic requirement of the need of undertaking a risk assessment in almost all cases. This would be an undue burden on many countries that India believed was not envisaged by the SPS Agreement when the measure was based on scientific principles and there existed sufficient scientific evidence to justify an SPS measure, regardless of a risk assessment being conducted.

7.12. India was also disappointed that the Appellate Body had not completed the analysis under Article 2.2 of the SPS Agreement due to the existence of competing evidence. India had provided sufficient scientific evidence on record to show that its SPS measures were based on scientific principles and were not maintained without sufficient scientific evidence. The Panel, in its analysis pursuant to Article 6.2 of the SPS Agreement, had observed that in order to comply with Article 6.2 of the SPS Agreement, a sanitary measure must at a minimum not deny or contradict the recognition of the concept of disease free areas and had further observed that the Indian Livestock Act 1898 may empower India's authorities to recognize the concepts of disease free areas and areas of low prevalence, notwithstanding the fact that this discretion had not been

exercised for this purpose. However, while analysing the consistency of India's SPS measure with Article 6.2 of the SPS Agreement, India was disappointed that the Appellate Body had agreed with the Panel's observation that India's SPS measures did not recognise the concept of disease-free areas and areas of low disease prevalence with respect to AI. India's regulatory scheme (the Livestock Act) in fact did not preclude the recognition of the concept of pest or disease free areas and areas of low pest or disease prevalence. India had argued before the Panel and the Appellate Body that the obligation under Article 6.1 of the SPS Agreement was only triggered when a claim under Article 6.3 of the SPS Agreement was made by the exporting Member. Any other interpretation would make Article 6.3 redundant and was not in keeping with the requirement of a harmonious interpretation of all the provisions of Article 6 of the SPS Agreement. Though the Appellate Body in paragraph 5.156 of its analysis, had alluded to the fact that in the context of dispute settlement proceedings, an exporting Member claiming that an importing Member had failed to determine a specific area within that exporting Member's territory as "pest or disease free", and ultimately adopted its SPS measures to that area, would have difficulties succeeding in a claim that the importing Member had thereby acted inconsistently with Articles 6.1 and 6.2 of the SPS Agreement, unless that exporting Member could demonstrate its own compliance with Article 6.3, it paradoxically ended the analysis by stating that the obligations under Article 6.1 and 6.2 were not triggered by an invocation of Article 6.3. It was pertinent to note that the Appellate Body, while addressing this issue, once again brought to light the overly broad statements of the Panel's reasoning, but had failed to effectively address them. The Appellate Body was concerned about the "sweeping nature of the Panel's statements", which were seen to be problematic to the extent that they had suggested that each of the paragraphs of Article 6 were to be read in isolation. However, while concluding, India was particularly disappointing to note that the Appellate Body had not considered that they had amounted to a reversible error when understood in the context of this dispute. The Appellate Body, in India's view, had not engaged in the fundamental issue of a holistic reading of the three paragraphs of Article 6 of the SPS Agreement.

7.13. India also found the Appellate Body's ruling with respect to the determination of the appropriate level of protection under Article 5.6 of the SPS Agreement to be extremely troubling as it seriously undermined a Member's right to determine its own appropriate level of protection. The Appellate Body, while beginning its analysis, maintained that, in principle, the determination of the appropriate level of protection "is a prerogative of the Member concerned and not of a panel or of the Appellate Body ". However, the Appellate Body had gone on to hold that the specification of such appropriate level of protection was both a prerogative and an obligation of the responding Member. While requiring to defer to the respondent's articulation of the appropriate level of protection, the Appellate Body had unfortunately held that this did not mean that a panel must defer completely to a respondent's characterisation of its own appropriate level of protection. The Appellate Body had held that in examining a claim under Article 5.6 of the SPS Agreement, a panel was required to ascertain the respondent's appropriate level of protection on the basis of the totality of the arguments and evidence on the record. This was particularly disturbing since now the panels and the Appellate Body were to make judgement as to how the evidence was to be weighed under the totality of circumstances while in previous WTO cases more deference was shown to Members' determination of the appropriate level of protection. This new task of weighing the totality of evidence in determining the appropriate level of protection would be a task unsuited for panels and the Appellate Body while significantly affecting Member's rights under the SPS Agreement. This had systemic undesired consequences for the interpretation of the SPS Agreement and would play out in subsequent disputes.

7.14. India wished to also touch upon another issue that the United States had raised as a systemic issue with respect to the length of the Appellate Body proceedings. Though it was deeply concerned about many of the Appellate Body's findings in this dispute, India did not concur with the United States on the issue of time-lines and the process followed by the Appellate Body. Workload issues at the panel and Appellate Body stage had often been discussed in the context of the working of the dispute settlement system and the strain it imposed on the system. The Chairman of the Appellate Body, in his letter dated 14 April 2015, had also made a reference of workload issues in terms of the systemic and structural challenges confronting the appellate review process as well as the role Members had in addressing them. The Chairman of the Appellate Body stated that the increasing number, size, complexity of appeals on the one hand and the DSU-mandated time constraints and limited resources on the other created a situation which, if left unaddressed, may have serious consequences for the WTO dispute settlement system in general and the appellate review in particular. It was a fact that, in recent decisions, the Appellate

Body had not been able to comply with the 90-day mandate under Article 17.5 of the DSU. The current process of informing the parties by a letter of the reasons for the delay was an acceptable, pragmatic, reasonable and sufficient basis for the Appellate Body to provide its report that it would need to go beyond 90 days. Though there was a mandate to respect the 90-day deadline in Article 17.5, the delay in completion due to a variety of genuine reasons needed to be recognized by the Membership. The solution to have a consultation meeting with the parties to the dispute would not resolve the workload issue. It may complicate it even further by introducing an element of Member's interference in the judicial process. Members may need to take a more pragmatic and realistic view of the matter. As per Article 17.14 of the DSU, the Appellate Body Report and the Panel Report, as modified by the Appellate Body, shall be adopted by the DSB at the present meeting. India, once again, thanked the Appellate Body, the Panel and the Secretariat for their work in these proceedings.

7.15. The representative of the European Union said that the EU welcomed the rulings of the Panel and the Appellate Body in this dispute, which was the first dispute to require a more detailed examination of Article 6 of the SPS Agreement concerning regionalisation. Regionalisation was an issue of systemic importance to the EU with its large territory in which science-based risk mitigation measures were promptly adopted and implemented following outbreaks of diseases or pests in a given area. Against this backdrop, the EU considered that the Panel and the Appellate Body provided useful guidance to WTO Members on the interpretation and application of the principles set out in Article 6 of the SPS Agreement on regionalisation. The EU wished to comment also on the observations made by the United States and India in relation to Article 17.5 of the DSU. First, the EU agreed with India's statement on this issue. Second, the US reference to past practice of the Appellate Body according to which it sought the agreement of the parties when it was not able to complete its work within 90 days was only an interpretation of the United States of an alleged prior practice. The EU did not share this interpretation as had been made clear many times in the past. Third, the EU also wished to comment on the issue of "queue jumping". In a recent meeting, the United States had expressed its contentment with the fact that the Appellate Body had issued its report in the DS429 dispute within 90 days. On the basis of the US statement made at the present meeting, the EU understood that the Appellate Body should have waited until after the issuance of the Report in the dispute at hand before issuing its report in the DS429 dispute. By definition, that would have meant that the report in the DS429 dispute would have been issued well beyond 90 days. The EU failed to understand the coherence between these two positions. For its part, the EU was fully confident that the Appellate Body was dealing with appeals in an even-handed manner within the limits of its very scarce resources when taking into account the workload it was facing. Members should remember that the Appellate Body was not a machine where one could press a button and the report would be circulated in 90 days. The Appellate Body consisted of human beings who also had families. Members should respect their efforts and not just criticize them.

7.16. The representative of Norway said that his country wished to comment briefly on the procedural issue raised by the United States, India and the EU, namely, the circulation of the Appellate Body Report after the 90-day timeframe set out in Article 17.5 of the DSU. In Norway's view, transparency was crucial where the Appellate Body was unable to circulate its report within the 90-day timeframe. Predictability and legal certainty were also key elements in that context. From a systemic point of view, any uncertainty connected to whether a report was deemed to be an Appellate Body report circulated pursuant to Article 17.5, and hence the adoption procedure for that report, would be unfortunate. Norway was ready to join other Members in any effort to find a workable solution to this issue, as well as issues concerning scheduling and general workload. Norway joined other Members in thanking the Appellate Body for their comprehensive work on WTO disputes.

7.17. The representative of Japan said that his country shared the concerns expressed by the United States regarding the procedural issue and the need to preserve high-quality reports. The current practice was that the Appellate Body would issue a letter explaining the reasons for the delay when it could not circulate its report within the required 90 days. However, as a matter of transparency and due process, Japan believed that a letter alone was not sufficient. With regard to the issue of "queue jumping", Japan did not believe that this was related to the 90-day issue. In Japan's view, without guidelines or basis for queues at the appeal stage, Members may lose the

incentive to agree to delay filing appeals. Japan was ready to engage in working with other delegations to resolve these issues.

7.18. The DSB took note of the statements, and adopted the Appellate Body Report contained in document WT/DS430/AB/R and the Panel Report contained in document WT/DS430/R and Add.1, as modified by the Appellate Body Report.

8 STATEMENT BY THE CHAIRMAN REGARDING SOME MATTERS RELATED TO THE APPELLATE BODY

8.1. The Chairman, speaking under "Other Business", recalled that at the regular DSB meetings held in April and May 2015, he had informed delegations that the first four-year terms of office of Messrs. Ujal Singh Bhatia and Thomas Graham would expire on 10 December 2015 and that both were eligible for reappointment to a second and final term of office, pursuant to Article 17.2 of the DSU. He had also informed delegations that both Messrs. Bhatia and Graham had expressed their willingness to serve for a second four-year term. In light of that, he had announced that he would consult informally with Members and he had invited delegations with views on these matters to contact him directly. At the present meeting, he wished to report that these consultations were still ongoing, and he again encouraged delegations with views on these matters to contact him directly.

8.2. The DSB took note of the statement.

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