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Dispute Settlement Body
17 December 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 December 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.97)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.97)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.72)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.35)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.15)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.12)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.6)

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.97)

2. The Chairman drew attention to document WT/DS176/11/Add.97, 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 6 December 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. The Committee on the Judiciary of the House of Representatives had held a hearing on certain of these proposals earlier in the course of the year. 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 very soon take steps towards implementing the DSB's ruling and resolve this dispute.

5. The representative of Cuba said that her country noted the brief status report submitted by the United States and said that that report was identical to the US status report submitted in January 2010. In other words, nothing had changed in the course of the year, just as nothing had changed for almost a decade. For the past ten years, Cuba had been forced to condemn the US disregard for the rules of international law. Cuba recalled that the purpose of status reports was to inform the DSB of progress being made in the implementation of recommendations or rulings. In this regard, Cuba questioned the purpose of the US status reports which, year after year and month after month, simply repeated the same words and indicated no intention on the part of the United States to come into compliance with its obligations. The legislative proposals referred to by the United States remained at the standstill, including those proposing to repeal Section 211 because they were not considered to be a priority for either the US administration or the US Congress. This situation helped to maintain the pressure from a small group of Cuban-Americans who had made the political dispute between Cuba and the United States the centre of their political careers and means of economic subsistence. The United States did not seem to be fully aware of its international disrepute into which it had fallen as a result of its policy against Cuba. The US conduct was not only unlawful and immoral, but totally inappropriate from the point of view of intellectual property rights. Intellectual property rights were private rights, the main beneficiaries of which were companies from the United States and other developed countries, which monopolized ownership of the vast majority of trademarks and patents.

6. Cuba noted that the United States had always maintained that intellectual property rights protection was its priority issue. However, it continued to implement legislation that was inconsistent with the TRIPS Agreement, which provided the ultimate protection for those rights at the multilateral level. It was well known that Section 211 undermined the rights of holders of Cuban trademarks and enabled Bacardi to engage in the fraudulent use and sale of the HAVANA CLUB trademark, which was a renowned trademark of Cuban origin. This only encouraged commercial crime and set a negative pattern, in particular for those trading partners that were serious about combating counterfeiting. The effectiveness and usefulness of the dispute settlement mechanism, in particular for developing countries, which constituted the majority of the WTO Membership, should be analysed in some depth, as the facts demonstrated that the system required urgent substantial changes. The Section 211 dispute was among those unresolved disputes that had remained on the DSB's Agenda for years. Cuba could not remain silent in the face of the current situation that undermined the credibility of the multilateral trading system. In Cuba's view, Members had a collective responsibility to preserve the effectiveness and credibility of the institutions and mechanisms, which had taken so much time and effort to be put into place. Under international law, the United States was responsible for ensuring that its laws, regulations and judicial as well as administrative procedures were in line with its obligations under the WTO Agreements and other international agreements to which it was party. Thus, Members had an obligation to unconditionally comply with their commitments, and in this particular case, the solution to resolving this dispute was to repeal Section 211.

7. The representative of Bolivia said that her delegation, once again, wished to express its concern about the status of this dispute and the US failure to comply with its WTO obligations. Bolivia, reiterated that the failure to achieve progress had a negative impact on the credibility of the multilateral trading system and the dispute settlement mechanism. It also undermined the balance between the rights and obligations of Members. Once again, Bolivia urged the United States to comply with the DSB's rulings and recommendations and to make efforts to ensure that the restrictions imposed under Section 211 were removed.

8. The representative of China said that her country thanked the United States for its status report and the statement made at the present meeting. However, China regretted that the United States had again reported non-compliance. Eight years had passed since the adoption of the rulings and recommendations by the DSB in this dispute. In China's view, such a situation was in violation of the principle of prompt implementation contained in the DSU provisions and raised systematic concerns. In addition, it was highly inappropriate for a developed-country Member to maintain, for such a long period of time, a WTO-inconsistent measure that affected the interest of a

developing-country Member. China, therefore, strongly supported Cuba and urged the United States to implement the DSB's rulings without any further delay.

9. 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 recommendations of 12 February 2002 on Section 211. Nonetheless, Angola recalled that prompt compliance with the DSB's rulings and the recommendations was fundamental to ensuring an effective resolution of disputes to the benefit of all Members. She recalled that the Appellate Body Report adopted by the DSB in February 2002 had proved the inconsistency of Section 211 with WTO rules and principles and had requested the United States to bring its measure into conformity with the DSB's recommendations. The delay in the implementation of the DSB decision affected the efficiency and the predictability of the multilateral trading system and set a negative precedent for similar cases. Angola was confident that concrete will and actions by the parties in this dispute would send an encouraging signal of respect for WTO rules.

10. The representative of Ecuador said that his country fully supported Cuba's statement and underlined, once again, that Article 21 of the DSU expressly referred to prompt compliance with the DSB's recommendations, in particular with regard to matters affecting the interests of developing countries. Ecuador hoped that the United States would accelerate its work to ensure immediate compliance with the DSB's recommendations and rulings. This dispute pointed out the weakness of the dispute settlement mechanism, namely, that there was an imbalance at the compliance stage, which affected the interests of developing countries.

11. The representative of Nicaragua said that her country thanked the United States for the status report and noted with regret that the report did not provide any information regarding substantive changes. Once again, Nicaragua wished to underline that the United States continued to fail to comply with the DSB's rulings. This situation was not in line with the principle of prompt compliance contained in the DSU provisions. The United States had to comply as soon as possible to ensure the efficient functioning of the system. Nicaragua urged the United States to act as soon as possible so as to comply with the DSB's recommendations in this dispute.

12. The representative of the Dominican Republic said that his country wished to thank the United States for its status report on its implementation of the DSB's recommendations regarding Section 211, which was incompatible with Article 42 of the TRIPS Agreement. In this regard, the Dominican Republic, once again, urged the United States to step up its domestic procedures to ensure compliance with the DSB's recommendations, given that a long-period of time had elapsed and that this situation undermined the credibility of the dispute settlement mechanism.

13. The representative of the Bolivarian Republic of Venezuela said that her country noted that the present meeting was the last meeting held in 2010, and regretted that, in the context of the discussion under the Agenda item on surveillance of implementation of recommendations adopted by the DSB, no progress had been made in the Section 211 dispute. Venezuela thanked the United States for its status report, but was disappointed that the report merely repeated the same information that the United States had already provided in its previous (96) status reports. Venezuela hoped that in 2011, once the new US Congress was convened, some progress would be made towards implementation in this dispute. Venezuela was concerned that, in spite of the DSB's recommendations made more than eight years ago, the United States continued to maintain its legislation that was in violation of the TRIPS Agreement. This situation had not only undermined and continued to undermine Cuba, it also adversely affected the credibility of the dispute settlement mechanism. Venezuela supported the statement made by Cuba and called upon the United States to comply with the DSB's recommendations. As Venezuela had pointed out on many occasions, such "action without achievement" had continued for a long period of time, and the "reasonable period of time" for implementation also seemed to be excessively long. This situation, namely the failure by certain Members to comply with their obligations, questioned the effectiveness of the dispute settlement

mechanism. Thus, Venezuela condemned the US economic, commercial and financial embargo policy vis-à-vis Cuba, and urged the United States to end it.

14. The representative of Brazil said that his country thanked the United States for its status report. Once again, the United States reported lack of progress in its efforts to achieve compliance with the DSB's rulings and recommendations in this dispute. Brazil remained concerned about this situation and urged the United States to bring its measures into conformity with WTO disciplines.

15. The representative of Mexico said that his country thanked the United States for its status report and urged the parties to resolve this dispute through the legal remedies provided for in the DSU. Mexico noted that any Member that considered that its rights were being impaired or nullified could initiate its own dispute. Mexico also noted that the discussion under this Agenda item could provide useful input for the ongoing discussions carried out in the context of the DSU negotiations.

16. The representative of Paraguay said that her country thanked the United States for its status report and regretted that, after several years, no progress had been made to resolve this dispute. Paraguay, therefore, urged the United States to comply promptly with its WTO obligations.

17. 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.97)

18. The Chairman drew attention to document WT/DS184/15/Add.97, 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.

19. The representative of the United States said that his country had provided a status report in this dispute on 6 December 2010, in accordance with Article 21.6 of the DSU. As of 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 recommendations and rulings of the DSB that were not already 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.

20. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. Japan noted 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 hoped that the United States would soon be in a position to report to the DSB a tangible progress. 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" (Article 3.3 of the DSU). Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

21. 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.72)

22. The Chairman drew attention to document WT/DS160/24/Add.72, 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.

23. The representative of the United States said that his country had provided a status report in this dispute on 6 December 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.

24. The representative of the European Union said that the EU noted that the United States was again reporting non-compliance. The EU remained keen to work with the US authorities towards the complete resolution of this dispute.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.35)

26. The Chairman drew attention to document WT/DS291/37/Add.35, 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.

27. The representative of the European Union said that, once more, the EU noted that its regulatory procedures on biotech products continued to work as foreseen in the legislation. The number of GMOs authorized since the date of establishment of the Panel was thirty-four. Progress had also been made on other applications for authorization or renewal. Draft decisions on two applications (cotton GHB614, maize MON89034×MON88017) and a draft decision on the renewal of a GM maize (1057) would be sent soon to the Council following the vote in the Standing Committee. Four more draft applications were expected to be discussed in the Standing Committee in January (MIR604×GA21 maize, BT11×MIR604 maize, 281-24-236/3006-210-23 cotton, Bt11×MIR604×GA21 maize). Furthermore, the European Food Safety Agency had delivered a favourable opinion on the renewal of a GM soy bean (MON Ø4Ø32-6). The EU hoped that the United States and the EU would continue their constructive technical dialogue on which they re-engaged on 20 July. The EU hoped that this constructive approach based on dialogue would allow the parties to leave litigation aside.

28. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. The United States was growing increasingly concerned with the current operation of the EU's regulatory system for biotech products. At the present meeting, the United States would like to highlight the fact that, since August 2010, the EU had not approved even a single one of the dozens of pending biotech product applications. This absence of approvals over the past several months appeared to be unwarranted, given that a number of the pending applications had received positive opinions from the EU's scientific food safety authority, and simply needed to be allowed to proceed through the remaining steps in the EU process. Several of those applications were far behind the EU's own time frames for decision-making on biotech products. The United States would also emphasize that those delays resulted in substantial barriers to

international trade in biotech products. The United States urged the EU to address the ongoing problems in the operation of its approval system for biotech products.

29. 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.15)

30. The Chairman drew attention to document WT/DS322/36/Add.15, 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.

31. The representative of the United States said that his country had provided a status report in this dispute on 6 December 2010, 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. As Members were aware, Japan had requested authorization from the DSB to suspend concessions or other obligations in this dispute, and the United States had objected to Japan's request. Therefore, pursuant to Article 22.6 of the DSU, the matter had been referred to arbitration. In response to a joint request of the United States and Japan, on 13 December, 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/DS322/38.

32. The representative of Japan said that his country thanked the United States for its statement and most recent status report. The United States stated in its status report 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. The United States referred to the Article 22.6 Arbitrator's decision to suspend its proceeding contained in document WT/DS322/38. As stated in the joint request by the parties attached to that document, the United States had sought informal discussions with Japan with respect to implementation. In light of that, Japan had agreed, in good faith, to join the United States in making such a request. Japan understood that the United States was in a process of seriously examining possible implementing measures that would address the DSB's recommendations and rulings in this dispute. Obviously, Japan was closely monitoring the situation and implementation efforts by the United States and was hopeful that full implementation would be imminent. However, it should be noted that, as the terms of the suspension of arbitral proceeding made clear, the suspension may be terminated at any time at the request of Japan without any precondition. Once again, Japan called on the United States to meet its commitment by taking immediate and concrete action so as to resolve this dispute.

33. The representative of the European Union said that, despite the recent information provided by the United States, the EU would like to reiterate its disappointment over the lack of progress by the United States on compliance with adverse rulings on zeroing in this dispute.

34. 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.12)

35. The Chairman drew attention to document WT/DS350/18/Add.12, 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.

36. The representative of the United States said that his country had provided a status report in this dispute on 6 December 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.

37. The representative of the European Union said that the reasonable period of time agreed between the parties to this dispute had expired on 19 December 2009. Currently, two days before the one-year anniversary of its expiry, the United States was, once again, reporting non-compliance. The EU noted with concern and disappointment that no progress toward compliance with the DSB's recommendations and rulings in this dispute had been made by the United States. On the contrary, the United States continued zeroing in reviews, which involved products and measures covered by this dispute, as if nothing had happened. Once again, the EU hoped that its patience and trust were not misplaced and continued to urge the United States to reconsider its Section 129 determination immediately and to implement without further delay.

38. 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.6)

39. The Chairman drew attention to document WT/DS294/38/Add.6, 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.

40. The representative of the United States said that his country had provided a status report in this dispute on 6 December 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, and would continue to consult with interested parties with regard to the remaining issues.

41. The representative of the European Union said that, not unlike its statements made under the previous Agenda items regarding the DS322 and DS350 cases, also under this Agenda item, the EU wished to express its disappointment over the lack of progress on the US side – progress overdue since 9 April 2007 – and stressed that it expected nothing more or less than full compliance with the DSB's rulings and recommendations. The EU hoped that the lengthy internal consultations would soon lead to concrete results and that the imposition of sanctions in this dispute would not be necessary.

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

2. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB

(a) Statements by the European Union and Japan

43. 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.

44. The representative of the European Union said that, as had been done many times on previous occasions, the EU wished to ask the United States when it would effectively stop to transfer anti-dumping and countervailing duties to the US industry and hence, put an end to the condemned measure. The EU clarified 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. And, once again, the EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

45. The representative of Japan said that, on 6 December 2010, US Customs and Border Protection had published its CDSOA Annual Report for FY 2010 which contained information on disbursements made under the CDSOA for FY 2010.[2] This demonstrated that the CDSOA remained operational. As US Customs and Border Protection explained, "the distribution process will continue for an undetermined period".[3] Japan urged 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.

46. The representative of Brazil said that his country thanked Japan and the EU for keeping this item on the DSB's Agenda. Brazil urged the United States to stop making disbursements pursuant to the CDSOA, in order to comply with the DSB's recommendations and ruling in this dispute. As long as the United States remained in non-compliance in this dispute, it was required by Article 21.6 of the DSU to provide status reports, the purpose of which was to keep under surveillance the implementation of recommendations and rulings adopted by the DSB.

47. The representative of Canada said that her country wished to thank the EU and Japan for placing this item on the Agenda of the present meeting. As Canada had stated at past meetings, and would like to reiterate at the present meeting, Canada was of the view that the CDSOA remained under surveillance of the DSB until the United States ceased to administer it.

48. The representative of India said that his country thanked the EU and Japan for continuously bringing this issue before the DSB. India shared their concerns and endorsed their views. As mentioned by previous speakers, the CDSOA remained fully operational, allowing for disbursements by the US administration to its domestic industry. This fact affected the rights of WTO Members and undermined the credibility of the dispute settlement mechanism. India, therefore, urged the United States to cease its WTO-inconsistent disbursements, and fully implement the DSB's recommendations and rulings.

[2] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/annual_report/

[3] 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.xml

49. The representative of China said that her country thanked the EU and Japan for placing this item on the Agenda of the present meeting. China shared the concerns expressed by previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings in this dispute.

50. The representative of Thailand said that his country thanked Japan and the EU for continuing to bring this matter 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 providing status reports until such actions were taken and this matter was fully resolved.

51. The representative of the United States said that, as his delegation 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. The United States recalled, furthermore, that Members 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. With respect to comments regarding further status reports in this matter, as the United States 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 made in the implementation of the DSB's recommendations and rulings.

52. The DSB took note of the statements.

3. Thailand – Customs and fiscal measures on cigarettes from the Philippines

(a) Joint request by Thailand and the Philippines for a decision by the DSB (WT/DS371/7)

53. The Chairman drew attention to the communication from Thailand and the Philippines contained in document WT/DS371/7 and invited the representative of the Philippines to speak.

54. The representative of the Philippines noted that, at the present meeting, the DSB had before it a draft decision extending the 60-day time-period in Article 16.4 of the DSU, as applicable to the DS371 dispute, until 24 February 2011. The Philippines recalled that it had taken this course of action for systemic and economic reasons. While fully respecting Thailand's sovereign prerogative to regulate its tobacco market, what was at stake for the Philippines in this case was very simple. Namely, that within whatever regulatory framework Thailand chose for itself, imported cigarettes should be treated fairly, both at the border and in the internal market, and in a non-discriminatory and transparent manner. The Philippines' exporting cigarette manufacturing industry depended on it. For the same reasons, his country would certainly like to see the speedy conclusion of this dispute. However, the Philippines were aware of the constraints currently faced by the Appellate Body. As a responsible Member, the Philippines were supportive of the system and, therefore, wished to show flexibility. For that reason, the Philippines had agreed, together with Thailand, to postpone the date of adoption or the starting date of any appeal of the Panel Report in this dispute. In that respect, he drew Members' attention to the procedural agreement attached to the draft Decision from which it could be inferred that the Philippines would not appeal this Report. Finally, he said that the Philippines would provide its views and comments on the Report when that Report would eventually be submitted to the DSB for adoption.

55. The representative of Thailand said that the Panel in this dispute had circulated its final Report on 15 November 2010. The 60-day period within which the DSB was normally obliged to decide on the adoption of panel reports that were not appealed, under Article 16.4 of the DSU, would expire on 15 January 2011. Taking into account the current workload of the Appellate Body, the

parties to this dispute had agreed that the 60-day period, as applicable to this dispute, would be extended to 24 February 2011. The parties had also reached the understanding that a decision of the DSB on this extension would be sought at the present meeting. Thailand would like to express its appreciation for the kind cooperation of the Philippines and the Appellate Body in this dispute. The extension had been agreed between the parties on the understanding that the rights of the parties to the dispute with respect to the adoption or appeal of the Panel Report are preserved, as if such an adoption or appeal had been requested within the 60 days specified in Article 16.4 of the DSU. Thailand would, therefore, be grateful if the DSB could accede to the joint request of the parties to extend the 60-day period.

56. The DSB took note of the statements.

57. The Chairman proposed that: "The DSB agree that, upon a request by Thailand or the Philippines, the DSB shall no later than 24 February 2011, adopt the Report of the Panel in the dispute: *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, contained in document WT/DS371/R, unless (i) the DSB decides by consensus not to do so or (ii) Thailand or the Philippines notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU".

58. The DSB so agreed.

4. Australia – Measures affecting the importation of apples from New Zealand

(a) Report of the Appellate Body (WT/DS367/AB/R) and Report of the Panel (WT/DS367/R)

59. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS367/16 transmitting the Appellate Body Report on: "Australia – Measures Affecting the Importation of Apples from New Zealand", which had been circulated on 29 November 2010 in document WT/DS367/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

60. The representative of New Zealand said that her country welcomed the adoption of the Panel and the Appellate Body Reports in the case: "Australia – Measures Affecting the Importation of Apples from New Zealand", and thanked the Panel, the Appellate Body and their respective Secretariats for their hard work. The findings of the Panel and of the Appellate Body had confirmed New Zealand's long-standing view that Australia's quarantine measures applied to New Zealand apples were neither based on an appropriate risk assessment nor supported by sufficient scientific evidence. The findings supported New Zealand's position throughout this process: namely, that mature and symptomless apples, subject to a standard border inspection, did not pose a phytosanitary risk. All 16 of Australia's measures at issue had been found to be inconsistent with its obligations under Articles 5.1, 5.2 and 2.2 of the SPS Agreement. Following adoption of the Reports at the present meeting, Australia would be under an obligation to bring its measures into conformity with its WTO obligations. New Zealand would be working with Australian officials to find an effective, durable and WTO-consistent solution within a reasonable period of time. New Zealand hoped that consultations would lead quickly to agreement on a reasonable period of time for Australia to bring its measures into conformity.

61. New Zealand welcomed warmly the media release issued jointly by Australian Ministers immediately following the release of the Appellate Body Report, in which Ministers had noted the Australian Government's acceptance of the outcome of the case. Ministers had also indicated that

Australia would now proceed with a science-based review of the import risk analysis for New Zealand apples. New Zealand looked forward to hearing more from Australia in this forum about its intentions with respect to timely implementation.

62. The representative of Australia said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work. Australia acknowledged the time and efforts dedicated to this legally and technically complex dispute. He said that on 30 November 2010, the Australian Government had announced its intentions to implement the DSB's recommendations and rulings in a manner consistent with Australia's WTO obligations. Australia acknowledged that the Appellate Body had reversed the Panel's findings on Article 5.6 of the SPS Agreement, as Australia had requested it to do. However, Australia considered there were aspects of the Appellate Body's reasoning on Article 5.6 that appeared problematic, and in particular in relation to the standard of review to be applied by panels in dealing with an Article 5.6 claim.

63. Australia recalled that in the "EC - Hormones" dispute, the Appellate Body had clarified that Article 11 of the DSU "bears directly" on the standard of review to be applied by panels in the assessment of facts in proceedings under the SPS Agreement.[4] The Appellate Body had stated that: "So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'."[5] The Appellate Body had recalled its statement in relation to Article 11 of the DSU in subsequent reports, including "US/Canada - Continued Suspension".[6] In doing so, the Appellate Body had not suggested that its guidance was limited to particular provisions of the SPS Agreement, such as Article 5.1. However, in its Report on "Australia - Apples", the Appellate Body had now stated: "Caution not to conduct a *de novo* review is appropriate where a panel reviews a risk assessment conducted by the importing Member's authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim. The legal question under Article 5.6 is not whether the authorities of the importing Member have, in conducting the risk assessment, acted in accordance with the obligations of the SPS Agreement. Rather, the legal question is whether the importing Member could have adopted a less trade-restrictive measure. This requires the panel itself to objectively assess, inter alia, whether the alternative measure proposed by the complainant would achieve the importing Member's appropriate level of protection."[7] In this statement, the Appellate Body had indicated that, while it was appropriate not to conduct a *de novo* review in the context of Article 5.1, the "situation is different" in relation to an Article 5.6 claim. The Appellate Body appeared to have suggested that a panel could conduct a *de novo* review in relation to an Article 5.6 claim. This would constitute a significant departure from the Appellate Body's long-standing guidance that Article 11 of the DSU precluded such a review.

64. Australia was concerned that the reasoning of the Appellate Body in this part of its Report would create difficulty for a panel in applying Articles 5.1 and 5.6 where a complainant brings claims under both provisions. In such a case, it may be that the importing party had in its risk assessment considered the alternative measure proposed by the complainant in its Article 5.6 claim, and found that the alternative would not meet its appropriate level of protection. Applying the standard of review relevant to Article 5.1, the panel may find the risk assessment "objectively justifiable"[8], and find no breach of Article 5.1. However, following what the Appellate Body had now said, the panel would need to take a different approach in applying Article 5.6. Rather than determining whether the importing Member's consideration of whether the alternative measure met its appropriate level of protection was objectively justifiable, the panel would need to answer that question based on its own judgement. In exercising its own judgement, the panel might find that the proposed alternative

[4] Appellate Body Report, "EC - Hormones", para. 116.
[5] Appellate Body Report, "EC - Hormones", para. 117.
[6] Appellate Body Report, "US/Canada - Continued Suspension", para. 589.
[7] Appellate Body Report, "Australia - Apples", para. 356.
[8] Appellate Body Report, "US/Canada - Continued Suspension", para. 590.

measure would meet the importing Member's appropriate level of protection, and thus find a breach of Article 5.6. In Australia's view, such an outcome would be incongruous: the finding on Article 5.6 would completely undermine the finding on Article 5.1, in the process rendering meaningless the Appellate Body's clear guidance on the interpretation of that provision. In sum, Australia was concerned that the Appellate Body had introduced a significant element of uncertainty on standard of review which would make the task of panels more difficult in reviewing Members' compliance with key provisions of the SPS Agreement. Finally and notwithstanding those concerns, he wished to reiterate that Australia would proceed to implement the DSB's recommendations and rulings in this dispute.

65. The representative of the United States said that his country had followed this dispute very closely as a third party. As Members were aware, the United States had previously brought a WTO dispute (DS245) relating to apple import restrictions adopted by a Member other than Australia. The United States also had an application pending before Australia to allow market access for US apples. The key finding in this dispute was that Australia's measures restricting imports of apples were inconsistent with Australia's obligations under Articles 2.2, 5.1 and 5.2 of the SPS Agreement. The United States appreciated the comprehensive and thoughtful analysis of the Panel and the Appellate Body in making those findings. The United States also noted that the Appellate Body had not upheld the Panel's findings under Article 5.6 of the SPS Agreement, including the finding that a limitation of apple imports to mature symptomless apples would achieve Australia's appropriate level of protection with regard to fire blight.

66. With regard to this finding, the United States emphasized that the Appellate Body had not reached the merits of the issue. Rather, the Appellate Body had found that the Panel had adopted an improper approach to its Article 5.6 analysis, and that the Panel's findings were not sufficiently detailed to permit the Appellate Body to complete the Article 5.6 analysis. Based on a review of the scientific evidence, as well as the findings by this Panel and by the Panel in DS245, it appeared that a measure restricting imports to mature symptomless apples would in fact meet Australia's appropriate level of protection.

67. Finally, as a technical note, the United States noted that the Appellate Body had stated (in paragraph 170 of its Report) that a "unique" feature of the SPS Agreement was that it defined the measures that were subject to its disciplines. However, there were other covered agreements that also defined the measures subject to their disciplines. The United States looked forward to implementation by Australia of the DSB's recommendations and rulings.

68. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS367/AB/R and the Panel Report contained in WT/DS367/R, as modified by the Appellate Body Report.