WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/274
23 November 2009

(09-5815)

Dispute Settlement Body
25 September 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 September 2009

Chairman: Mr. John Gero (Canada)

Subjects discussed: Page

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.82)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.82)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.57)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.20 –WT/DS293/31/Add.20)

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 by Ecuador: Status report by the European Communities (WT/DS27/96/Add.8)

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DSS332/19/Add.6)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.1)

(h) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36)

1. The Chairman recalled that Article 21.6 of the DSU required that unless the DSB decided 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 was resolved. He proposed that the eight sub-items under Agenda item 1 be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.82)

2. The Chairman drew attention to document WT/DS176/11/Add.82, 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.

3. The representative of the United States said that his country had provided a status report in this dispute, on 14 September 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, which had convened in January 2009. The US administration was working with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, at the present meeting, the United States was presenting its eighty-second status report in this dispute. The EC hoped that the new US authorities would now take steps to finally implement the DSB's ruling and resolve this matter.

5. The representative of Cuba said that, in 2009, Members continued to urge the United States to comply with the Appellate Body's rulings, which had been made more than seven years ago. Unfortunately, the expectations and hopes of compliance that arose on 20 January 2009 were now gone. The United States had not even met its obligation to inform Members of the steps that the US administration proposed to take with the US Congress in relation to this case. The first objective of the dispute settlement mechanism was to secure the withdrawal of the measures found to be inconsistent with the covered agreements, in accordance with Article 3.7 of the DSU. It was, therefore, impossible to speak to security and predictability of a system that did not meet its primary objective, even if the respondent insisted that it had complied with the DSB's rulings in most cases. On 29 April 2009, in the statement to the General Council on his appointment, the Director-General had stated that: "[t[he pursuit of openness, the guarantee of the most-favoured-nation principle and non-discriminatory treatment by and among Members [...] remain our founding political values". The US failure to comply with the DSB's rulings in this case undermined those core political values. Pursuant to the Understanding reached by the EC and the United States pertaining to the Section 211 dispute, which had been signed more than four years ago, the EC preserved its right to be granted DSB authorization to suspend concessions or other obligations at any future date. However, neither was the United States taking steps to repeal Section 211, nor was the EC exercizing its right under Article 22.2 of the DSU. According to media reports, the new European Presidency's work programme relating to intellectual property stressed the need for effective protection of intellectual property rights, and in this connection a conference on enforcement would be held in Stockholm in December 2009. The media had also indicated that the new US administration would work vigorously to ensure that intellectual property rights were observed, both domestically and abroad, as had been affirmed by Trade Secretary, Gary Locke. Thus, it could be inferred that the parties in this dispute were "supposedly" committed to observing intellectual property rights. It was, therefore, inexplicable that no action had been taken to repeal Section 211, which undermined fundamental principles of the TRIPS Agreement. Once again, Cuba urged the parties to resolve this dispute without delay. This was not the time to continue postponing actions that could send a positive signal of genuine commitment to the protection of intellectual property rights and the WTO.

6. The representative of the Bolivarian Republic of Venezuela said that his country had taken note of the US status report. He further stated that trade was fundamental to the development of countries, and unilateral measures such as that of the United States against Cuba were without justification. The US measure not only distorted Cuba's trade, but had also created problems that were related to human rights issues by seriously undermining Cuba's economy. The fact that the United States had prolonged Cuba's blockade for a further year was a bad sign, and suggested that the United States was unlikely to bring itself into line with the DSB's recommendations since Section 211 was part of that blockade. The US attitude posed systemic and credibility problems for the DSB. Indeed, the two arguments periodically put forward by the United States to defend its position could not be considered valid, namely: (i) that the United States was complying with almost all of the DSB's recommendations; and (ii) that the credibility of the system was not being undermined, since the number of disputes brought before the DSB continued to increase. The first argument was unacceptable, because it was not up to Members to decide what rulings they would or would not comply with – they must comply with all of them. The second argument, concerning the increase in the number of disputes as proof of the DSB's credibility, was also unacceptable, since that increase was due to the intricacy of the international trading system, which created disputes that Members tried to settle in a civilized manner. To accept that argument would be as inappropriate as deriving satisfaction from the fact that Members' judicial systems were trying more and more cases every day, and believing that this was due to the credibility of the system rather than the conflictual nature of today's society. Cuba's blockade was difficult enough to justify in the past, but at present, with borders tending to fade as technology had advanced and trade relations had reached every corner of the globe, the maintenance of the blockade was nothing more than a show of imperial arrogance backed by military power. At a time when undemocratic and illegal interests were trying to disrupt the American continent in an attempt to reverse what had been achieved in the area of inclusiveness –

a concept with which the United States was not unfamiliar – Venezuela asked the United States to give a clear demonstration of its commitment to international rules, and to comply with the DSB's long-standing decision by repealing Section 211.

7. The representative of Ecuador said that his country thanked the United States for its status report but regretted that the report indicated little progress towards compliance. Ecuador fully supported the statement made by Cuba and recalled, once again, that Article 21 of the DSU referred explicitly to prompt compliance with the DSB's rulings and recommendations, and in particular with regard to matters affecting the interests of developing countries. The United States closely monitored other Members' compliance with WTO obligations and had expressed, in different WTO Councils and Committees, its systemic concerns about the commitments undertaken by other Members, and had prepared reports about other Members' compliance with their obligations in the area of intellectual property rights. Therefore, if the United States wished to promote coherence, it should set a good example. Ecuador, once again, urged the US administration and the US Congress to accelerate compliance with the DSB's rulings and recommendations by repealing Section 211. Ecuador wished to receive more detailed information from the EC on the steps taken to resolve this long-standing dispute.

8. The representative of Brazil said that his country thanked the United States for its status report. Brazil continued to be seriously concerned about the prolonged situation of non-compliance with the DSB's recommendations and rulings. In this connection, Brazil urged the United States to expedite its efforts and to comply with its multilateral obligations.

9. The representative of India said that her country thanked the United States for its status report and its statement. India, once again, wished to express its concern since nothing new had been reported by the United States, and there was no indication as to when the matter would be resolved. India continued to be concerned about the non-compliance situation in this dispute, which undermined the credibility of the WTO dispute settlement system and urged the United States to fully implement the DSB's recommendations in this dispute.

10. The representative of Argentina said that his country thanked the United States for its status report. Argentina supported the statements made by previous speakers, which had referred to negative effects for the system resulting from the lack of implementation of the DSB's recommendations. Argentina supported Cuba's statement that both parties had the responsibility in this dispute, and that it was important to find a prompt solution as well as to fully implement the adopted recommendations. Argentina called upon the parties, and in particular on the United States, to take the necessary measures to ensure that this matter was resolved once and for all.

11. 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.82)

12. The Chairman drew attention to document WT/DS184/15/Add.82, 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.

13. The representative of the United States said that his country had provided a status report in this dispute on 14 September 2009, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. With

respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities by 23 November 2002, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

14. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan noted the fact that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. Japan hoped that the United States would soon be in a position to report to the DSB a tangible progress for the remaining part of the DSB's recommendations and rulings. A full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[1] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

15. 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.57)

16. The Chairman drew attention to document WT/DS160/24/Add.57, 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.

17. The representative of the United States said that his country had provided a status report in this dispute on 14 September 2009, in accordance with Article 21.6 of the DSU. In July 2009, the EC Trade Commissioner and the US Trade Representative had met and had announced that they had exchanged ideas on this dispute. The US administration would continue to confer with the EC, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

18. The representative of the European Communities said that the United States had again reported non-compliance and the EC was again disappointed, especially in light of the importance the United States attached to intellectual property protection. The EC was aware that the United States was in favour of strong intellectual property protection throughout the world, and thus hoped that the United States would lead by example. The EC remained ready to work with the US authorities towards the complete resolution of this case, and hoped that the financial loss suffered by the EC industry could be brought to an end soon.

19. 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 Communities (WT/DS291/37/Add.20 – WT/DS293/31/Add.20)

20. The Chairman drew attention to document WT/DS291/37/Add.20 – WT/DS293/31/Add.20, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

21. The representative of the European Communities said that the EC regulatory procedures on biotech products continued to work as foreseen in the legislation. Draft authorization decisions for

[1] Article 3.3 of the DSU.

three GM maize events[2] had been submitted shortly after their vote in the regulatory Committee in July 2009 and would now be subject to a vote on 19 October 2009 in the Council. If the vote did not result in a qualified majority against the draft decisions, the Commission would be in a position to authorize these three events sometime in November 2009. This would raise the number of GMOs authorized since the date of establishment of the Panel to twenty-four.

22. The representative of the United States said that his country thanked the EC for its status report and its statement. As the United States had noted, at the 31 August 2009 DSB meeting, more than 60 pending biotech applications remained backed up in the EC approval system. This backlog resulted in ongoing bans on major US agricultural products. Regrettably, it appeared that not one of the pending applications had progressed since the August 2009 DSB meeting. At the present meeting, the United States wanted to respond to one of the assertions made by the EC at the 31 August 2009 DSB meeting. In particular, the EC had stated that the 2008 approval of a biotech soybean showed that the EC system was "speedy" and performed "satisfactorily". The United States noted that the EC selected this one application from among dozens. However, even this hand-picked application illustrated some of the major problems in the EC's operation of its approval system. First, even after the EC scientific committee had issued a favourable risk assessment, the EC had continued for an additional five months to ban the import of any US agricultural commodity that contained even trace amounts of this soybean variety. The EC's stated rationale was that the approval had to be submitted for review by a committee of EC member State representatives. But the committee had failed to act in accordance with the scientific opinion and had blocked the approval. The result was months of delay while the EC held an additional vote of member State representatives. Finally, the EC Commission had to take the step of approving the product over member State opposition. This same byzantine process had been applied to every biotech application considered by the EC for more than ten years. Not once had the committee of member State representatives acted in accordance with the scientific opinion by consenting to a biotech approval. The result was delays for each and every application.

23. Second, the unnecessary five-month period between the favourable risk assessment and the ultimate approval of the biotech soybean was not the norm. Three-quarters of the pending applications were still awaiting risk assessments. But of the 17 applications that had received risk assessments, at least 14 were still pending approval for more than five months after the assessment. In fact, some of those 14 pending applications had received favourable risk assessments many years ago, but nonetheless remained unapproved. Two of these applications – covering different varieties of biotech maize – had been found by the DSB to have been unduly delayed in breach of the EC's obligations under the SPS Agreement. One of these maize varieties had been pending for over eight years, the other for more than 13 years. In short, it defied credibility for the EC to assert that its biotech approval system was "speedy" or that it operated "satisfactorily". The United States thanked the DSB for its attention to this matter.

24. The representative of Argentina said that his country thanked the EC for its status report. Argentina continued to monitor with great interest both new developments as well as the implementation process by the EC member States. Argentina would work together with the EC to resolve this matter as quickly as possible.

25. The representative of the European Communities said that the GMO regulatory regime was not the subject of the original Panel's findings and neither was its "operation" nor was the status of specific applications not dealt with in the original Panel covered by this Agenda item.

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

[2] These GM maize events are the following: MON89034, MON88017 and 59122xNK603.

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Communities (WT/DS27/96/Add.8)

27. The Chairman drew attention to document WT/DS27/96/Add.8, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations and rulings in the case concerning the EC's regime for the importation, sale and distribution of bananas.

28. The representative of the European Communities said that, as had been indicated at previous DSB meetings, the EC stood ready to implement the recommendation of the Panel Report by means of modifying its bound duty. The EC still hoped that the rebinding could be made in the context of a comprehensive agreement with Latin American suppliers, an agreement that had been sought since the EC initiated GATT Article XXVIII negotiations back in 2004. The EC was fully committed to finding very soon a final solution to this long-standing "banana saga". As had been indicated in its status report, the EC was fully engaged in negotiations with all Latin American supplying countries with the view of concluding promptly such a comprehensive agreement. The EC hoped that the negotiations could soon lead to a satisfactory agreement for all suppliers.

29. The representative of Ecuador said that his country thanked the EC for its status report which, once again, did not provide any information as to when the EC expected to comply with the DSB's recommendations and rulings in this dispute. The EC had proposed to the MFN banana suppliers an agreement subject to many conditions that had gone beyond the Bananas dispute and had made more difficult to reach an understanding on this matter. The conditions proposed by the EC were not linked to the EC's compliance with the DSB's recommendations and rulings in the dispute that had been won by Ecuador, nor were they linked to the compensations for the EC's enlargement claimed by Ecuador. His country did not understand the EC's lack of compliance, in particular since Ecuador had a legal right to retaliate against the EC, which resulted from previous Bananas disputes. However, Ecuador remained open to negotiating a solution in the context of the WTO. Ecuador would be in a position to accept a solution to this dispute only if the balance reached under the July 2008 Agreement were to be preserved.

30. The representative of Colombia said that his country thanked the EC for its status report. For the eighth time since January 2009, the EC had repeated its proposal to bring itself into conformity with the DSB's recommendations and rulings by changing its scheduled tariff commitments on bananas. Colombia had participated in the discussions held with the EC with a view to reaching an agreement on bananas which, among other things, would establish a new bound tariff level for bananas, a product of importance to Colombia's economy. Colombia hoped that, as a result of those negotiations, it would be possible to reach a balanced agreement. However, this would require the EC's full commitment. Like the EC, Colombia hoped that it would soon be possible to put an end to this long-standing dispute. Colombia was confident that the EC would live up to its obligation under the DSU and give special attention to this issue that was affecting the interests of developing countries such as Colombia.

31. The representative of the Dominican Republic, speaking also on behalf of the ACP countries, said that ever since this item had been on the DSB's Agenda, the ACP countries had stressed that they respected final WTO decisions, notwithstanding their disagreement with certain conclusions reached by the Panel and the Appellate Body in this dispute. The ACP countries recalled, once again, that both the Panel and the Appellate Body had agreed that the EC's schedule at this time still committed the EC to a TRQ at a tariff of €75/mt and an out-of-quota tariff of €680/mt. As previously stated, the ACP countries could resign themselves to live with a literal implementation of those conclusions. The EC, however, aimed to achieve compliance and implementation by changing the structure of its tariff commitments through negotiations with the MFN banana suppliers. It appeared that the result

of this process would be an overall reduction of bound and applied duties on bananas. The ACP countries understood that the DSB's conclusions in this dispute did not require such an overall reduction of average tariffs; all they required was either a literal implementation or a rearrangement. Any decision to reduce the EC's average banana tariffs could not be justified by the need to comply with the DSB's recommendations, but could rather be justified in the context of the DDA negotiations. This should be kept in mind when designing and implementing a solution which should be based on the right reasoning and anchored and balanced out in the right context. The ACP countries remained committed to supporting their partners in finding and implementing an effective final solution to the "banana issue".

32. The representative of Honduras said that, although this was the tenth DSB meeting since the Appellate Body had issued its most recent condemnation of the EC's bananas regime, Honduras continued to hope that the EC would make a clear commitment to bind its tariff at a reasonable level in the near future and put an end to its discrimination. Unfortunately, the EC continued to press for a "comprehensive" proposal under which it would make no binding commitment and Latin American countries would have to forgo everything, including their rights to prompt compliance, tariff rights, expansion rights, non-discrimination rights, Doha rights with regard to bananas, Doha rights with regard to tropical products, rights under the Bananas III dispute, and other rights under the DSU. As it was well known, the DSU provisions prohibited Members from reaching a mutually agreed solution that was inconsistent with the covered agreements or that nullified or impaired the benefits accruing under those agreements. Thus, the DSU did not permit a "solution" that: (i) would grant the EC the unilateral right to declare that the settlement reached was "null and void", thereby contravening its obligation of prompt compliance; (ii) granted other Members the right to stand in the way of the EC's compliance obligations; (iii) supported measures that had already been condemned in the Bananas III dispute; (iv) or deprived Members of their procedural rights in case of non-compliance by the EC with the Bananas III dispute in the future. Like others, Honduras was interested in finding a lasting solution to this dispute. However, it would continue to insist on compliance with the basic DSU principles. Honduras reserved all its rights, including those relating to the EC's Schedule and its continued discrimination.

33. The representative of Panama said that under the DSU provisions, and in accordance with the DSB's rulings, the EC had been under obligation to bring itself into compliance on 1 January 1999. Almost a decade had passed but it was still not known when the EC planned to bring itself into compliance with its obligations. Panama remained concerned that the EC wanted to take what it called a "comprehensive" approach to the settlement of the Bananas dispute. Panama was particularly concerned that the EC should insist on "settling" the issue in a way that was not provided for in the DSU. In fact, practically every aspect of this "comprehensive" approach proposed by the EC was at odds with the legal framework established under the DSU. The DSU required the EC to eliminate its violations, both with respect to bindings and discrimination. None of the status reports that the EC submitted each month made any reference to discrimination, or to how and when the EC proposed to comply with its obligations. The moral and legal responsibility under the DSU to comply fell solely and exclusively with the EC. Under the DSU provisions, issues that were separate from each other should not be linked. And yet the EC was trying to link its compliance obligations in the Bananas dispute to Latin American concessions in respect to other products, and with numerous conditionalities, without any guarantee that it would comply with an agreement or with its obligations in the future. There was only one reason why this dispute had dragged on without a settlement for 17 years – the EC had disregarded the relevant DSB's recommendations and rulings. The solution would not be found by ignoring the rules, but by reaching a mutually acceptable agreement that would respect the covered agreements once and for all. That was the basis on which Panama was seeking a solution and it, once again, urged the EC to do the same.

34. The representative of the United States said that his country thanked the EC for its status report and its statement. As all Members were aware, this was the longest-running dispute in the

WTO, and the reasonable period of time for compliance in this dispute had expired more than ten years ago, on 1 January 1999. While the United States had taken note of the EC's efforts to reach agreement with interested parties to resolve the dispute, the United States also noted that the commercial impact of the EC's non-compliance over this very long period was undeniably large and damaging to a number of WTO Members. The United States called on the EC to resolve this dispute, and until then, renewed its request to the EC to provide a status report with respect to the dispute brought by the United States and those of the other complaining parties.

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

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DSS332/19/Add.6)

36. The Chairman drew attention to document WT/DS332/19/Add.6, which contained the status report by Brazil on progress in the implementation of the DSB's recommendations and rulings in the case concerning Brazil's measures affecting imports of retreaded tyres.

37. The representative of Brazil said that, at the present meeting, his country was submitting its final status report in this dispute. For many years, bilaterally with the EC, before the Panel and in the Appellate Body's proceedings, Brazil had affirmed the critical role of the ban on the importation of retreaded tyres for legitimate public policies it had pursued. Imported retreaded tyres accelerated the generation of waste tyres because they had a shorter lifespan. The more waste tyres were generated, the greater the health and environmental risks associated with them. Those risks included toxic tyre fires in stockpiles, carcinogenic emissions from cement kilns and dangerous mosquito-born diseases, such as dengue and malaria. In this dispute, the Panel and the Appellate Body had shown, once again, that the WTO disciplines and its dispute settlement mechanism were able to strike the proper balance between legitimate trade and non-trade concerns. Brazil's policy objective of protecting its population and its environment from the risks posed by the accumulation, transportation and disposal of used tyres had been unmistakably supported. The Appellate Body had textually stated that "[a]s a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces [...] a material contribution to the realization of its objective". Brazil had nonetheless been required to undertake adjustments to the application of the import ban. The Supreme Court's decision, issued on 24 June 2009, and Portaria SECEX 24/2009, published on 26 August 2009, had implemented those adjustments. Those efforts reflected Brazil's firm disposition of reconciling its legitimate policy objectives with its commitments under the WTO Agreements. Brazil, therefore, reported, with satisfaction, its full compliance with the DSB's recommendations and rulings in this dispute.

38. The representative of the European Communities said that the EC had noted Brazil's seventh status report. The EC noted that Brazil had, for the first time, claimed to be in full compliance with the DSB's recommendations and rulings in this dispute. Brazil claimed to have put an end to its discriminatory targeting of certain imported products that, in the EC's view, contributed marginally, if at all, to the environmental concerns Brazil had identified. Brazil claimed further that it had achieved full compliance. The EC was in the process of reviewing that claim. Throughout the proceedings, the EC had stated that it shared Brazil's stated environmental and public health objectives, but that there was disagreement about whether Brazil's discriminatory import ban on retreaded tyres contributed to the attainment of those objectives. The EC had consistently argued that there were far more effective measures that would actually make a difference, for instance, enforcing the existing obligation of collection and disposal of waste tyres. As the EC had demonstrated in the course of this dispute, in particular the Brazilian producers of new tyres had failed to fulfil this obligation, and the Brazilian government had failed to enforce it effectively, for example, by imposing excessively low fines, if any. The Brazilian government had even decided to reduce the obligation of waste tyre collection and

disposal. The EC did not consider this to be an effective manner to tackle the problem of waste tyres that were scattered throughout the Brazilian landscape, when those waste tyres were partly responsible for spreading of mosquito-borne diseases. The EC considered it deplorable that Brazil had chosen to ban imported retreaded tyres which had contributed to Brazil's mosquito problem only marginally, if at all, thereby making those tyres a scapegoat, while refraining from tackling the problem where it could actually be solved.

39. The DSB took note of the statements.

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.1)

40. The Chairman drew attention to document WT/DS294/34/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

41. The representative of the United States said that his country had provided a status report in this dispute, on 14 September 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had already taken a number of steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, including those identified in the DSB's recommendations and rulings, the United States would continue to consult with interested parties.

42. The representative of the European Communities said that the US report was the second status report pertaining to this dispute. At the 31 August 2009 DSB meeting, the EC had explained what it expected the United States to do to comply with the findings contained in the reports adopted by the DSB in this case: stop applying the zeroing methodology in administrative reviews immediately and stop collecting illegally calculated duties. At present, it sufficed to say that the United States had not taken any actions to correct the shortcomings in its implementation. This was so, despite a clear obligation under Article 21.3 of the DSU to comply immediately. The EC could understand perhaps that the United States may have had doubts about the scope of its compliance obligations in the process of implementing the rulings adopted by the DSB in May 2006. The EC could also understand that any such doubts may have been the reason for the US failure to comply by the expiry of the reasonable period of time on 9 April 2007. However, any such doubts that may have existed on the side of the United States, had been clarified by the compliance Panel and the Appellate Body, the Reports of which had been adopted almost three months ago. The only step left for the United States to take was to bring itself into full compliance. The EC noted, once again, that the status report did not refer to involving Congress in ending zeroing in administrative reviews. This confirmed the EC's view that the United States could bring itself into compliance by administrative action.

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

(h) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36)

44. The Chairman drew attention to document WT/DS322/36, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

45. The representative of the United States said that his country had provided a status report in this dispute, on 14 September 2009, in accordance with Article 21.6 of the DSU. As noted in the

status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

46. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan was encouraged by the submission of the status report, as it showed the renewed commitment on the part of the United States to implement the DSB's recommendations and rulings in this dispute. The United States had stated in its report that it "will continue to consult with interested parties in order to address the findings contained in [the reports of the Appellate Body and the panel]". Japan called on the United States to take immediate and concrete action to fully comply with the DSB's recommendations and rulings in order to resolve this dispute.

47. The representative of the European Communities said that the zeroing dispute brought against the United States by Japan was another case, much like the EC's own dispute addressed under the previous Agenda item, where US implementation was long overdue. The EC hoped that the United States would finally accept that zeroing ran foul of fundamental obligations of the Anti-Dumping Agreement and put an end to all remaining illegal practices of zeroing.

48. 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 Communities and Japan

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

50. The representative of Japan said that the preparatory work for a new round of distributions under the CDSOA appeared to be well underway[3], and thus the CDSOA still remained operational.[4] Japan, once again, called on the United States to stop illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance.

51. The representative of the European Communities said that, as in many previous DSB meetings, her delegation wanted to know when the United States would effectively stop the transfer of anti-dumping and countervailing duties to its industry and finally put an end to the condemned measure. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU, and to submit implementation reports in this dispute.

52. The representative of India said that her country thanked the EC and Japan for bringing, once again, this issue before the DSB. In India's view, the CDSOA still allowed for disbursements by the US administration to its domestic industry, and WTO Members continued to raise concerns about this situation. As had previously been reiterated, it was India's concern that non-compliance by Members

[3] On 3 September 2009, the US Customs and Border Protection published the list of certifications received from claimants for the FY 2009 distributions. See US Customs and Border Protection's website as:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/

[4] In the words of the US Customs, "the distribution process will continue for an undetermined period". See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xm

led to a growing lack of credibility for the WTO dispute settlement system. India agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

53. The representative of Canada said that her country agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

54. The representative of Brazil said that his country thanked the EC and Japan for keeping this item on the DSB's Agenda. It was clear that, until such time as the United States ceased all disbursements made pursuant to the Byrd Amendment, the situation of non-compliance would persist, and the issue would not be "resolved" within the meaning of Article 21.6 of the DSU. Thus, Brazil urged the United States to resume the submission of status reports in this dispute until the case was effectively resolved.

55. The representative of China said that his country thanked the EC and Japan for, once again, raising this matter in the DSB. China shared the concerns expressed by previous speakers and joined them in urging the United States to comply fully with the DSB's recommendations.

56. The representative of Thailand said that his country thanked the EC and Japan for bringing, once again, this matter before the DSB. Thailand's position remained the same as at the previous DSB meeting. Thailand continued to urge the United States to stop disbursements under the CDSOA and to provide status reports until such actions were taken and this matter was fully resolved.

57. The representative of the United States said that his country had already explained at numerous previous DSB meetings, that the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States further recalled that Members, including the EC 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. The United States did not, therefore, understand the purpose for which the EC and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports, the United States failed to see what purpose would be served by the further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

58. The DSB took note of the statements.

3. United States – Subsidies on upland cotton: Recourse to arbitration by the United States under Article 22.6 of the DSU and Articles 4.11 and 7.10 of the SCM Agreement: Decisions by the Arbitrators

(a) Statement by Brazil

59. The Chairman said that this item was on the Agenda of the present meeting at the request of Brazil, and invited the representative of Brazil to speak.

60. The representative of Brazil said that, in July and October 2005, his country had requested authorization to take countermeasures in response to the US failure to comply with the March 2005 DSB's rulings in the US - Cotton dispute. The United States had objected to Brazil's requests on both occasions, and the matter had been referred to arbitration. He noted that one arbitration proceeding dealt with countermeasures with respect to prohibited subsidies and the other one covered actionable

subsidies. Subsequently, the arbitration proceedings had been suspended by common agreement of the parties to this dispute. In the meantime, a new panel had been established, pursuant to Article 21.5 of the DSU, which had found that the United States had not complied with the DSB's rulings. Those conclusions had been upheld by the Appellate Body and the Reports of the compliance Panel and the Appellate Body had been adopted by the DSB in June 2008 – more than three years after the original rulings in this dispute. In August 2008, Brazil had requested the resumption of the Arbitrators' work in both proceedings, which had been completed with the circulation of two Decisions on 31 August 2009. Those Decisions had prompted Brazil to include this item on the Agenda of the present meeting. Thus, Brazil thanked the Arbitrators and the Secretariat for their work in those proceedings, which involved hundreds of pages of lengthy submissions, annexes and exhibits, many of them heavily loaded with highly technical material. It was, therefore, understandable that, after the composition of the Arbitrators, no less than 11 months had elapsed before their Decisions had been circulated. In Brazil's view, even though this was an unusually long period of time for such arbitrations – the DSU envisaged 60 days from the expiry of the compliance period – the quality of the result attested that it had been the product of hard work, which also reflected the voluminous input provided by the parties. In general, the Arbitrator's Decisions were thorough, clear and well reasoned. Overall, Brazil was satisfied that the Arbitrators had taken the extensive arguments by the parties on their merits, reaching determinations that were balanced and grounded in the applicable disciplines of the DSU and the SCM Agreement.

61. Brazil considered that some of the important determinations made by the Arbitrators would be worth mentioning at the present meeting. First, with regard to prohibited subsidies, namely the export credit guarantees provided under the GSM 102 programme (not only for cotton but also for a number of other commodities), the Arbitrators had not accepted the argument that the countermeasures should be gauged solely in light of the net cost incurred by the US Government in providing the guarantees. In essence, the United States had argued that item (j) of Annex I to the SCM Agreement could be read *a contrario* – that, if an export credit guarantee programme met the breakeven test, there would be no subsidy involved, regardless of the benefit actually conferred by the guarantees. The Arbitrators had rejected this notion and had rightly found that, "as a matter of law, it is possible that an item (j)-consistent export credit guarantee programme might still be found to confer a 'benefit'", and "Brazil would be entitled to continue to apply countermeasures until the full benefit of the GSM 102 programme has been withdrawn". Drawing on a methodology that had been provided by Brazil, the Arbitrators showed that the benefits involved were very significant – in many cases well above 20 per cent of the transaction value.

62. Another important determination concerned actionable subsidies – in this case, the payments on US cotton provided under the programmes "marketing loan" and "countercyclical payments". The United States had argued that the marketing loan and counter-cyclical payments, challenged by Brazil before the original and the compliance panels, were payments authorized by the 2002 Farm Bill which had expired. Thus, the argument went, there would be no legal basis for countermeasures in respect of those payments. The Arbitrators had agreed with Brazil that, even though the 2002 Farm Bill had expired, it had been replaced by new legislation – the 2008 Farm Bill – which left the marketing loan and countercyclical payments programmes basically unchanged in respect of cotton. In response to the US argument that one would have to wait and see what the level of the payments would be under the new Farm Bill, the Arbitrators noted that they had not been provided "with any indication that the payments that may be made under the 2008 Farm Bill would be of a different nature than those that gave rise to the rulings at issue". According to the Arbitrators, "[nor] can any uncertainty about what might happen in the future dissuade these Arbitrators from assessing the adverse effects determined to exist in relation to a measure which did exist and which, *on the facts, continues to exist*".

63. With regard to the quantification of the effects of the cotton subsidies, running the economic model proposed by Brazil with one minor modification, the Arbitrators had calculated that, in marketing year (MY) 2005, the world price of upland cotton would have been higher by 9.38 per cent

but for US marketing loan and countercyclical payments. In the words of the Arbitrators, "the adverse effects on the rest of the world from US marketing loans and countercyclical payments in MY 2005 amounted to US$2.905 billion". In other words, taking MY 2005 as a representative year, the Arbitrators had stated that the average effects of only those two US subsidies on cotton producers in the rest of the world amounted to nearly US$3 billion each year. Overall, the Arbitrators had confirmed the very significant economic impact of the US actionable and prohibited subsidies.

64. With regard to the issue of the so-called "cross-retaliation", Brazil welcomed the Arbitrators' recognition of the difficulties faced by Brazil if it only had the option to apply countermeasures on imports of US goods. The Arbitrators had determined that only a limited subset of the overall US imports into Brazil could be subject to countermeasures without resulting in unreasonable costs on the Brazilian economy and its consumers. Thus, the Arbitrators had granted Brazil the right to seek the suspension of concessions and obligations under the GATS and the TRIPS Agreement pursuant to certain conditions. In Brazil's view, those determinations were important not only for illuminating – and sometimes precisely quantifying – some aspects of this dispute. They were also important for safeguarding the integrity and credibility of the WTO dispute settlement mechanism. According to the Arbitrators' Award, Brazil was authorized to adopt countermeasures in an amount that was made of two parts: (i) a fixed amount of US$147.3 million per year, which corresponded to actionable subsidies; and (ii) with respect to prohibited subsidies, a variable amount, to be updated each year on the basis of data on US exports of several commodities that benefited from the export credit guarantee the GSM 102 programme. As regards the type of the countermeasures, the Arbitrators had determined that Brazil would have the right to apply "cross-retaliation" every time the total amount of calculated countermeasures exceeded a "threshold" in a given year. This threshold had in turn been calculated on the basis of the variation in Brazil's imports from the United States. The Arbitrators had thus provided a formula whereby the permissible amount and type of countermeasures could be determined. According to the formula, the amount of the countermeasures depended, *inter alia*, on the transaction value secured by GSM 102 and its distribution among classes of obligors. In that regard, the Arbitrators had determined that "[the] United States shall provide the most recent FY data on GSM 102 transactions".

65. The Arbitrators had also decided that the formula should be applied to three scheduled products (big meat, poultry meat and rice) only to the extent that the export subsidies provided to volumes of exports of the products were in excess of US reduction commitments. For the calculation of the corresponding deduction, the Arbitrators determined that "[the] United States shall provide the most recent data on US export prices of the scheduled products". Brazil intended to apply the formula on the basis of 2009 data. Given that FY 2009 would end on 30 September 2009, Brazil would be sending a letter, on 25 September 2009, to the United States requesting GSM 102 data relating to FY 2009 in the format indicated by the Arbitrators.[5] Brazil would also request data on US export prices for the three commodities mentioned. Brazil expected that the United States would comply with the Arbitrators' Decision so that Brazil could use that information to calculate the amount of permissible countermeasures. Brazil regretted that the dispute had come to this stage. After such a long period of time since the US measures had been found to be illegal, the United States persisted in maintaining the same subsidies and even dramatically increasing their use. The Arbitrators had now attached numbers to those measures and their effects, and the numbers were significant. Brazil, once again, urged the United States to eliminate its illegal subsidies and their adverse effects, so that the imposition of countermeasures would not be necessary.

66. The representative of Australia said that her country welcomed the Reports of the Arbitrator in the dispute concerning US subsidies on upland cotton, in which Australia had been a third party. For the first time, there was now a WTO-arbitrated quantification of the damage caused to other WTO Members by US farm subsidies. The Reports vividly illustrated the trade-distorting impact of US

[5] Subsequently circulated in document WT/DS267/40.

farm programmes. As correctly recognized by the Arbitrator: "[T]he specific design and structure of the subsidies at issue, as they have been maintained over a significant period of time, is such as to have created an artificial and persisting competitive advantage for US producers over all other operators … [T]his has a significant trade-distorting impact, not just on the US domestic market, but on the world market in these products". The decision by the Arbitrator under Article 7.10 of the SCM Agreement estimated the effects on world markets, and the damage done to other WTO Members, by just two subsidies – marketing loan and countercyclical payments – paid by the United States in respect of its cotton sector. The Arbitrator estimated that: in marketing year 2005, the world price of cotton would have been over 9 per cent higher but for those subsidies; in marketing year 2005, cotton farmers outside the United States had lost US$2.384 billion because of the lower world price caused by those subsidies; and in marketing year 2005, cotton farmers outside the United States had lost US$521.5 million because of reduced cotton production caused by those subsidies. Furthermore, the Arbitrator estimated that the damage to cotton farmers outside the United States from these two subsidy programmes totalled over US$12.2 billion from marketing year 1999 to marketing year 2005 inclusive. The decision by the Arbitrator under Article 4.11 of the SCM Agreement estimated the damage caused to farmers outside the United States by the prohibited export credit guarantees provided by the United States under the GSM 102 programme. The Arbitrator estimated that: for FY 2006, the damage to farmers outside the United States from the reduction in prices caused by those guarantees was US$120.64 million; and for FY 2006, US products supported by those guarantees had displaced US$628.6 million worth of sales that would otherwise have been made by farmers outside the United States. If the level of damage suffered in FY 2006 was used to approximate the level of damage for each year from FY 1999 to FY 2005 inclusive, then the total estimated damage to farmers outside the US from those guarantees for that period was over US$5.2 billion. This meant that the total estimated damage to farmers outside the United States from the subsidy programmes considered by the Arbitrator was in excess of US$17 billion for FY 1999 to FY 2005 inclusive. And all of those programmes continued, having been reauthorized by the 2008 Farm Bill.

67. Furthermore, WTO Members should recall that those Reports covered only a portion of the trade-distorting subsidies provided by the United States to its agricultural sector. The decision by the Arbitrator under Article 7.10 of the SCM Agreement covered only the marketing loan and countercyclical payments made in respect of upland cotton. However, those same programmes paid subsidies in respect of all the major US commodities – including corn, wheat, soybeans and rice; and prior to the welcomed changes to its export credit guarantee system, the US had provided widespread prohibited export credit guarantees under programmes in addition to GSM 102. The Reports had confirmed why the Cairns Group consistently called for a fair and market-oriented agricultural trading system. As stated in the Cairns Group's 20 July 2008 communiqué, major subsidisers "have provided … trade-distorting support – effectively denying the opportunity for others, including low income producers in developing countries, to enter the market". Australia recalled that Article 22 of the DSU provided that the suspension of concessions or other obligations were "temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time". Article 22 of the DSU stated that "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements". Australia called on the United States to implement the rulings and recommendations of the DSB in this long-running dispute without further delay.

68. The representative of the United States said that his country remained disappointed with the outcome of this dispute. Members of the DSB would recall that the United States had explained its concerns at previous meetings, and did not wish to cover that ground again at the present meeting. Instead, the United States wished to comment on a few aspects of the Awards of the Arbitrators that had been circulated on 31 August 2009. In a number of respects, the United States commended the work of the Arbitrators. It was clear that they had approached their task in a methodical and thoughtful manner, and they had reached a number of important conclusions, rejecting substantial

aspects of Brazil's DSB requests. For example, contrary to Brazil's DSB request, the Arbitrators had properly limited possible countermeasures by Brazil to the trade effects of the subsidies at issue on Brazil. If a Member could impose countermeasures for trade effects of a subsidy on the entire world, as Brazil had requested and as previous Arbitrators had concluded, those countermeasures would be unrelated to the nullification or impairment actually suffered by that Member. In addition, the Arbitrators had properly rejected Brazil's request for a one-time award of countermeasures for the Step 2 programme, which had been repealed. The Arbitrators were right to refuse countermeasures for a measure that had already been withdrawn. Once a WTO Member had brought its measure into conformity with the covered agreements, the aim of the dispute settlement system would have been achieved. A contrary finding that countermeasures could be authorized for a withdrawn measure would have meant a fundamental shift in the WTO dispute settlement system to retroactive sanctioning, and the United States commended the Arbitrator's analysis of this issue. Furthermore, the Arbitrators were correct to reject Brazil's arguments that it was entitled to an unlimited right to cross-sectoral countermeasures, for example, subject only to the "appropriate countermeasures" standard of Article 4.10 of the SCM Agreement. This argument was difficult to follow given that Brazil's own request for DSB authorization had cited Article 22.3 of the DSU and had explained how Brazil had followed those principles and procedures. The Arbitrator was correct to apply the disciplines of Article 22.3 of the DSU to Brazil's request and to find that Brazil had not followed those principles and procedures.

69. The United States also had certain concerns about the awards. With respect to the countermeasures for GSM 102, the Arbitrator had acknowledged that its approach of using, and then combining, an interest rate subsidy and an "additionality" calculation, which it adapted from Brazil's methodology, may overestimate any effects on Brazil in some aspects. Yet the Arbitrator still used it as the basis for the formula for countermeasures. The United States had some difficulty with the Arbitrator's conclusion that the "appropriate countermeasures" standard in Article 4.10 of the SCM Agreement had permitted it to proceed in that way. Similarly, in the arbitration concerning marketing loan and countercyclical payments related to cotton, the United States believed that the Arbitrator had incorrectly given Brazil the benefit of the doubt on several issues, such as the choice of price elasticities in the model for the effects of marketing loan and countercyclical payments. The United States also noted from certain press reports that Brazil had said that it would like a dialogue. The United States thought that such a dialogue would imply more than making DSB statements. The United States, therefore, looked forward to continuing discussions with Brazil on the issues related to this dispute.

70. The DSB took note of the statements.

4. United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil

(a) Request for the establishment of a panel by Brazil (WT/DS382/4)

71. The Chairman recalled that the DSB had considered this matter at its meeting on 31 August 2009 and had agreed to revert to it. He drew attention to the communication from Brazil contained in document WT/DS382/4, and invited the representative of Brazil to speak.

72. The representative of Brazil recalled that, at the 31 August 2009 DSB meeting, his country had requested the DSB to establish a panel to examine anti-dumping measures adopted by the United States on imports of Brazilian orange juice. At that meeting, the United States had not joined in the consensus and the panel had not been established. At the present meeting, Brazil was submitting, for the second time, its request for the establishment of a panel. As Brazil had stated in the previous DSB meeting, the United States used the "zeroing" methodology when calculating margins of dumping for exporters of orange juice from Brazil. It was not necessary to repeat the long

list of cases in which the WTO dispute settlement mechanism had found the use of zeroing to be inconsistent with the GATT and the Anti-Dumping Agreement. The fact that the United States continued to use the illegal methodology in administrative reviews, placing an unfair burden on Brazilian exports, had compelled Brazil to submit its second request for the establishment of a panel.

73. The representative of the United States said that his country was disappointed that Brazil had chosen to pursue its request for a panel in this matter. The United States understood that a panel would be established at the present meeting. However, the United States did not agree with the view expressed by Brazil that pursuing this panel proceeding was necessary. If Brazil chose to pursue this proceeding, however, the United States would defend the challenged measures before the panel. The United States reiterated the concerns it had expressed at the 31 August 2009 DSB meeting concerning the way in which Brazil had framed its panel request. As noted in August, the panel request included measures that were not in existence at the time of consultations and consequently could not have been, and had not been, consulted upon.

74. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

75. The representatives of Argentina, the European Communities, Japan, Korea, Chinese Taipei and Thailand reserved their third-party rights to participate in the Panel's proceedings.