WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/288
15 December 2010

(10-6730)

Dispute Settlement Body
25 October 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 October 2010

Chairman: Mr. Yonov Frederick Agah (Nigeria)

Subjects discussed: Page

[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

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.95)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.95)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.70)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.33)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.13)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.10)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.4)

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 seven 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.95)

2. The Chairman drew attention to document WT/DS176/11/Add.95, 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 October 2010, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the First Session of the current (111th) Congress. The Second Session of the 111th Congress had begun in January 2010. The Committee on the Judiciary of the House of

Representatives had held a hearing on certain of those proposals on 3 March 2010. In addition, the US administration was working with Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Union said that, at the present meeting, the United States was presenting yet another status report in this dispute. The EU hoped that the US authorities would soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba said that his country wished to draw attention to the fact that each month, under Agenda item 1, the DSB discussed the implementation issue pertaining to a long-standing dispute that involved the United States, due to its failure to comply with the DSB's recommendations and rulings. Thus, under this Agenda item, the United States was required to report on its progress in implementation. The situation was similar with regard to the other Agenda items. The United States, which was the largest user of the dispute settlement system, very often appeared on the list of disputes where compliance was pending. Furthermore, with regard to the disputes where the United States had supposedly complied with its obligations, Members continued to express concerns about the damage caused by US trade measures. Thus, it was difficult to reconcile this situation with the statements made by the United States in its most recent Trade Policy Review report, which read as follows: (i) "The fundamental features of US trade policy – maintenance of open, competitive markets, compliance with WTO obligations, and leadership in the multilateral trading system - remain unchanged ..."[2]; (ii) "...we have made it clear that we welcome rapid and pragmatic resolution of trade disputes rather than prolonged uncertainty..."[3], and (iii) "... a central theme of US policy has been to undertake the effective and timely implementation of our WTO commitments. We believe it is not only important for American trade interests, but for the WTO system as a whole, to ensure that all Members meet their commitments. The various manifestations of this policy range from active and constructive participation in the deliberations of WTO committees to the use of the dispute settlement mechanism. US trade policy seeks to support and advance the rule of law."[4] In Cuba's view those statements bore no relation to the US action with regard to Section 211.

6. Cuba noted that, for the past eight years, as a result of Section 211, the registration of intangible assets such as the Havana Club trade mark had been repeatedly hindered and even made impossible in the United States as a result of Section 211. This famous Cuban trademark, which was recognized as such all over the world, except by the US authorities, had been registered in the United States to a Cuban company since 1976. Havana Club was made by Cuban master rum-makers using techniques that dated back more than half a century, which demonstrated the antiquity of the Cuban trademark. It was, therefore, unacceptable that US companies wanted to appropriate that trade mark through the application of a law.

7. Cuba had demonstrated its commitment to, and respect for, international intellectual property treaties, agreements and arrangements to which it was party. The same, however, could not be said about the United States, which had failed to bring its legislation into compliance with its WTO obligations. This US behaviour was yet another expression of the US blockade against Cuba, a policy that had been extended to the area of intellectual property. In this regard, Cuba noted that, on 26 October 2010, the UN General Assembly in New York would vote on a new draft resolution entitled: "The Necessity of Ending the Economic, Commercial and Financial Embargo Imposed on by the United States of America Against Cuba". Cuba was certain that the overwhelming majority of countries would, once again, unequivocally condemn this genocidal policy against Cuba. Cuba would continue to request the United States to respond effectively and to repeal Section 211.

[2] USTPR Report (WT/TPR/G/235), page 6, para. 5.
[3] USTPR Report (WT/TPR/G/235), page 9, para. 17.
[4] USTPR Report (WT/TPR/G/235), page 18, para. 72.

8. Cuba considered that the information provided in the US status report, which consisted of changing a few lines each month, was absurd and disrespectful to all Members. At present, there was a real danger that the unlawful intentions to auction Cuban patents and trade marks, which had been duly registered in the United States, would become a reality as a result of irrational decisions that were contrary to the principles of law. This new development would aggravate the impact of the US failure to comply with the DSB's recommendations in this dispute. In Cuba's view, it was clear that after so many years of damage to its trade and economy, the only solution to this dispute was the immediate repeal of Section 211.

9. The representative of Ecuador said that his country supported Cuba's statement and, once again, wished to emphasize that Article 21 of the DSU referred expressly to the prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing-country Members. Ecuador hoped that the United States would continue its efforts to ensure prompt compliance with the DSB's recommendations and rulings by fully repealing Section 211. Ecuador requested the EU to provide more detailed information on the steps it was taking to resolve this dispute.

10. The representative of India said that his country thanked the United States for its status report and its statement. India noted with regret that there had been no substantive change in the situation, and felt compelled, yet again, to stress that the principle of prompt compliance was missing in this dispute. India renewed its systemic concerns about the continuation of non-compliance, as this undermined the credibility and confidence that Members reposed in the WTO dispute settlement system. India urged the United States to implement the DSB's recommendations in this dispute without any further delay.

11. The representative of Angola said that her country thanked the United States for providing information on the implementation of the DSB's decision and the Appellate Body's findings made in 2002 with regard to Section 211. Angola recalled that the prompt compliance with the DSB's rulings and recommendations was essential to ensure an effective resolution of disputes to the benefit of all WTO Members. As was well known, the Appellate Body Report, adopted by the DSB in February 2002, had found that Section 211 was inconsistent with WTO rules and principles and had requested the United States to bring its measure into conformity with those rules and principles. The delay in the implementation of the DSB's decision affected the efficiency and the predictability of the multilateral trading system and set a negative precedent for similar cases. Angola believed that concrete actions by the parties in this dispute would send a positive signal that WTO rules were being respected.

12. The representative of Nicaragua said that her country thanked the United States for its status report pertaining to this dispute. Nicaragua regretted that the report showed no substantive progress and confirmed the US continued lack of compliance with the DSB's recommendations. This situation was not in line with the principle of prompt compliance which was essential to ensuring the effective functioning of the dispute settlement system. Nicaragua called upon the United States to fully comply with the DSB's recommendations and rulings in this dispute as soon as possible.

13. The representative of Brazil said that his country thanked the United States for its status report concerning the surveillance of implementation in this dispute. Brazil continued to be concerned by the US non-compliance with the DSB's recommendations and rulings. Brazil urged the United States to bring its measures into conformity with the multilateral trade disciplines in the nearest future.

14. The representative of Bolivia said that her country had not seen any progress in this dispute and was concerned about the consequences caused by such non-compliance with the DSU provisions. The United States must comply with the DSB's rulings and repeal Section 21. This would be

important for ensuring the credibility of the multilateral trading system and the WTO. Bolivia hoped that the United States would show the necessary political will to resolve this dispute. Finally, she said that Bolivia supported the statement made by Cuba at the present meeting.

15. The representative of China said that her country thanked the United States for its most recent status report. However, China regretted that the report was merely a repetition of previous status reports and that there was no compliance in this dispute after more than eight years since the adoption of the Panel and the Appellate Body Reports by the DSB. China believed that this situation was not in line with the principle of prompt implementation stipulated in the DSU provisions, and that it was highly inappropriate for a developed-country Member to maintain such prolonged non-compliance in a dispute that involved the interests of a developing-country Member. China strongly supported Cuba and urged the United States to implement the DSB's rulings without further delay.

16. The representative of the Bolivarian Republic of Venezuela said that the participation in the discussion under the Agenda item on the surveillance of the implementation of recommendations adopted by the DSB was of great importance to her country, which was concerned about the credibility and the effective functioning of the dispute settlement mechanism. Venezuela supported the statement made by Cuba and condemned the US-led economic, trade and financial embargo policy imposed on Cuba. Venezuela was concerned about the US maintenance of legislation that was inconsistent with the TRIPS Agreement, the US failure to repeal Section 211 and the US non-compliance with the DSB's recommendations for more than eight years. Venezuela noted, once again, that in its most recent status report, dated 15 October 2010, the United States had provided the same information as it had done so on previous occasions; i.e. 94 times. In that regard, Venezuela reiterated what had previously been pointed out that this constituted "action without results" and reflected the US lack of commitment towards the DSB and WTO Members. Venezuela called upon the United States to comply with the DSB's recommendations and urged the United States to end the damaging embargo against Cuba.

17. The representative of Paraguay said that her country thanked the United States for its status report. Paraguay regretted that, after several years, this case continued to remain on the DSB's Agenda. Paraguay called on the United States to comply with the DSB's recommendations and rulings.

18. The representative of Mexico said that his country thanked the United States for its status report pertaining to this dispute. Mexico urged the parties to resolve this dispute through the legal remedies provided for under the DSU provisions. He said that any Member had the right to initiate its own dispute on the same matter, if it considered that its benefits were being impaired or nullified. Mexico noted that the discussion regarding various pending disputes under Agenda item 1 of the DSB meeting could provide useful input for the discussions on effective compliance in the context of the DSU negotiations.

19. The representative of the Dominican Republic said that, like other delegations, her delegation also wished to underline the need for Members to comply with the DSB's recommendations since failure to do so would undermine the multilateral trading system. The Dominican Republic thanked the United States for its status report and urged the United States to resolve the dispute as soon as possible.

20. The representative of South Africa said that his country wished to join previous speakers in calling on the United States to bring its measures into compliance with the DSB's rulings and recommendations. The DSU espoused the principle of prompt implementation. Non-compliance undermined the proper functioning of the DSU and presented severe systemic problems and challenges for WTO Members. South Africa, therefore, called on the United States to implement the DSB's recommendations as soon as possible.

21. 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.95)

22. The Chairman drew attention to document WT/DS184/15/Add.95, 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.

23. The representative of the United States said that his country had provided a status report in this dispute on 14 October 2010, 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, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

24. The representative of Japan said that his country thanked the United States for its statement and most recent status report. Japan noted the US status report that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. As for the remaining part of the DSB's recommendations, Japan was still waiting for statutory action to be taken by the United States. Japan hoped that the United States would soon be in a position to report to the DSB on tangible progress. Japan noted that 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".[5] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

25. 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.70)

26. The Chairman drew attention to document WT/DS160/24/Add.70, 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.

27. The representative of the United States said that his country had provided a status report in this dispute on 14 October 2010, 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.

28. The representative of the European Union said that his delegation remained disappointed that the United States had again reported non-compliance. As had regularly been stated, the EU remained ready to work with the US authorities towards the complete resolution of this dispute.

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

[5] Article 3.3 of the DSU.

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.33)

30. The Chairman drew attention to document WT/DS291/37/Add.33, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

31. The representative of the European Union said that, once again, his delegation noted that the EU regulatory procedures on biotech products continued to work as foreseen in the legislation. The adoption, by the Commission, of five new authorizations for GM maize on 28 July 2010, had raised the number of GMOs authorized, since the date of establishment of the Panel, to thirty-four. Progress had also been made on other applications for authorization. Recently, the European Food Safety Agency had delivered favourable opinions on two other GM events (GM MON 89034×1507×MON 88017×59122 and MON 89034×1507×NK 603). The EU hoped that the United States and the EU would continue their constructive technical dialogue on which they had re-engaged on 20 July 2010. The EU hoped that this constructive approach, based on dialogue, would allow the parties to leave litigation aside.

32. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. As it had explained at previous DSB meetings, the United States continued to have substantial concerns with the operation of the EU's regulatory system for biotech products. The United States noted that at the 21September 2010 DSB meeting, the EU had mentioned that four biotech products had received favourable safety opinions from the EU's scientific food safety authority. Those recent opinions had included opinions from May 2010 on three varieties of biotech maize. The United States noted that those favourable opinions had been issued over five months ago. The United States looked forward to the EU making timely decisions on the approval of those products in accordance with the EU's scientific opinions.

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

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.13)

34. The Chairman drew attention to document WT/DS322/36/Add.13, 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.

35. The representative of the United States said that his country had provided a status report in this dispute on 14 October 2010, in accordance with Article 21.6 of the DSU. As noted in that 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.

36. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. The United States had stated in its status reports that it "will continue to consult with interested parties in order to address the findings contained in [the Appellate Body and the panel] reports" adopted by the DSB on 31 August 2009. Japan took this statement as an expression of commitment by the United States to fully implement the DSB's recommendations and rulings. Once again, Japan called on the United States to fulfil its commitment by taking immediate and concrete action so as to resolve this dispute.

37. The representative of the European Union said that his delegation wished to reiterate its disappointment over the lack of any real progress by the United States on compliance with adverse rulings on zeroing in this dispute. The EU recalled that immediate compliance with the DSB's recommendations and rulings was not an option but an obligation under the DSU.

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

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.10)

39. The Chairman drew attention to document WT/DS350/18/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

40. The representative of the United States said that his country had provided a status report in this dispute on 14 October 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

41. The representative of the European Union said that the EU's concerns about the US lack of implementation in this dispute were well known and were recorded in the minutes of past meetings of the DSB. The EU remained disappointed that the United States continued using zeroing in reviews which involved products and measures covered by this dispute, as if nothing had happened. The most recent example was the reviews concerning ball bearings from France, Germany, Italy and the United Kingdom, for which the results had been published on 1 September 2010. The EU continued to urge the United States to reconsider its Section 129 determination immediately and to implement the DSB's rulings.

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

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.4)

43. The Chairman drew attention to document WT/DS294/38/Add.4, 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.

44. The representative of the United States said that his country had provided a status report in this dispute on 14 October 2010, 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. The United States would continue to consult with interested parties with regard to the remaining issues. He said that, as Members were aware, the EU had requested authorization from the DSB to suspend concessions or other obligations in this dispute, and the United States had objected to the EU's request. Therefore, pursuant to Article 22.6 of the DSU, the matter had been referred to arbitration. Furthermore, in response to a joint request by the United States and the EU, on 8 September 2010, the Arbitrator had issued a communication stating that it had decided to suspend its work. The communication of the Arbitrator had been circulated to the DSB as document WT/DS294/39.

45. The representative of the European Union said that his delegation thanked the United States for its status report. The EU would continue consulting with the United States concerning the next steps in implementation. The EU welcomed US reassurances that it was taking the necessary steps to bring itself into compliance and that the imposition of sanctions would not be necessary.

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

2. European Communities and its member States – Tariff treatment of certain information technology products

(a) Implementation of the recommendations of the DSB

47. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In that respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 21 September 2010, the DSB had adopted the Panel Report pertaining to the dispute: "European Communities and its member States – Tariff Treatment of Certain Information Technology Products". The 30-day period in this case had expired on 21 October 2010 and, on 13 October 2010, the European Union had informed the DSB in writing of its intentions in respect of implementation. The relevant communication was contained in document WT/DS375/14 – WT/DS376/14 – WT/DS377/12. He then invited the representative of the European Union to make a statement.

48. The representative of the European Union said that, at its meeting on 21 September 2010, the DSB had adopted the Panel's recommendations and rulings in the dispute: "European Communities and its Member States – Tariff Treatment of Certain Information Technology Products". As provided in the first sentence of Article 21.3 of the DSU and as had already been stated in the EU's written communication of 13 October 2010, the European Union wished to state that it intended to implement the DSB's recommendations and rulings in this dispute in a manner that respected its WTO obligations. The EU was consulting internally on the options for doing so and would need a reasonable period of time for implementation.

49. The representative of the United States said that his country thanked the EU for the written notification of its intentions dated 13 October 2010, indicating that it intended to implement the DSB's recommendations and rulings in this dispute, and for its statement made at the present meeting. Where, as in this case, no DSB meeting had been scheduled within 30 days of the meeting at which the DSB adopted its recommendations and rulings, and the parties to the dispute agreed, the United States believed that it was helpful to all Members for the Member concerned to provide its statement of intentions in writing as this avoided having to schedule a DSB meeting just for that purpose. The United States looked forward to further discussions with the EU on a reasonable period of time for its implementation, pursuant to Article 21.3(b) of the DSU. In this context, the United States wished to recall a phrase made by the EU earlier at the present meeting: "immediate compliance with DSB recommendations and rulings is not an option but an obligation". The United States trusted that the EU would apply that sentiment to this item as well.

50. The representative of Japan welcomed the EU's intention to implement the DSB's recommendations and rulings in this dispute, as stipulated in the EU's written communication to the DSB, as well as in its statement at the present meeting. Japan further noted that the EU needed a reasonable period of time in which to implement the DSB's recommendations and rulings. Thus, Japan stood ready to discuss this matter with the co-complainants. As provided for in Article 21.1 of

the DSU, prompt compliance with the DSB's recommendations and rulings was essential in order to ensure effective resolution of disputes. Japan trusted that the EU would promptly implement the DSB's recommendations and rulings and wished to engage, together with the other co-complainants, in a constructive dialogue with the EU to this end.

51. The representative of Chinese Taipei said that his delegation welcomed the EU's intention to implement the DSB's recommendations and rulings in this dispute as indicated in its written communication to the DSB, which had been circulated within the 30-day period as set forth in Article 21.3 of the DSU, and in its statement at the present meeting. Chinese Taipei understood from the EU's communication and statement that it needed a reasonable period of time to bring itself into compliance with the DSB's rulings and recommendations. Thus, Chinese Taipei stood ready to discuss this matter with the co-complainants. Article 21.1 of the DSU stipulated that prompt compliance with the DSB's recommendations or rulings was essential in order to ensure effective resolution of disputes to the benefit of all Members. Chinese Taipei believed that the EU would promptly comply and it looked forward to working closely with the other co-complainants, and engaging with the EU, to reach an effective and satisfactory resolution of this dispute.

52. The DSB took note of the statements, and of the information provided by the European Union regarding its intentions in respect of implementation of the DSB's recommendations.

3. 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

53. 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.

54. The representative of the European Union said that, as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry and, hence, put an en end to the condemned measure. The EU reiterated that, the fact that the United States had stopped disbursing duties collected after a certain point in time did not achieve full compliance. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations. The EU, once again, 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.

55. The representative of Japan said that, "FY 2010 Certifications Received" (which was a list of the claims filed by US domestic industries for FY2010 distributions) published by US Customs and Border Protection[6] in September 2010 showed that a new round of distributions under the CDSOA appeared to be underway. Thus the CDSOA remained operational. As the US Customs and Border Protection explained, "the distribution process will continue for an undetermined period".[7] Japan urged the United States to stop the 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 pertaining to this dispute.

56. The representative of India said that his country thanked the EU and Japan for regularly bringing this issue before the DSB and fully shared their concerns. As had been mentioned by

[6] See US Customs and Border Protection website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_l0/

[7] See US Customs and Border Protections website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xm1

previous speakers, the CDSOA remained operational and the WTO-inconsistent disbursements continued unabated to the US domestic industry. India was concerned that non-compliance by Members led to a lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to report full compliance on this issue as soon as possible.

57. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. As had been expressed at previous DSB meetings, Brazil was of the view that as long as the United States continued to make disbursements pursuant to the Byrd Amendment, the situation of non-compliance in this dispute would persist and the issue would not be "resolved" within the meaning of Article 21.6 of the DSU. Thus, pursuant to Article 21.6 of the DSU, unless the DSB decided otherwise, the issue of implementation should be placed on the Agenda of the DSB and should remain thereon until the issue was resolved.

58. The representative of China said that her country thanked the EU and Japan for raising this item at the DSB meeting. China shared the concerns expressed by previous speakers and joined them in urging the United States to fully comply with the DSB's rulings.

59. The representative of Thailand said that his country thanked Japan and the EU for continuing to bring this item before the DSB and supported the statements made by previous speakers. Thailand continued to urge the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume the submission of status reports until such actions had been taken and this matter was fully resolved.

60. The representative of the United States said that, as his country had explained at previous DSB meetings, 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. Furthermore, the United States recalled that Members had acknowledged that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

61. The DSB took note of the statements.

4. Armenia – Measures affecting the importation and internal sale of cigarettes and alcoholic beverages

(a) Request for the establishment of a panel by Ukraine (WT/DS411/2/Rev.1)

62. The Chairman drew attention to the communication from Ukraine contained in document WT/DS411/2/Rev.1, and invited the representative of Ukraine to speak.

63. The representative of Ukraine said that her country regretted that Armenia maintained measures affecting the importation and internal sale of cigarettes and alcoholic beverages in violation of the national treatment principle of the multilateral trading system, and in clear violation of its commitment set out in the Working Party Report on Armenia's accession to the WTO in 2002. The measures at issue were the following: (i) the so-called "Presumptive Tax" under the Armenia's law "On Fixed Charges on Tobacco Products", in force since 2000, which imposed higher tax rates on imported cigarettes than on like domestic products; (ii) the collection of import duties on imported

cigarettes according to the previously mentioned law in excess of duties set forth in Armenia's Schedule of Concessions; and (iii) the imposition of higher excise tax rates on imported alcoholic beverages than on like domestic products pursuant to the Law "On Excise Tax", in force since 2000. Ukraine believed that these measures were in violation of Article III:1,2 and 4 of the GATT 1994 as well as Armenia's WTO commitment, which confirmed that Armenia would apply its domestic taxes in a non-discriminatory manner consistent with the national treatment provisions before or from the date of accession. She said that Armenia had been aware of these discriminatory and protectionist violations. Ukraine had raised this issue with Armenia bilaterally and had drawn the attention of Armenia's high-level delegation to this matter in the context of the trade policy review of Armenia in April 2010. At that time, several Members had echoed and had shared Ukraine's concerns regarding this matter. Ukraine had encouraged Armenia to honour its multilateral commitments and to bring its measures into full compliance with the WTO basic principles by taking speedy and effective actions. Notwithstanding the clear acknowledgement of those long-standing problems and Ukraine's openness to dialogue and patient efforts to resolve those matters bilaterally, Ukraine unfortunately had to report that no WTO-consistent solution had been forthcoming from Armenia.

64. She recalled that, on 20 July 2010, Ukraine had requested consultations with Armenia, pursuant to Article 4 of the DSU and Article XXII.1 of the GATT 1994. The official request for consultations was circulated in document WT/DS411/1; G/L/925 dated 22 July 2010. Subsequently, having waited more than 60 days after filing its request for consultations, without receiving any official response from Armenia in due time, Ukraine had exercised its right under the DSU and had requested the establishment of a panel to examine this matter. She noted that Ukraine's request for the establishment of a panel had been circulated as document WT/DS/411/2/Rev.1 on 8 October 2010 and was available to all Members. Nevertheless, official consultations between Ukraine and Armenia had finally been held only recently. Those consultations, which had shown Armenia's engagement in the process, had borne no sign of having moved the two parties any forward towards an immediate satisfactory resolution of this dispute. Ukraine remained open to further consultations in substance, and hoped to reach an amicable and sustainable solution to this matter. Thus, Ukraine would highly appreciate if Armenia removed its discriminatory measures which were, in their current form, inconsistent with the basic principles of the multilateral trading system. Ukraine, therefore, requested that the DSB establish a panel, with standard terms of reference, to examine the matter as laid out in Ukraine's panel request.

65. The representative of Armenia said that his country wished to thank Ukraine for its statement and to inform the DSB that Armenia had intensified its bilateral consultations with Ukraine on this matter. Armenia believed that the matter could be resolved bilaterally through consultations and, for that reason, it was not in a position to agree to the establishment of a panel at the present meeting.

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

5. United States – Certain measures affecting imports of poultry from China

(a) Report of the Panel (WT/DS392/R)

67. The Chairman recalled that at its meeting on 31 July 2009, the DSB had established a panel to examine the complaint by China pertaining to this dispute. The Report of the Panel, contained in WT/DS392/R, had been circulated on 29 September 2010 as an unrestricted document. The Report of the Panel was before the DSB for adoption at the request of China. He said that the adoption procedure was without prejudice to the right of Members to express their views on the Report.

68. The representative of China said that her country thanked the members of the Panel and the Secretariat for the time and efforts dedicated to resolving this dispute, which concerned various measures taken by the United States affecting imports of poultry from China. The United States had

completely banned the importation of poultry products from China since 2007 through its annual appropriation acts and other related measures. Those measures fundamentally violated relevant WTO rules, significantly impeded the ordinary Sino-US trade in poultry products, and substantially impaired the rights and benefits that Chinese enterprises deserved to enjoy under the multilateral trading system. Although China had repeatedly expressed its serious concerns to the United States, both bilaterally and multilaterally, unfortunately this matter could not have been resolved. China welcomed the Panel Report which had been issued on 29 September 2010. The Panel was very clear in its findings that, among others, Section 727 of Division A of the Omnibus Appropriations Act of 2009 ("Section 727"), which had been signed into law as Public Law 111-8, as such, was inconsistent with Articles 2.2, 2.3, 5.1, 5.2, 5.5, 8, and Annex C of the SPS Agreement and Articles I and XI of the GATT 1994. China believed that the Panel's rulings, as they were, already sufficed in addressing conclusively the question of WTO-inconsistency of the US poultry legislation. Therefore, China had inscribed the Panel Report on the Agenda of the present meeting for adoption. Although Section 727 had now expired, China noted that certain provisions in annual appropriations measures of the US Congress may still affect China's ability to access the US poultry market in the future. Therefore, China wished to reiterate that Chinese poultry products were safe and hoped that the United States would attach importance to China's concerns, take positive steps to eliminate all discriminatory measures against Chinese poultry products, conduct fair import assessments and tests on poultry from China and resume normal China – US trade on poultry products.

69. The representative of the United States said that his country was disappointed with the findings in the Panel Report pertaining to this dispute. The measure that had been the subject of the dispute, Section 727 of a 2009 Appropriations Act, was a single sentence that restricted the funding of certain government activities during a specific and limited period of time. The measure had been adopted in the context of an equivalence review, a process explicitly recognized in the SPS Agreement. In particular, the measure had been adopted during an ongoing review of China's request to have the United States agree that China's SPS measures resulted in exports of poultry products from China that would meet the level of safety deemed appropriate by the United States. The specific effect of the measure was to prohibit the US Department of Agriculture from using funds, during a period of several months, to establish or implement a rule permitting import of poultry products from China. The measure was designed to provide time for a study of changes in China's regulatory system and the development of a plan to guarantee the safety of imports from China. As the Panel had found, Section 727 had expired in 2009, and there was currently no restriction on the use of funds to finalize or implement a determination as to whether China's SPS measures were equivalent to US measures. Although the measure was an expired funding restriction with a narrow effect under US law, the Panel Report in this dispute addressed the measure under multiple, disparate provisions of the WTO Agreement.

70. Those findings raised a number of significant questions that should be of interest and concern to many Members. First, issues regarding equivalence reviews were new to the WTO dispute settlement, and were distinct from any previous dispute under the SPS Agreement. Article 4 of the SPS Agreement provided specific obligations when a Member claimed that its measures were equivalent. Yet, China made no claim in this dispute under Article 4. Nor did the Panel Report recognize that Article 4 was important context to be used in determining whether other provisions of the SPS Agreement applied to issues involving an equivalence review. As a result, many of the Panel Report's findings appeared to be at odds with the inherent nature of any Member's review of a claim of equivalence. For example, the Panel Report had found that Section 727 breached SPS Articles 2.3 and 5.5 because it found that Section 727's differential treatment of Chinese poultry products resulted in discrimination. By its very nature, however, an equivalence examination treated products from different Members differently. Indeed, the whole premise of an equivalence review was to decide whether to allow the import of products from the territory of a single WTO Member because of that Member's measures. The Panel Report's findings regarding Article 8 and Annex C of the SPS Agreement raised similar questions. On their face, Article 8 and Annex C applied only to "control,

inspection or approval procedures". The examples in the SPS Agreement of those procedures were "procedures for sampling, testing and certification". However, the Panel Report found, without a textual basis, that equivalence reviews were covered by Article 8 and Annex C. In short, the relationship between equivalence reviews under Article 4 and other provisions of the SPS Agreement was a complex one. That relationship was of systemic importance to all WTO Members. The United States considered that the matter warranted a more careful analysis than it received in the Panel Report.

71. Second, the United States had systemic concerns with the Report's "like products" analysis under Article I of the GATT 1994. The Panel Report's analysis effectively proceeded from the assumption that products produced by one WTO Member, and processed by that Member's food safety system, must be presumed to be as safe as products produced by another Member and processed by that Member's food safety system. There was no basis for such a presumption. Indeed, that approach would be contrary to the very purpose of an equivalence review. Third, the United States was concerned with the treatment the Panel Report provided the US defence under Article XX(b) of the GATT 1994. The Report did not include a systematic analysis of the US arguments. Instead, the Panel Report found that no measure that breached Articles 2 and 5 of the SPS Agreement could be justified under Article XX(b). The United States believed that this conclusion was not correct. In fact, it had the legal relationship between Article XX of the GATT 1994 and the SPS Agreement backwards. The SPS Agreement contained obligations in addition to those in Article XX of the GATT 1994. The fact that a measure may not fully comply with those additional obligations was not sufficient, standing alone, to support a finding that the measure was not "necessary to protect human, animal, or plant life or health" under Article XX(b). With those concerns in mind, the United States noted its appreciation that the Panel Report had exercised judicial economy with respect to China's claim under Article 4.2 of the Agreement on Agriculture, and part of China's claim under Article 5.5 of the SPS Agreement. In that context, the Report explained the principles underlying the exercise of judicial economy, in particular that panels should only address those claims necessary to resolve the dispute. Applying that same approach to other issues may have avoided many of the systemic concerns raised by the United States at the present meeting.

72. The United States again noted that, as the Panel had found, the measure at issue had expired in 2009. The United States further noted that, the US Department of Agriculture was currently working with China on reviewing its equivalence application, and looked forward to working with China on this matter in a positive and productive manner. As the measure at issue in this dispute had ceased to exist in 2009, the United States considered that the measure had been withdrawn within the meaning of Article 3.7 of the DSU, and that this dispute had been resolved.

73. The representative of the European Union said that his delegation welcomed the Panel Report, which had clearly arrived at the right conclusions on a measure that was obviously in breach of basic WTO obligations. The EU also welcomed the Panel's examination of Articles I and XI of the GATT 1994, even after the breaches of the SPS Agreement had already been found. The EU thought that this was the correct approach, as obligations under the SPS Agreement could not be considered in a vacuum and separately from their natural context of GATT obligations. However, the EU had some doubts on the exact path that the Panel had chosen to come to the conclusion that the measure was not justified under Article XX(b) of the GATT 1994. The Panel had arrived at this finding by simply observing that the measure had been found in breach of Articles 2 and 5 of the SPS Agreement, and that, therefore, the measure must also not have been in line with the requirements of Article XX(b) of the GATT 1994. The EU was of the view that, while the SPS Agreement and Article XX(b) of the GATT 1994 were obviously very closely related, it would not be appropriate to assume that a breach of the SPS Agreement always and automatically resulted in the measure not being in line with Article XX(b) of the GATT 1994. On the contrary, in the context of analyzing violations of Articles I and XI of the GATT 1994, and possible defences thereto, the EU considered that the Panel should have examined the measure in light of the different requirements of Article XX(b) of the GATT 1994

and the chapeau to see if those requirements had been met. Given the particular facts of this case, the EU would have expected such an examination to have arrived at a finding of inconsistency with Articles I and XI of the GATT 1994, not justified by Article XX(b), but not automatically because of the SPS breach *per se*. That approach would also have been more coherent with the Panel's analysis of Articles I and XI of the GATT 1994 as distinct obligations.

74. The DSB took note of the statements and adopted the Panel Report contained in WT/DS392/R.

6. Statement by Brazil regarding official documents addressing the issue of implementation of DSB recommendations and rulings

75. The representative of Brazil, speaking under "Other Business", said that his country wished to raise an issue related to WTO dispute settlement that had caught Brazil's attention when it had read the Report prepared by the Secretariat in connection with the most recent Trade Policy Review (TPR) of the United States. In its Report, the Secretariat stated that: "The United States has not yet implemented the WTO Dispute Settlement Body's (DSB) recommendations and rulings relating to: Section 110(5) of the US Copyright Act; some aspects of the US anti-dumping investigation of certain hot rolled steel products from Japan; and Section 211 of the Omnibus Appropriations Act of 1998." Brazil believed that the Secretariat in charge of the US TPR had prepared this list on the basis of item 1 of the DSB's Agenda, although it must have looked at the Agenda of a meeting that had taken place before August 2009. Brazil understood that, in practice, a dispute was only placed under item 1 of the DSB Agenda when the responding party voluntarily submitted status reports pursuant to Article 21.6 of the DSU. In cases where a party had not yet implemented the DSB's recommendations and rulings, but nevertheless had not submitted a status report, the dispute was not listed under item 1. Therefore, in light of this practice, there was no reason to assume that the list of disputes provided under item 1 covered all disputes where implementation was still outstanding. One obvious example of incongruity was the Cotton dispute. There might be others, as demonstrated by the discussion on implementation in the Byrd Amendment dispute. Brazil, therefore, requested that the WTO Secretariat take this situation into account when addressing in official documents the issue of implementation of DSB recommendations and rulings, and clarify that the list drawn from item 1 of the DSB Agenda may not be exhaustive with respect to disputes where no full implementation had yet taken place.

76. The DSB took note of the statement.