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

COMMUNICATION FROM THE EUROPEAN UNION

The following communication, dated 13 February 2014, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated at the request of that delegation.

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Third Party Rights and Sequencing
of Compliance/Arbitration Panel Proceedings

At the DSB meeting on 22 January 2014 the European Union made a statement concerning the above matters. Several other Members also made statements. The meeting included a discussion about matters to be included under any other business. In order to afford any interested Member the opportunity to comment further, the European Union has requested that this matter be placed on the agenda of the next DSB meeting. In this respect, we recall the statement that we made at the meeting on 22 January 2014, in the following terms.

At the DSB meeting on 23 August 2013, when Indonesia made its unilateral request under Article 22.2 of the DSU, the European Union made a statement.

The European Union noted that there was disagreement between the United States and Indonesia with respect to compliance and recalled that such disagreement must be decided through recourse to Article 21.5 of the DSU, before recourse to arbitration subsequent to a request under Article 22.2 can be entertained. That is the correct sequence, even if Indonesia strongly believes that the United States has failed to comply and even if that belief is reasonably held. The European Union reserved its rights in this regard.

Consistent with this, on 4 September 2013, the European Union filed an application with the compliance/arbitration panel, seeking to ensure that it would have an opportunity to exercise its third party rights. Brazil and Mexico have made similar requests.

The European Union explained in its application the specific interest that it has in the *United States – Clove Cigarettes* case as well as the systemic concerns that the European Union has with respect to the sequencing and related issues.

After a lapse of months, the European Union received the arbitrator's decision which was designated as confidential and thus cannot be circulated. Suffice it to say that it appears to envisage that no other Member apart from the parties is to have a role in or information about these compliance/arbitration panel proceedings. This is despite the fact that these proceedings will necessarily need to deal with the question of compliance in which the EU has a particular interest and will raise several important systemic issues, particularly relating to the interpretation of the DSU, of potential interest to the wider Membership. It appears that these issues will now be dealt with behind closed doors.

The European Union also considers this a breach of its third party rights, as provided for under Article 10 of the DSU, and the principle of due process. This is a matter of very serious concern and we consider that it necessitates further action on our part.

In this regard, we are of the firm view that Article 21.5 of the DSU is the proper procedure for settling compliance disputes, and that making an Article 22.2 DSU request in such a situation whilst omitting to initiate and pursue compliance proceedings or suspend the arbitration panel proceedings, is inconsistent with Articles 23.1 and 23.2(a) of the DSU.

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