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ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

COMMUNICATION FROM THE EUROPEAN UNION

The following communication, dated 9 December 2014, from the delegation of the European Union to the Presiding Member of the Appellate Body Division in this dispute, is circulated at the request of this delegation.

The European Union refers to a letter dated 5 December 2014 from three participants in these proceedings i.e. the responding party Argentina and two of the complaining parties United States and Japan ("the three participants"). In this letter the three participants appear to interpret Article 17.5 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (DSU) in a manner that necessitates a reaction from the European Union. In particular, the letter appears to suggest that the Appellate Body would be required to consult and obtain the agreement of the participants if it cannot issue its report within the 90-day time limit set out in Article 17.5 of the DSU. However, the three participants fail to cite any legal basis in the DSU, textual or otherwise, that would require such consultation and agreement. For its part, the European Union would like to state for the record its view that such a basis does not exist and that therefore the interpretation provided by the three participants is plainly incorrect.

Furthermore, the three participants assert the existence and normative significance of a "prior practice of Members" citing *inter alia* certain cases to which the European Union has been a main party/participant. In particular, the letter asserts that a practice existed until 2011 according to which "the Appellate Body consulted with the Parties and obtained their agreement before circulating reports after the deadline provided for in the DSU". Furthermore, it appears that for the three participants the asserted past practice carries some normative relevance. The European Union would like to state for the record that it disagrees with the assertion made by the three participants on the existence of such past practice and its normative value. At most, the citations provided in the letter demonstrate that each of the participants agreed that a certain factual situation existed or certain events factually took place in the context of the relevant proceedings without those circumstances and/or the purported "agreement" having any normative relevance.
