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Dispute Settlement Body
19 November 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 November 2009

Chairman: Mr. John Gero (Canada)

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.84)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.84)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.59)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.22 – WT/DS293/31/Add.22)

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Communities (WT/DS27/96/Add.10)

(f) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.3)

(g) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.2)

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.84)

2. The Chairman drew attention to document WT/DS176/11/Add.84, 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 November 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress. The US administration was working with Congress to implement the DSB's recommendations and rulings.

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

5. The representative of Cuba said that the cases under the Agenda item on: "Surveillance of Implementation of Recommendations Adopted by the DSB", including the case under consideration, raised serious doubts as to whether this was an appropriate way for ensuring compliance with the covered agreements in order to preserve Members' rights and obligations. According to Article 3.7 of the DSU, the primary objective of the dispute settlement system, which was one of the main achievements of the Uruguay Round, was to ensure that any WTO-inconsistent measures were withdrawn. Consequently, by failing to comply with the DSB's rulings on Section 211, the parties ignored the primary objective of the system that had been frequently used by them for the past 14 years of its existence. The United States was a complainant in no fewer than 93 dispute settlement cases. He noted that the United States and the EC had set a bad precedent in the Section 211 dispute. More than seven years had passed since the Appellate Body had made its ruling, and yet the United States persisted in using different multilateral fora to call on other Members to respect intellectual property rights. Month after month, the United States had not provided the DSB with any information as to how and when it intended to implement the DSB's recommendations. Section 211, which was illegal and yet remained in force, prejudiced the trademark rights of Cuban owners. Furthermore, it was an unacceptable manifestation of the US embargo policy against Cuba. On 28 October 2009, with near-unanimous support of 187 countries voting in favour, the UN General Assembly had passed its eighteenth resolution calling on the United States to end its economic, commercial and financial embargo imposed on Cuba in 1962. The international community had sent out a clear message and never before had the United States been so isolated in its embargo policy against Cuba, which included Section 211. Nor had Section 211 produced the desired results. HAVANA CLUB was a renowned trademark that showed the Cuban origin, despite Bacardi's attempts to misappropriate it. The parties to the dispute were aware of the economic and commercial importance of intellectual property rights. It was no coincidence that they were responsible for the establishment of the TRIPS Agreement, which contained the majority of provisions that did not reflect the interests of developing and least-developed countries. Once again, Cuba called on the parties to the dispute to take immediate and effective action to put an end to the dispute.

6. The representative of Ecuador said that his country thanked the United States for its status report, which unfortunately did not show much progress on compliance, and supported the statement made by Cuba. Ecuador emphasized, once again, that Article 21 of the DSU expressly referred to prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing countries. The United States closely monitored compliance by all Members with their WTO obligations and had expressed, in different WTO Councils and Committees, its systemic concerns with regard to certain commitments undertaken by other Members. It was the United States that drew up internal reports on Members' compliance with their obligations regarding

intellectual property rights. Thus, if the United States wished to promote coherence, it should set an example. Once again, Ecuador urged the US administration and Congress to accelerate compliance with the DSB's recommendations and rulings by repealing Section 211 of the Omnibus Appropriations Act of 1998. Finally, he said that Ecuador wished to receive more details from the EC concerning the steps it had taken to resolve this dispute.

7. The representative of Brazil said that his country thanked the United States for its status report pertaining to this dispute. Brazil continued to be concerned by the US non-compliance with the DSB's recommendations and rulings in this dispute. Thus, Brazil expected that the United States would bring its measures into conformity with the multilateral trade disciplines in the very near future.

8. The representative of China said that his country thanked the United States for its status report and its statement. China noted that the report demonstrated that the US non-compliance in this dispute continued. Thus, China supported the statements made by the EC and Cuba and urged the United States to implement the DSB's decision without further delay.

9. The representative of the Bolivarian Republic of Venezuela said that his country had noted the US status report regarding Section 211, which had to be repealed pursuant to the DSB's ruling to the effect that the measure was in violation of WTO rules. However, there had been no change, to date, concerning the information submitted each month by the United States. The United States had had more than seven years to comply within the "reasonable period of time" in order to resolve this dispute. "Reasonable" meant not exaggerated or excessive, as provided for and specified in Article 21.3 of the DSU. He noted that the 2009 Annual Report of the DSB, on page 103 of its addendum, described how those "reasonable periods of time" had been extended to enable the United States to comply with the DSB's recommendation. The other interpretation of the word "reasonable" (*prudencial* in Spanish) was that it related to prudence, which meant good sense and good judgement. But, in this dispute, it was clear that this was not reasonable to Cuba nor to the WTO, which saw its credibility being damaged. However, it was reasonable to the violator, who continued to enjoy the use of Cuban trademarks, which owed their prestige to Cuba and not to the United States, although the United States had been deriving earnings there from for a considerable period of time. Recently, many developments had taken place over the past seven years, including the UN resolutions calling for an end to the Cuban blockade, changes in the Presidency of the United States and Cuba, apologies from the OAS for having unjustifiably expelled Cuba from its ranks in 1962 and the tarnishing of the image of the DSB as a result of non-compliance with its decisions, a situation which appeared to be getting worse. The situation would continue to get worse as a result of an agreement reached between the EC and the United States four years ago. As had happened so often in modern history, the two parties had negotiated with the intention of preserving a state of inertia and neglect for the benefit of the United States and the peace of mind of the EC. They had made all the necessary changes to ensure that everything remained as it was. Venezuela, once again, urged the United States to take urgent and necessary measures to comply with its TRIPS obligations and to implement the DSB's recommendation by repealing that Act without delay.

10. The representative of Viet Nam said that his country thanked the United States for its status report. Viet Nam supported the statement made by Cuba and urged that the United States shortly comply with the DSB's recommendations and rulings.

11. The representative of Bolivia said that her country thanked the United States for its status report and expressed, once again, its concern at the lack of progress in this case. The United States must comply with the DSB's recommendations and rulings and lift the restrictions imposed under Section 211, which were contrary to the rules of international law. At each DSB meeting, concerns were being raised about serious consequences for the WTO resulting from the lack of compliance by

Members with their WTO obligations. Thus, Bolivia supported the statement made by Cuba on this matter.

12. The representative of Argentina said that his country thanked the United States for the status report. Argentina recalled its statement made at the October DSB meeting to the effect that the lack of compliance with the DSB's decisions damaged the credibility of the system. Argentina urged both parties, in particular the United States, to take the necessary measures to ensure full implementation of the DSB's recommendations and rulings.

13. The representative of Nicaragua said that her country had noted the US status report and the statements made by the affected parties. Section 211 continued to be in breach of the DSB's recommendations and rulings and failed to conform to multilateral rules. On previous occasions, Nicaragua had asked the United States to inform the DSB of the positive steps it had taken to introduce the relevant laws into the Congress and Senate, so that Members could have more information on the progress on this issue. Once again, Nicaragua urged the United States to bring its measure into compliance with the DSB's recommendations and rulings.

14. The representative of the United States said that, in response to the comments regarding systemic concerns about the dispute settlement system, as his country had stated in the past, the facts simply did not support Members' assertions or justify such systemic concerns. The record was clear: the United States had complied, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where US efforts to do so had not yet been entirely successful, the United States had been working actively towards compliance in furtherance of the purpose of the dispute settlement mechanism, to secure a positive solution to the dispute.

15. The representative of Cuba said that his delegation did not understand what the United States had just stated. In order to ensure coherence and respect for international law there could only be one standard and one rule of conduct. It was not enough for a country to claim that it respected the majority of international agreements when it then assumed the right, in a particular case, in the name of some particular bilateral policy, or for the purposes of a specific action on behalf of particular political groups within the country, to violate, disregard, abuse and simply to make a mockery of international law. No country, regardless of its size or economic situation, could assume the right to decide on a selective basis, even exceptionally, what rules of international law it was entitled to violate, and in what specific cases. If, for example, a country was able to give itself the right to commit genocide in another country, simply because it felt entitled to commit an action, this would be manifestly brutal, aggressive and simply unacceptable under international law. The United States could not find a single argument to justify the unacceptable and disrespectful way in which it had approached the implementation in the Section 211 dispute. However much the US lawyers or representatives tried to create, fabricate and invent, no one would accept a single argument to support what the United States stated because conduct and coherence go hand in hand, and did not allow for the slightest exception. Cuba, once again, called on the United States to honour what had been decided by the DSB, to respect the DSB and to show genuine commitment to the WTO, its laws, its Bodies and its rulings. Otherwise, if the United States could simply decide not to respect a particular decision – even if in most cases it did respect them – then why should Cuba and the other Members should not be entitled to do the same in areas of interest to the United States or of interest to any of the Members, since in this Organization the sovereign equality of Members prevailed. In other words, either all Members were equal and all respected each other, or they could simply give themselves the right, which the United States had assumed, to disregard rulings in specific cases to suit hegemonic policies and interests on the international scene. Either there was a standard or a rule that everyone accepted in all cases, or everybody simply did what the United States was doing. In short, the United States would have to abide by the consequences of its behaviour, and what other Members would do depended on what the United States had done. The United States should not claim its superiority, even if it had more wealth and for a number of reasons, often not particularly glorious or

legitimate, it had accumulated greater trade and economic opportunities. Nobody had given the United States any right to behave in this way. Thus, the US conduct would determine what the United States could expect from other Members.

16. 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.84)

17. The Chairman drew attention to document WT/DS184/15/Add.84, 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.

18. The representative of the United States said that his country had provided a status report in this dispute on 6 November 2009, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. With respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities by 23 November 2002, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

19. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan noted the US statement that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. Japan hoped that the United States would soon be in a position to report to the DSB tangible progress for the remaining part of the DSB's recommendations and rulings. A full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[2] Japan called on the United States to fully implement the DSB recommendations in this long-standing dispute without further delay.

20. 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.59)

21. The Chairman drew attention to document WT/DS160/24/Add.59, 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.

22. The representative of the United States said that his country had provided a status report in this dispute, on 6 November 2009, in accordance with Article 21.6 of the DSU. The US administration would continue to confer with the EC, and would work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Communities said that the United States had, once again, reported non-compliance. The EC was again disappointed, especially in light of the importance that the United States attached to intellectual property protection. Members were aware that the

[2] Article 3.3 of the DSU.

United States was in favour of strong intellectual property protection throughout the world, and the EC thus hoped that the United States would lead by example. The EC also remained ready to work with the US authorities towards the complete resolution of this case, and hoped that the financial loss suffered by the EC industry could be brought to an end soon.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.22 – WT/DS293/31/Add.22)

25. The Chairman drew attention to document WT/DS291/37/Add.22 – WT/DS293/31/Add.22, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

26. The representative of the European Communities said that the EC regulatory procedures on biotech products continued to work as foreseen in the legislation. The Commission would soon adopt decisions authorizing three GM maize after the vote held in the Agriculture Council the previous month. This would raise the number of GMOs authorized since the date of establishment of the Panel to twenty-four. Furthermore, the Commission would soon transmit a draft authorization decision for another GM maize to the Council, following the vote in the previous month in the relevant Council Committee.

27. The representative of Argentina said that his country thanked the EC for its status report and would continue to monitor any new developments in some of the EC member States.

28. The representative of the United States said that his country thanked the EC for its status report and its statement. The United States recalled its concerns about the large number of biotech products backed up in the EC approval system. Approximately 60 biotech products were awaiting approval, which was more than double the number at the time this dispute had been initiated in 2003. The EC's failure to move forward, in a timely manner, on those applications for approval resulted in an effective import ban on important US agricultural products. After months of inaction, in the past few days the EC had finally approved three varieties of biotech maize, and the EC had allowed a fourth variety to move forward in the approval process. Unfortunately, even if the four maize varieties were approved, they would represent only a small fraction of the total backlog of pending applications. Thus, approvals of the varieties would not result in a resumption of trade in important biotech products. Moreover, the EC's selection of the particular products for action served to highlight the US concerns with the EC's operation of its approval system. Although the EC had allowed the four applications to move forward in its approval system, a dozen other applications at the same stage of the EC's process remained stalled. The only apparent reason for the EC's selection of the products for action – as opposed to the other many pending applications – was that a failure by the EC to act would have resulted in increased EC feed prices and, thus, would have harmed EC economic interests. The United States recalled that the obligation of Members was to consider applications for approval without undue delay. A Member was not entitled to delay action until it was imperative for its own economic interests to allow an approval. Accordingly, the United States urged the EC to address promptly the problems with its approval system, and thanked the DSB for its attention to this matter.

29. The representative of the European Communities said that the GMO approval system, as the United States called it, was not the subject of the original Panel's findings and neither was its "operation" nor the status of specific applications not dealt with in the original panel covered by this Agenda item. In any event, the GMO regulatory regime was working normally. Its functioning

should not be rigidly assessed purely quantitatively and in abstract, in terms of number of authorizations per year, since this was dependent on various product and case specific elements and, in particular, on the quality of applications and on the time needed by applicants to answer requests from the EFSA on additional scientific information.

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

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Communities (WT/DS27/96/Add.10)

31. The Chairman drew attention to document WT/DS27/96/Add.10, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations and rulings in the case concerning the EC's regime for the importation, sale and distribution of bananas.

32. The representative of the European Communities said that, as had been indicated at previous DSB meetings, the EC had always favoured an implementation of the recommendation made by the Panel Report (i.e. modifying its bound duty) in the context of a comprehensive agreement with Latin American banana suppliers. After weeks of intensive negotiations, the parties were very close to finalizing such an agreement. The agreement would put an end to the long-standing "banana saga", while taking in due consideration the interests of all those supplying bananas to the EC.

33. The representative of Ecuador said that his country thanked the EC for its status report. For the first time since the adoption by the DSB of the Reports of the Panels and the Appellate Body in the Bananas dispute, in which Ecuador had been involved for 12 years, Ecuador was optimistic that an agreement could be finalized, resulting in a mutually agreed solution with the EC. However, despite this optimism, until the parties jointly notified the DSB that a mutually agreed solution had been reached, under Article 3.6 of the DSU, this matter would have to remain on the DSB Agenda under an item concerning surveillance of the implementation of recommendations adopted by the DSB, in accordance with Article 21.6 of the DSU.

34. The representative of Honduras said that, as a complaining party in the Bananas III dispute, Honduras was pleased to note that efforts to settle this dispute, which had been going on for 14 years, were now intensifying. Since the EC was looking for a comprehensive agreement, contingent on various requirements, a number of substantive issues were still being negotiated. A number of procedural steps would also have to be taken. However, Honduras would continue to reserve its rights in this dispute until all pending issues and steps were to be dealt with in a satisfactory manner.

35. The representative of the Dominican Republic, speaking also on behalf of the ACP countries, said that ever since this item had been on the DSB's Agenda, the ACP countries had expressed their respect for final WTO decisions, even though they continued to disagree with some of the conclusions reached by the Panel and the Appellate Body in this dispute. The ACP countries believed that it remained useful to keep in mind the actual thrust of the rulings. Both the Panel and the Appellate Body had agreed that the EC's Schedule still committed the EC to a tariff-rate-quota at a tariff of €75/mt and an out-of-quota tariff of €680/mt. As had been indicated previously, the ACP countries could resign themselves to live with a literal implementation of those conclusions. The EC had, however, indicated that it aimed at achieving compliance, and thereby implementation, by changing the structure of its tariff commitments through negotiations with the MFN banana suppliers. It transpired that the result of this process would likely be an overall reduction of bound and applied duties on bananas. As on previous occasions, the ACP countries recalled again that the DSB's recommendations in this dispute did not require an overall reduction of average tariffs; all they

required was either a literal implementation or a rearrangement. This meant that a decision to reduce the EC's average banana tariff did not find its rationale in the need for compliance in this dispute; it would have to find this rationale in another context, namely the DDA negotiations. This should be kept in mind when designing a solution. Any such solution should be based on the right reasoning and anchored and balanced out in the right context. With this in mind, the ACP countries remained committed to supporting its partners on the way towards an effective and hopefully final solution to the "banana issue".

36. The representative of Colombia said that his country thanked the EC for its status report. Colombia noted that the status report reiterated the EC's intention to bring itself into compliance with the DSB's recommendations and rulings by modifying its scheduled tariff commitments on bananas. Colombia would work constructively with the EC to conclude an agreement on bananas that would fundamentally resolve this long-standing dispute.

37. The representative of Panama said that, as had been indicated in the EC's status report, the negotiations to reach a settlement in this dispute had entered into a crucial stage, although a few major issues still needed to be resolved. If the parties managed to resolve the pending issues, a number of steps would need to be taken before they could sign an agreement and before that agreement could enter into force. Panama hoped that it would be possible to complete the remaining stages and would continue its efforts to reach a mutually acceptable solution that would put an end to this long-standing dispute.

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

39. The representative of Nicaragua said that her country took note of the status report by the EC, which had correctly pointed out that the negotiations to settle the Bananas dispute were still ongoing. As had previously been stated, Nicaragua was seeking a settlement that would satisfy its interests as a developing country with regard to all the issues involved. Nicaragua would continue to negotiate constructively on this issue and hoped that the EC would make positive contributions in order to achieve a fair outcome.

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

(f) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.3)

41. The Chairman drew attention to document WT/DS294/34/Add.3, 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.

42. The representative of the United States said that his country had provided a status report in this dispute, on 6 November 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had already taken a number of steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

43. The representative of the European Communities said that this was the fourth status report in this dispute. As was the case with the three preceding reports, the US status report confirmed that the United States had not taken any action whatsoever to correct the shortcomings in its implementation. There had been no implementing action despite the fact that the reasonable period of time for implementation in this dispute had expired on 9 April 2007. There had been no implementing action, despite the fact that the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in the compliance proceedings for this dispute had been adopted by the DSB five months ago. There was no implementing action despite implementation apparently being subject to the discretion of the US administration and, therefore, accomplishable by administrative action. For the fourth time, the United States was merely telling Members what it had done in 2007. The EC was already well aware that the United States had taken some action in February 2007 to cease zeroing in weighted-average-to-average comparisons in original investigations. However, as the Panel and Appellate Body Reports in this dispute had confirmed, that was not enough. The real problem was the use of zeroing in reviews, both administrative reviews (on the basis of which a large percentage of anti-dumping duties paid were collected) and sunset reviews, where "zeroed" margins of dumping were used to justify the continuation of duties. The Appellate Body had made the legal situation on zeroing crystal clear. Zeroing was prohibited in both original investigations and reviews. In addition, any anti-dumping duties collected after the end of the implementation period must be calculated without zeroing, whenever the goods in question were imported or the review determination made. The EC also noted that it was only one month from the deadline of 19 December 2009 for the United States to implement the DSB's recommendations in the second zeroing case. The EC sincerely hoped that there would be swift compliance in this case. The only step left for the United States to take was to bring itself into full compliance without further delay.

44. The representative of the United States said that, as had been previously stated, his country was consulting with interested parties in order to address the findings in this dispute. Furthermore, the United States recognized the difficulties raised by the Appellate Body's findings on zeroing and was consulting within the government and with interested stakeholders to find an appropriate solution. With respect to the DSB's recommendations and rulings in other disputes, the United States had, in each case, expressed its intent to comply with its obligations under the WTO Agreement. The United States would address the DSB's recommendations and rulings in those disputes in the DSB at the appropriate time.

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

(g) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.2)

46. Finally, the Chairman drew attention to document WT/DS322/36/Add.2, 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.

47. The representative of the United States said that his country had provided a status report in this dispute, on 6 November 2009, 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.

48. The representative of Japan said that his country thanked the United States for its statement and its latest status report. Japan noted that in its status report the United States stated that it "will continue to consult with interested parties in order to address the findings contained in [the reports of the Appellate Body and the panel]". Japan took this as commitment by the United States to bring into

conformity with the Anti-Dumping Agreement and the GATT 1994 the measures found in those Reports to be inconsistent with those Agreements. Japan recalled that those adopted Reports contained, among others, the finding that the use of zeroing in the subsequent periodic reviews, which Japan had challenged in the compliance proceedings, was inconsistent with Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Japan called on the United States to meet its commitment by taking immediate and concrete action to fully comply with the DSB's recommendations and rulings in order to resolve this dispute.

49. The representative of the European Communities said that her delegation wished to reiterate its disappointment over the lack of any progress by the United States on compliance with adverse rulings on zeroing in yet another dispute, and recalled that immediate compliance with the DSB's recommendations and rulings was not an option, but an obligation under the DSU provisions.

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

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

(a) Statements by the European Communities and Japan

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

52. The representative of Japan said that financial year 2009 distributions under the CDSOA appeared to be well underway[3] and thus, the CDSOA still remained operational.[4] Japan, once again, called on the United States to stop illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance.

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

54. The representative of China said that his country thanked the EC and Japan for, once again, raising this item at the DSB 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.

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

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[3] On 3 September 2009, the US Customs and Border Protection published the list of certifications received from claimants for the FY2009 distributions. See US Customs and Border Protection s website at:
http://www.cbp.gov/xp/cgov/trade/priority trade/add cvd/cont dump/cdsoa 09/

[4] In the words of the US Customs, "the distribution process will continue for an undetermined period". See US Customs and Border Protections website at:
http://www.cbp.gov/xp/cgov/trade/priority trade/add cvd/cont dump/cont dump faq.xm 1

56. The representative of India said that his country thanked the EC and Japan for bringing this issue, once again, before the DSB. In India's view, the CDSOA still allowed for disbursements by the US administration to its domestic industry. Members continued to be concerned about this fact. As had been previously reiterated, India was concerned that non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. India agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

57. The representative of Brazil said that his country thanked the EC and Japan for keeping this item on the DSB's Agenda. As stated previously, in Brazil's view, the United States was required to submit status reports in this dispute until such time that disbursements were no longer being made pursuant to the Byrd Amendment. Only then the issue would be "resolved" within the meaning of Article 21.6 of the DSU and the United States would be released from its obligation to provide status reports in this dispute.

58. The representative of Thailand said that his country thanked the EC and Japan for bringing this item, once again, before the DSB. Thailand continued to urge the United States to cease the disbursements under the CDSOA and to provide status reports until such actions were taken and the matter was completely resolved.

59. The representative of the United States said that, as his country had already explained at numerous 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, including the EC and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States did not, therefore, understand the purpose for which the EC and Japan had inscribed the item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as had been 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.

60. The DSB took note of the statements.

3. United States – Certain country of origin labelling (COOL) requirements

(a) Request for the establishment of a panel by Canada (WT/DS384/8)

4. United States – Certain country of origin labelling requirements

(a) Request for the establishment of a panel by Mexico (WT/DS386/7 and Corr.1)

61. The Chairman proposed that Items 3 and 4 be considered together since they pertained to the same matter. He recalled that the DSB had considered these matters at its meeting, on 23 October 2009, and had agreed to revert to them. He first drew Members' attention to the communication from Canada contained in document WT/DS384/8 and invited the representative of Canada to speak.

62. The representative of Canada said that, at the 23 October 2009 meeting of the DSB, her country had made its first request for the establishment of a panel regarding the US country of origin labelling (COOL) requirements. Requesting the establishment of a dispute settlement panel was the

latest step in Canada's lengthy engagement with the United States on this issue. Since 2002, when the COOL measure was first proposed, Canada had raised concerns with regard to the impact of the measure on the Canadian livestock and meat industries and on the highly integrated supply chains of these industries. Canada had raised its concerns through letters, meetings between government officials and at meetings of the WTO TBT Committee. In addition, Canada's Minister of International Trade and Canada's Minister of Agriculture and Agri-Food had raised concerns with their US counterparts regarding the consistency of the COOL measure with US international trade obligations. Canada was disappointed that despite these efforts, the United States had persevered with this unnecessary and trade-distorting measure. Canada had already set out its reasons for proceeding with this case in its request for the establishment of a panel, and would not repeat them. Further to its request, of 23 October 2009, Canada asked, once again, that the DSB establish a panel in this case with standard terms of reference. Given the similarities between the issues raised in Canada's panel request and those raised in Mexico's panel request in DS386, Canada asked that, pursuant to Article 9.1 of the DSU, a single panel be established for DS384 and DS386 cases.

63. The Chairman then drew attention to the communication from Mexico contained in document WT/DS386/7 and Corr.1 and invited the representative of Mexico to speak.

64. The representative of Mexico said that, at the 23 October 2009 DSB meeting, his country had made its first request for the establishment of a panel to examine this dispute. However, following the US objection at that meeting, the panel had not been established. Therefore, for the second time, Mexico was submitting its panel request, under Article 6.1 of the DSU, and wished to reiterate its statement made on this matter at the 23 October 2009 DSB meeting. He added that since Mexico's request and Canada's request concerning the same issue (DS386; DS384) were closely related, Mexico, like Canada, would request the establishment of a single panel pursuant to Article 9.1 of the DSU to examine both complaints. Mexico reiterated its readiness to continue working together with the United States in order to reach a mutually satisfactory solution to this matter.

65. The representative of the United States said that his country was disappointed that Canada and Mexico had chosen to pursue their requests for a panel in this matter. The United States understood that a panel would be established at the present meeting. Nonetheless, the United States was confident that its measures provided information to consumers in a manner consistent with its WTO commitments. As the United States had noted at the 23 October 2009 DSB meeting, WTO Members had long recognized that country of origin labelling was a legitimate policy. Indeed, that recognition predated the entry into force of the WTO Agreement. It was common for WTO Members to require that goods be labelled as to their origin, and the United States was confident that a panel would agree with it. With respect to the requests for a single panel, the United States could agree that a single panel be established to consider both complaints. The United States thanked Canada and Mexico for their cooperation on a procedural issue, namely, and without prejudice to any systemic views, that the two complaining parties and the United States had agreed that they would jointly request the panel that would be established at the present meeting to open its meetings to the public. The United States looked forward to continuing that procedural cooperation with the complaining parties throughout this dispute.

66. The DSB took note of the statements and agreed to establish a single panel in accordance with the provisions of Article 9.1 of the DSU, with standard terms of reference, to examine the complaint by Canada contained in WT/DS384/8 and the complaint by Mexico contained in WT/DS386/7 and Corr.1.

67. The representatives of Argentina, Australia, Canada, China, Colombia, India, Japan, Korea, Mexico, New Zealand and Peru reserved their third-party rights to participate in the Panel's proceedings.

68. The representative of Mexico said that his country wished to comment briefly on the statement made by the United States regarding public hearings, and would refer to some systemic implications of this issue. Mexico's position on this issue was well known to those Members who participated in the ongoing DSU negotiations. The fact that Mexico had agreed to the holding of public hearings in this dispute was without prejudice to Mexico's negotiating position thereon. In Mexico's view, such issues should be resolved in the context of the DSU negotiations. However, the practice followed by panels and the Appellate Body, of allowing hearings to be open to the public at the request of the parties to a dispute, did not leave Mexico with many options. Therefore, in order not to affect the proceedings and to facilitate settlement of this dispute jointly with Canada, Mexico would rather go along with the requests to hold public hearings made by Canada and the United States. However, he noted that Mexico's acceptance to do so should be viewed as an additional argument in favour of taking the negotiating path towards such issues and of Mexico's position on those issues in the negotiations.

69. The DSB took note of the statement.

5. European Communities – Certain measures affecting poultry meat and poultry meat products from the United States

(a) Request for the establishment of a panel by the United States (WT/DS389/4)

70. The Chairman recalled that the DSB had considered this matter at its meeting on 23 October 2009 and had agreed to revert to it. He drew Members' attention to the communication from the United States contained in document WT/DS389/4, and invited the representative of the United States to speak.

71. The representative of the United States said that as his country had explained at the DSB meeting on 23 October 2009, the United States was concerned with restrictions that the EC had imposed on the import and marketing of poultry meat and poultry meat products from the United States. In 2002, the United States requested the European Commission to approve four pathogen reduction treatments (PRTs) for use in the production of poultry intended for export to the EC. After a delay of over six years, however, the EC had failed to approve any of the four PRTs, notwithstanding the fact that the EC's own scientists had found that the importation and consumption of poultry processed with those four PRTs did not pose a risk to human health. Instead, the EC had rejected the requests for approval of those PRTs. At the October 2009 DSB meeting, the EC had mentioned the dialogue between the United States and the EC on this issue. The United States regretted that significant US engagement over many years had not resulted in the lifting of the EC's ban on the import and marketing of US poultry. As outlined in its panel request, the United States considered that the EC's ban on the import and marketing of US poultry treated with these PRTs was inconsistent with several provisions of the SPS Agreement, the Agriculture Agreement, the GATT 1994, and the TBT Agreement. Accordingly, the United States again requested that the DSB establish a panel to examine this matter, with standard terms of reference.

72. The representative of the European Communities said that, as had been mentioned at the previous DSB meeting, her delegation regretted that the United States had decided to request, for a second time, the establishment of a panel on this matter. The EC understood that a panel would be established at the present meeting, and the EC would defend its measure before the panel.

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

74. The representatives of Australia, China, Korea and Norway reserved their third-party rights to participate in the Panel's proceedings.

6. China – Measures related to the exportation of various raw materials

(a) Request for the establishment of a panel by the United States (WT/DS394/7)

(b) Request for the establishment of a panel by the European Communities (WT/DS395/7)

(c) Request for the establishment of a panel by Mexico (WT/DS398/6)

75. The Chairman proposed that the three sub-items be taken up together since they pertained to the same matter. He first drew attention to the communication from the United States contained in document WT/DS394/7, and invited the representative of the United States to speak.

76. The representative of the United States said that his country was concerned about Chinese measures that restrained the exportation of certain raw materials that were critical to US manufacturing industries. Those restraints not only limited the availability of those raw materials, but also increased the cost of those raw materials to US and other producers outside of China, while providing an artificial cost advantage to downstream industries within China. The materials at issue were either raw or initially processed materials that were essential inputs in the production of steel, aluminium, and industrial chemicals with far-ranging applications. The export restraints at issue included export quotas, export duties, minimum export pricing, various restrictions on the right to export, as well as administrative requirements that increased the burdens and costs for exporting these materials from China. As described in more detail in the US panel request, those restraints appeared to be inconsistent with provisions of the GATT 1994 and China's Protocol of Accession. Accordingly, the United States requested that the DSB establish a panel to examine the matter set out in its panel request with standard terms of reference.

77. The Chairman then drew attention to the communication from the European Communities contained in document WT/DS395/7, and invited the representative of the European Communities to speak.

78. The representative of the European Communities said that, regrettably, her delegation found itself left with no choice but to request the establishment of a panel in this dispute. While the consultations had been helpful in clarifying the Chinese measures and their application, there had been no basis for a negotiated solution to the dispute. The EC noted that the Chinese export restraints on raw materials were by no means a recent phenomenon. The restraints were a problem at the time of China's accession to the WTO, and they remained so at present. The EC believed that the restraints constituted a violation not only of provisions of the GATT, but also specific commitments undertaken by China upon accession – commitments which aimed specifically at these types of export restraints. Needless to say, in the current economic climate, export restraints on key raw materials caused hardship for non-Chinese companies dependent on these raw materials, just as they caused an uneven playing field. With the request for the establishment of a panel, the EC was seeking the reestablishment of a level playing field through ensuring China's observance of its WTO obligations.

79. The Chairman then drew attention to the communication from Mexico contained in document WT/DS398/6, and invited the representative of Mexico to speak.

80. The representative of Mexico said that his country shared the concerns expressed by the United States and the EC in their respective statements. Mexico had also held consultations with China, on 1 and 2 September 2009, in order to find a solution to the negative effects of the Chinese measures on various raw materials of crucial importance to the Mexican chemicals and steel sectors. As had already been stated, China maintained a set of restraints on exports of various raw materials – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. These were used, *inter alia*, for the production of aluminium, steel and some chemicals.

Mexico considered that the export restrictions imposed by China by means of quotas, tariffs and other measures (minimum prices, licences and collection of duties) were contrary to China's WTO commitments. China's restrictive measures increased the prices of those raw materials on the world market and reduced prices on the Chinese market. This created conditions of competition that were more favourable to Chinese producers of aluminium, steel and certain chemicals, and placed producers from the rest of the world at a disadvantage. Having failed to resolve the concerns at the consultations stage, Mexico was forced to request the establishment of a panel. Mexico reiterated that it continued to stand ready to work with China, in cooperation with the United States and the EC and with their support, in order to find a mutually satisfactory solution to the concerns.

81. Finally, the Chairman invited China to speak.

82. The representative of China said that his country was disappointed that the United States, the EC and Mexico had chosen to move forward with requests for panel establishment at the present meeting. Two rounds of consultations between China and the three complainants had been held respectively, in July and September 2009, on this matter. China had taken those consultations very seriously and thought that those consultations had been constructive. During the consultations, China had clarified relevant Chinese administrative measures and had specified that its policy objectives were to conserve the environment and exhaustible natural resources, which were recognized by the United States, the EC and Mexico. China also questioned whether some complainants really needed China's raw materials since certain complainants, such as the EC and the United States, imposed anti-dumping measures on some Chinese raw materials at issue for more than a decade. During the consultations, China had also expressed its willingness to further communicate with the complainants on the implementation of the specific measures so as to address their concerns. China had made it clear to the three complainants that relevant administrative measures on subject products were under review at present and China was open to hear the opinion of other WTO Members, including the United States, the EC and Mexico through further constructive communications. Furthermore, contrary to the three complainants' allegations, China consistently respected and abided by the WTO rules and its own commitments and believed that its measures related to exportation were consistent with the principles and rules of the WTO. For all of those reasons, China urged the United States, the EC and Mexico to reconsider their decision to pursue a panel in this case and was not in a position to agree to the establishment of a panel at the present time.

83. The DSB took note of the statements and agreed to revert to these matters.

7. United States – Subsidies on upland cotton

(a) Recourse to Article 4.10 of the SCM Agreement and Article 22.7 of the DSU by Brazil (WT/DS267/41)

(b) Recourse to Article 7.9 of the SCM Agreement and Article 22.7 of the DSU by Brazil (WT/DS267/42)

84. The Chairman proposed that the two sub-items be taken up together. He said that the above-mentioned item was on the Agenda of the present meeting at the request of Brazil. He then drew Members' attention to the communications from Brazil contained in documents WT/DS267/41 and WT/DS267/42, and invited the representative of Brazil to speak.

85. The representative of Brazil said that, in July and October 2005, Brazil had requested authorization to take countermeasures in response to the US failure to comply with the DSB's recommendations and rulings in this dispute. On both occasions, the United States had objected to Brazil's requests and the matter had been referred to arbitration. The Arbitrators circulated their Decisions on 31 August 2009. Article 22.7 of the DSU provided in part that "[the] DSB shall be

informed promptly of the decision of the arbitrator and shall, upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request". Accordingly, Brazil requested authorization from the DSB to suspend the application to the United States of concessions or other obligations, in conformity with both Decisions of the Arbitrators, as indicated in the documents that had been circulated to Members together with the Agenda for the present meeting.

86. The representative of the United States said that his country wished to reiterate at the outset that its ongoing intent was to comply with the DSB's recommendations and rulings in this dispute. Thus, while the United States understood that the DSB would be authorizing the suspension of concessions or other obligations, it did not believe that it would be necessary for Brazil to exercise that authorization. The United States wished to also reiterate its appreciation to the Arbitrators, and the thoughtful and methodical manner in which they had approached their task in a number of respects. As the United States had explained on 25 September 2009, the Arbitrators had reached several important conclusions, including that appropriate countermeasures under the SCM Agreement shall be limited to trade effects on Brazil, agreeing with the position of the United States as well as that advanced by Members in other arbitrations. For further details, the United States referred Members to the US statement made at the September 2009 DSB meeting. He added that suspending concessions or obligations could present economic and other challenges for both Brazil and the United States. The previous week, Brazil had published a list of goods for possible increased tariffs as part of countermeasures. This list included a wide range of goods that were important for both the US and Brazilian economies. In fact, the range of goods demonstrated the extensive and positive trade relationship that had been developed. The United States valued its economic relationship with Brazil and hoped to build on it and not have this dispute detract from that effort. The United States would welcome Brazil's ideas on identifying a solution to these issues and looked forward to continuing discussions with Brazil on the issues related to this dispute.

87. The DSB took note of the statements and, pursuant to the request by Brazil contained in document WT/DS267/41, agreed to grant authorization to suspend the application to the United States of concessions or other obligations consistent with the Arbitrator's Decision contained in document WT/DS267/ARB/1. Furthermore, pursuant to the request by Brazil contained in document WT/DS267/42, the DSB also agreed to grant authorization to suspend the application to the United States of concessions or other obligations consistent with the Arbitrator's Decision contained in document WT/DS267/ARB/2 and Corr.1.