

Dispute Settlement Body
2 September 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 2 September 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Reports in the case on: "China – Measures Related to the Exportation of Various Raw Materials" (DS394; DS395; DS398) was removed from the proposed Agenda following China's decision to appeal the Reports.

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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.

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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.105)
- (b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.105)
- (c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.80)
- (d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.43)
- (e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.23)
- (f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.20)
- (g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.14)
- (h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.7)
- (i) Australia – Measures affecting the importation of apples from New Zealand: Status report by Australia (WT/DS367/20)

1. The Chairperson 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. She proposed that the nine 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.105)

2. The Chairperson drew attention to document WT/DS176/11/Add.105, 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 22 August 2011, in accordance with Article 21.6 of the DSU. Legislative proposals had been introduced in the current 112th Congress that would implement the recommendations and rulings of the DSB. The US Administration would continue to work on solutions to implement the DSB's recommendations and rulings.

4. The representative of the European Union said that the EU thanked the United States for its status report and hoped that the US authorities would very soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba noted that on its website the WTO stated the following: "Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy". It further stated that: "Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced". Cuba believed that the US non-compliance, for the past nine and a half years, in this dispute seriously undermined those statements. Every month, the behaviour of the United States and the US disregard for WTO rules was criticized by other Members, but to no avail. Cuba recalled that the DSB had adopted the Appellate Body's rulings and recommendations that clearly condemned the violation of two basic principles of the WTO, namely national treatment and most-favoured-nation treatment. In spite of this, the current dispute settlement mechanism had not succeeded in enforcing the rules. Cuba wondered whether the international community and WTO Members actually believed in such an "exalted" Dispute Settlement Understanding and Cuba thought that they did not.

6. Cuba recalled that paragraph 69 of the Panel Report pertaining to this dispute clearly stated that, as indicated by the United States, Section 211 would not apply to abandoned trademarks because there was no original owner whose consent was required under this Section. Nevertheless, ten years later, the facts revealed the falsity of the US response. Not only Section 211 remained in force, violating two fundamental principles of the multilateral trading system, but it was also applied to prevent the renewal of a trademark that had been abandoned by its first owner. Furthermore, this was in contradiction of the US trademark law, the Lanham Act, which fully recognized the abandonment of trademarks and released third parties from all liability for their use. On 28 July 2006, the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury had refused to issue a specific licence for the renewal of the Havana Club trademark registration to Cubaexport, the owner since 1976. That refusal had been based on the provisions of Title 31, Part 515, of the US Code of Federal Regulations, in accordance with Section 211. The US courts that had heard the petition filed subsequently by Cubaexport with OFAC had failed to amend that erroneous decision by the Department of the Treasury. The final two-to-one majority ruling of 29 March 2011 by judges of the Court of Appeals of the District of Columbia had stripped Cubaexport of the registration rights to the Havana Club trademark that it had enjoyed for 35 years.

7. It was clear that Cubaexport would continue to have recourse to all possible legal procedures to appeal that decision, and that the Cuban Government would continue to call on the United States in order to: (i) amend its rulings; (ii) issue a licence permitting the renewal of the trademark registration; and (iii) act in accordance with its own assertions made during the dispute settlement proceedings regarding the non-applicability of Section 211 to abandoned trademarks. Once again, Cuba recalled that, in spite of the implementation and continued validity of a measure that undermined the intellectual property rights that belonged to Cuba, his country had afforded, and

continued to afford, extensive protection to the approximately 5,000 US trademarks registered in Cuba. Cuba, therefore, urged that the United States, in a spirit of reciprocity, repeal Section 211 without further delay.

8. The representative of Ecuador said that his country supported the statement made by Cuba and, once again, wished to stress that Article 21 of the DSU referred specifically to prompt compliance with the DSB's recommendations and rulings, in particular with regard to issues affecting the interests of a developing-country Member. Ecuador hoped that the United States would step up its efforts to ensure prompt compliance with the DSB's recommendations and rulings by repealing Section 211.

9. The representative of China said that her country thanked the United States for its status report and its statement made at the present meeting. China regretted that the United States had, once again, reported non-compliance. This prolonged situation of non-compliance was highly incompatible with the prompt and effective implementation as required under the DSU, in particular since the interests of a developing-country Member were affected. China, therefore, supported Cuba and joined other speakers in urging the United States to implement the DSB's recommendations and rulings without any further delay.

10. The representative of Viet Nam said that his country thanked the United States for its status report and called upon the United States to fully and promptly implement the DSB's recommendations and rulings so as to ensure that the credibility of the system was preserved.

11. The representative of Brazil said that his country thanked the United States for its status report pertaining to this dispute. As at previous meetings, Brazil remained concerned about the non-compliance with the DSB's recommendations and rulings in this dispute. Brazil urged the United States to take immediate steps to remedy this prolonged situation of non-compliance without further delay.

12. The representative of the Plurinational State of Bolivia said that his country had, once again, noted that the US status report did not contain any information on progress in this dispute. Bolivia, therefore, wished to reiterate its concern about the US failure to comply with the DSB's rulings. Such non-compliance caused serious harm to a developing country and affected the efficient functioning of the WTO. As Bolivia had repeatedly stated, this situation undermined the credibility and integrity of the multilateral trading system. Bolivia, once again, urged the United States to comply with the DSB's rulings and to take steps to remove the restrictions imposed under Section 211. Like other delegations, Bolivia supported the concerns raised by Cuba at the present meeting.

13. The representative of Nicaragua said that her country had taken note of the statements made by the parties to this dispute, as well as of the concerns raised by Cuba about the US non-compliance with the DSB's recommendations and rulings. In its statements made at previous DSB meetings, Nicaragua had noted how much time had elapsed since the adoption of the DSB's recommendations in this dispute. On several occasions, Nicaragua had requested the United States to provide more details on US efforts towards implementation and had raised systemic concerns about the lack of compliance. Once again, Nicaragua wished to reiterate its call upon the United States to promptly comply and resolve this matter, which had been on the DSB's Agenda for more than eight years.

14. The representative of the Bolivarian Republic of Venezuela said that her country supported Cuba's statement. Venezuela welcomed the US status report, but regretted that this report was merely a repetition of previous status reports submitted by the United States. The US failure to comply in this dispute had resulted in legislation which was contrary to the TRIPS Agreement and inconsistent with the principles of national and most-favoured-nation treatment. Furthermore, that legislation injured Cuba and undermined the credibility of the WTO and its dispute settlement mechanism. Venezuela hoped that the United States would comply with the DSB's recommendations. As had

been done on previous occasions, Venezuela urged the United States to put an end to its policy of economic, commercial and financial blockade against Cuba and recalled the US commitment to respect the DSB by complying with the recommendations and rulings.

15. The representative of Argentina said that his country thanked the United States for its status report and joined previous speakers who had called for prompt implementation of the DSB's recommendations pertaining to this dispute. Like Cuba, Argentina was also concerned about the effect of non-compliance on other Members and the multilateral trading system. Once again, Argentina reiterated its call upon the parties, in particular on the United States, to take all the necessary steps to finally remove this item from the DSB's Agenda.

16. The representative of Paraguay said that his country thanked the United States for its status report. Paraguay supported the statements made by Cuba and other speakers. It urged the United States to comply with the DSB's recommendations and rulings by repealing Section 211.

17. The representative of Mexico said that his country thanked the United States for its report. Mexico urged the parties to solve this dispute through the legal remedies provided under the DSU provisions. Mexico noted that, if a dispute was not resolved, any Member could initiate its own dispute if it considered that its rights were being nullified or impaired. Mexico also noted that the discussion under this Agenda item could provide useful input for the on-going discussions carried out in the context of the DSU negotiations, in particular with regard to the issue of effective compliance.

18. 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.105)

19. The Chairperson drew attention to document WT/DS184/15/Add.105, 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.

20. The representative of the United States said that his country had provided a status report in this dispute on 22 August 2011, 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. With respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

21. 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. Japan hoped that the United States would soon be in a position to report to the DSB on more tangible progress with respect to the implementation of the remaining part of the DSB's recommendations. 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's recommendations in this long-standing dispute without further delay.

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

² Article 3.3 of the DSU.

- (c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.80)

23. The Chairperson drew attention to document WT/DS160/24/Add.80, 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.

24. The representative of the United States said that his country had provided a status report in this dispute on 22 August 2011, 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.

25. The representative of the European Union said that the EU had taken note of and thanked the United States for its status report. The EU remained keen to work with the US authorities towards the complete resolution of this case.

26. 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.43)

27. The Chairperson drew attention to document WT/DS291/37/Add.43, 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.

28. The representative of the European Union said that, as mentioned at the 20 July 2011 DSB meeting, the EU welcomed the continuation of the technical dialogue with the United States which gave both parties an opportunity to discuss directly issues of their concern regarding biotechnology. The EU hoped that this constructive approach based on dialogue would allow the parties to leave litigation aside. Once again, 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. In 2010, 11 applications had been authorized, more than double the number of authorizations in 2009, including one authorization for cultivation. On 17 June 2011, the Commission had adopted two more authorization decisions³, together with the decision on the renewal of the authorization of maize 1507. Progress had also been made on other applications for authorization. Four more draft applications had been voted in the Standing Committee in February 2011.⁴ The Council would examine those applications in the coming weeks. In April and July 2011, EFSA had adopted other scientific opinions on three GM soybean.⁵

29. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. As noted in prior meetings, the United States was concerned with delays in the EU approval system for biotech products. Some product applications were subject to long delays even after receiving favourable assessments from the EU's own scientific authority. Unfortunately, those delays continued to constrain access to the EU for biotech products. In the first eight months of 2011, the EU had reached a final decision on only two

³ Maize MON89034xMON88017 and cotton GHB614.

⁴ MIR604xGA21 maize, BT11xMIR604 maize, Bt11xMIR604xGA21 maize, 281-24-236/3006-210-23 cotton.

⁵ A5547-127, 356043 and MON87701.

of the dozens of pending applications. The United States hoped that the EU would allow additional product applications to reach a final decision in the remaining months of 2011.

30. 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.23)

31. The Chairperson drew attention to document WT/DS322/36/Add.23, 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.

32. The representative of the United States said that his country had provided a status report in this dispute on 22 August 2011, in accordance with Article 21.6 of the DSU. As the United States had explained in its status report, in December 2010 the US Department of Commerce had announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. At the present time, the US Department of Commerce was continuing with its ongoing work on the December proposal.

33. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. Japan took note of the report that the internal consultation process and ongoing work was under way, based on the proposal announced by the US Department of Commerce on 28 December 2010. While taking the US implementation efforts as a positive step forward, Japan continued to seek prompt and full compliance by the United States with respect to all of the measures at issue that were subject to the recommendations in this dispute. Japan looked forward to a continued dialogue with the United States and would closely monitor any developments on this matter. Japan reserved its right under the DSU to take appropriate action, if necessary.

34. The representative of China said that her country thanked the United States for its status report and its statement. China welcomed the steps taken by the United States towards the implementation of the DSB's rulings and recommendations on zeroing matters. However, China's concerns as to how the United States would implement the DSB's decision on zeroing matters remained high. China would follow the US implementation steps closely and urged the United States to take actions to fully comply with the DSB's recommendations and rulings without further delay.

35. 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.20)

36. The Chairperson drew attention to document WT/DS350/18/Add.20, 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.

37. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 22 August 2011, and earlier in the present meeting's discussion of Agenda item 1(e). The United States referred Members to that report and statement for further details.

38. The representative of the European Union said that the EU thanked the United States for its most recent status report. Since the United States had not reported on any steps taken to address the concerns raised by the EU in the DSB, the EU referred Members to its statements made at the DSB

meetings in January and February 2011. The EU remained ready to engage with the United States in discussions in the WTO and bilaterally in order to ensure that its concerns were addressed by the United States. The EU looked forward to further information from the United States on its intentions.

39. 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.14)

40. The Chairperson drew attention to document WT/DS294/38/Add.14, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

41. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 22 August 2011, and earlier in the present meeting's discussion of Agenda item 1(e). The United States referred Members to that report and that statement for further details.

42. The representative of the European Union said that the EU thanked the United States for its status report and referred Members to its statement made under Agenda item 1(f) of the present meeting.

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

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.7)

44. The Chairperson drew attention to document WT/DS363/17/Add.7, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning China's measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products.

45. The representative of China said that her country had provided its status report in this dispute on 22 August 2011, in accordance with Article 21.6 of the DSU. China had made tremendous efforts to implement the DSB's rulings and recommendations and had, thus far, completed amendments to most measures at issue. China believed that this matter would be properly resolved through joint efforts and mutual cooperation by relevant parties.

46. The representative of the United States said that his country thanked China for its status report and its statement made at the present meeting. As it had previously noted, the United States remained concerned about the lack of progress by China in bringing its measures relating to films for theatrical release into compliance with the DSB's recommendations and rulings. The United States also had significant concerns about the incomplete progress relative to China's measures relating to audiovisual home entertainment products, reading materials, and sound recordings. The United States was conferring with China on these matters and hoped that China would take steps to resolve this matter soon.

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

- (i) Australia – Measures affecting the importation of apples from New Zealand: Status report by Australia (WT/DS367/20)

48. The Chairperson drew attention to document WT/DS367/20, which contained the status report by Australia on progress in the implementation of the DSB's recommendations in the case concerning Australia's measures affecting the importation of apples from New Zealand.

49. The representative of Australia said that with respect to the adoption on 17 December 2010 of the DSB's recommendations and rulings pertaining to the dispute: "Australia – Measures Affecting the Importation of Apples from New Zealand", Australia wished to inform the DSB that it had adopted the measures necessary to comply with those recommendations and rulings. In particular, as foreshadowed at the 17 December 2010 DSB meeting, Australia had undertaken a science-based review of its pre-existing import policy for New Zealand apples with respect to the three pests at issue in the dispute (fire blight, European canker, and apple leaf curling midge). A draft of the review had been released for a 60 day public comment period on 4 May 2011. The Governments of New Zealand and the United States, as well as other stakeholders, had made submissions on the draft review during the comment period. Their submissions, along with those of the other stakeholders, had been taken into account in finalizing the review. On 17 August 2011, the Australian Government had announced that Australia's Director of Animal and Plant Quarantine had determined a policy for the import of apples from New Zealand based on the review. Finally, on 17 August 2011, Australia had commenced issuing import permits for apples from New Zealand on the basis of this policy, consistent with the joint notification of the agreed reasonable period of time by Australia and New Zealand to the DSB on 31 January 2011. Import of New Zealand apples into Australia had commenced as of 19 August 2011. The adoption of these measures ensured the full implementation of the DSB's recommendations and rulings pertaining to this dispute. Australia, therefore, considered that it was in full compliance with those recommendations and rulings.

50. The representative of New Zealand said that his country appreciated the opportunity to comment on Australia's status report. In August 2011, New Zealand had welcomed the release of a new Determination for the importation of New Zealand apples to Australia. New Zealand also recognized that since issuance of the Determination, import permits had been granted and trade had commenced. New Zealand expected the main flow of exports to begin early in 2012 with the new season harvest. This marked a momentous step along the road in this process: it ended what was effectively a 90-year prohibition on the importation of New Zealand apples to Australia. New Zealand recognized the efforts of Australian officials and the Commonwealth Government of Australia to ensure that the new measures were put in place within the agreed time-frames. Ministers and officials on both sides had worked together closely and had maintained clear and open lines of communication. New Zealand appreciated the positive and constructive relationship it had with Australia throughout the implementation process and looked forward to this continuing, as they moved towards durable and commercially viable trade.

51. New Zealand noted that, in its status report and statement at the present meeting, Australia had stated that it had "fully" implemented the DSB's recommendations and rulings in this dispute. In that regard, New Zealand recalled that the Panel's and the Appellate Body's findings in this dispute had confirmed New Zealand's long-standing view that Australia's previous quarantine measures applied to New Zealand apples were neither based on an appropriate risk assessment nor supported by sufficient scientific evidence. The findings had supported New Zealand's position throughout this process: that mature and symptomless apples, subject to a standard border inspection, did not pose sufficient phytosanitary risk to require additional measures. Australia's "Final Report for the Non-Regulated Analysis of Existing Policy for Apples from New Zealand" recognized that the risk posed by the three quarantine pests and diseases at issue in this dispute was lower than that arrived at in Australia's 2006 Import Risk Analysis (IRA). The Final Report also stated that, as a result of this level of risk, "additional" quarantine measures were not required to achieve Australia's appropriate level of protection. However, the Final Report nevertheless required New Zealand to ensure that

several commercial practices (in the orchard and packhouse) were used for production of apples. While those measures may reflect current industry practice, New Zealand considered that the imposition of those measures was not supported by sufficient scientific evidence. They went beyond a requirement for mature, symptomless apples subject only to standard border inspection procedures. New Zealand had raised these and other concerns with Australia in its submission on the "Draft Report for the Non-Regulated Analysis of Existing Policy for Apples from New Zealand". However, New Zealand had agreed to provide the assurances required by Australia in its final determination on the basis that they may result in commercially meaningful access. For those reasons, and despite trade commencing, New Zealand questioned whether Australia had fully complied with the DSB's recommendations and rulings in this case. New Zealand also noted that efforts continued to be made at both state and Federal levels to change the current measures. For example, New Zealand was aware of a proposal to introduce a Private Members Bill in the Australian Senate that would prevent the importation of New Zealand apples. Some states had also indicated that they would seek to prevent the entry of New Zealand apples. The state of Tasmania had indicated that it was considering imposing an import ban on New Zealand apples and South Australia had also indicated that it would declare its own quarantine zones to restrict the presence of New Zealand apples in its apple growing regions. New Zealand acknowledged that those were clearly not measures sought by the Commonwealth Government of Australia, and urged the Commonwealth Government to continue to resist strongly such proposals.

52. The representative of Australia said that, in response to some comments made by New Zealand in its statement, Australia noted that with regard to the Private Member's Bill referred to by New Zealand, the Australian Government was strongly opposed to the Bill and would be working hard to prevent its passage. There had been no indication that the Bill was supported by any of the major political parties in Australia. With regard to possible State measures restricting the movement of New Zealand apples, Australia noted that the Commonwealth was in discussions with the State Governments to ensure that all SPS measures in Australia were consistent with Australia's obligations under the SPS Agreement.

53. The DSB took note of the statements.

2. Implementation of the recommendations of the DSB

- (a) Thailand – Customs and fiscal measures on cigarettes from the Philippines
- (b) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China

54. The Chairperson recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In that respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. She proposed that the two sub-items under Agenda item 2 be considered separately.

- (a) Thailand – Customs and fiscal measures on cigarettes from the Philippines

55. The Chairperson recalled that, at its meeting on 15 July 2011, the DSB had adopted the Appellate Body Report pertaining to the dispute: "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines" and the Panel Report on the same matter, as modified by the Appellate Body Report. She noted that the 30-day time-period under Article 21.3 of the DSU pertaining to this dispute had expired on 14 August 2011 and, on 11 August 2011, Thailand had informed the DSB in writing of its intentions in respect of implementation. The relevant

communication was contained in document WT/DS371/12. She then invited the representative of Thailand to make a statement.

56. The representative of Thailand said that his country thanked the DSB for the opportunity to comment on the implementation of the DSB's recommendations pertaining to this dispute. Thailand confirmed that it intended to implement the DSB's recommendations and rulings in this dispute and that it would need a reasonable period of time to do so. Thailand had indicated its intentions in writing to the Chairperson of the DSB by letter, dated 11 August 2011, which had subsequently been circulated to Members in document WT/DS371/12 on 15 August 2011. Thailand had submitted its statement of intentions in writing to the DSB in order to avoid holding a special meeting of the DSB solely for that purpose during the summer break. Thailand was currently in discussions with the Philippines in order to reach an agreement on a reasonable period of time for implementation in this dispute. In order to allow sufficient time for the parties to discuss a mutually agreed period, the Philippines and Thailand had agreed that any agreement between the parties on a reasonable period of time shall be considered to be an agreement under Article 21.3(b) of the DSU even if it was concluded outside of the 45-day period referred to therein. Thailand looked forward to continuing to work cooperatively with the Philippines in the implementation phase of this dispute.

57. The representative of the Philippines said that her country thanked Thailand for its written notification of its intentions to fully implement the DSB's rulings and recommendations, as well as for its statement made at the present meeting. As noted by Thailand, the parties were currently engaged in consultations to determine the duration of the reasonable period of time. The Philippines were in agreement with Thailand that this may go beyond the 45-day period set out in Article 21.3(b) of the DSU. Further to that agreement, Thailand and the Philippines would be making a joint communication to the DSB of an agreement to extend the 90-day period provided for under Article 21.3(c) of the DSU shortly after the present meeting. The Philippines hoped that those discussions would soon bear fruit. The Philippines looked forward to Thailand's full implementation of the DSB's recommendations.

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

(b) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China

59. The Chairperson recalled that, at its meeting on 28 July 2011, the DSB had adopted the Appellate Body Report pertaining to the dispute: "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China" and the Panel Report on the same matter, as modified by the Appellate Body Report. She noted that the 30-day time-period under Article 21.3 of the DSU pertaining to this dispute had expired on 27 August 2011 and, on 18 August 2011, the European Union had informed the DSB in writing of its intentions in respect of implementation. The relevant communication was contained in document WT/DS397/12. She then invited the representative of the European Union to make a statement.

60. The representative of the European Union said that, as had been indicated in writing on 18 August 2011, the EU wished to reconfirm that it intended to implement the DSB's recommendations and rulings pertaining to this dispute in a manner that respected its WTO obligations. The EU would need a reasonable period of time in order to do so. The EU stood ready to discuss this matter with China in due course, in accordance with Article 21.3(b) of the DSU.

61. The representative of China said that her country thanked the EU for its statement at the present meeting, informing the DSB of its intentions to implement the DSB's recommendations and rulings pertaining to this dispute. With regard to the EU's communication of 18 August 2011, China was pleased to confirm that, as stated in that letter, China had agreed with the EU in the spirit of

collaboration and mutual support that the EU would inform the DSB of its intentions in writing rather than at a special DSB meeting held in August. China noted that Article 21 of the DSU provided clearly that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China looked forward to the EU taking steps towards bringing its measures into compliance with the DSB's rulings and recommendations pertaining to this dispute. China took note that the EU would need a reasonable period of time for implementation, and was ready to discuss with the EU a reasonable period of time for implementation at the earliest convenience for both parties.

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

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

(a) Statements by the European Union and Japan

63. The Chairperson said that this item was on the Agenda of the present meeting at the request of the European Union and Japan. She then invited the respective representatives to speak.

64. The representative of the European Union said that the EU had already informed the DSB about the annual adjustment in the level of duties applied by the EU in this case in a document circulated on 12 April 2011. At the present meeting, and as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry and, hence, put an end to the condemned measure. The fact that the United States had stopped disbursing duties collected after a certain point in time did not achieve full compliance. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations. The EU 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 pertaining to this dispute.

65. The representative of Japan said that a new round of distributions under the CDSOA appeared to be underway⁶ and thus the CDSOA remained operational. As the US Customs and Border Protection had explained, "the distribution process will continue for an undetermined period".⁷ Under those circumstances, Japan had decided to extend, as from 1 September 2011, its suspension of concessions and related obligations under the GATT 1994 on certain US imports for another one year. Details of this decision were provided in document WT/DS217/60. Japan urged the United States to stop the illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute. 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.

66. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Brazil was of the view that, in order to comply with the DSB's recommendations and rulings pertaining to this dispute, the United States was required to discontinue all disbursements pursuant to the CDSOA. Until then, the United States should resume the regular submission of status reports to the DSB pursuant to Article 21.6 of the DSU.

67. The representative of India said that his country thanked the EU and Japan for keeping this issue under the surveillance of the DSB. India shared their concerns and endorsed their views. The

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

⁷ 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

CDSOA remained operational allowing for the disbursements by the US Administration to its domestic industry, thereby affecting the rights of other WTO Members. India agreed with previous speakers that this item should continue to remain under the surveillance of the DSB until full compliance was achieved.

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

69. The representative of Thailand said that his country thanked the EU and Japan for continuing to bring this item before the DSB. Thailand urged the United States to cease disbursement and to fully implement the DSB's rulings and recommendations on this matter.

70. The representative of the United States said that, as his country had explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. 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 it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings. Finally, the United States noted that the EU and Japan had referred, at the present meeting, to their renewed measures relating to this dispute. The United States would be reviewing carefully those measures. As the United States had observed previously, the DSB had only authorized the suspension of concessions or other obligations as had been provided in the Awards of the Arbitrators.

71. The DSB took note of the statements.

4. United States – Anti-dumping measures on certain shrimp from Viet Nam

(a) Report of the Panel (WT/DS404/R)

72. The Chairperson recalled that at its meeting on 18 May 2010, the DSB had established a panel to examine the complaint by Viet Nam pertaining to this dispute. The Report of the Panel contained in document WT/DS404/R had been circulated on 11 July 2011 as an unrestricted document. The Report of the Panel was before the DSB for adoption at the request of Viet Nam. The adoption procedure was without prejudice to the right of Members to express their views on the Report.

73. The representative of Viet Nam said that his country welcomed the adoption of the Panel Report at the present meeting and thanked the Panel and the Secretariat for their work on this dispute. Viet Nam also appreciated the cooperation of the United States and expected the United States to promptly and fully implement the DSB's recommendations. Viet Nam hoped that the parties would continue to cooperate and discuss any issue during the implementation process.

74. The representative of the United States said that his country would like to begin by thanking the Panel and the Secretariat assisting them for their work on this dispute. The United States appreciated the Panel's thorough review of the facts and the legal claims in this dispute. In particular, the United States welcomed the Panel's finding that Viet Nam had failed to identify any so-called "continued use" claim in its panel request and, accordingly, no such claim was within the Panel's terms of reference. It was essential for panels to make findings only with respect to claims that were properly part of the matter referred to them by the DSB. The United States also appreciated the Panel's recognition that Members' investigating authorities had the right to limit the number of

exporters and producers individually examined when the number of exporters or producers was so large that investigating each individually would be impracticable. The United States said that the flexibility to limit the examination is critical in light of the resource constraints that all Members faced.

75. With respect to the "zeroing" claims at issue in this dispute, the United States noted that in one context the Panel had simply adopted the reasoning of the Appellate Body in some prior disputes⁸, and in another context had relied on different reasoning that was also problematic.⁹ Although the Panel had quoted the text of the relevant Agreement provisions¹⁰, the Panel had not undertaken any assessment of the ordinary meaning of that text, in its context, and in light of the object and purpose of the Anti-Dumping Agreement, as provided for in the DSU. The United States had made very clear its significant concerns with the Appellate Body's evaluation of "zeroing" in past disputes. The United States said that it would not repeat those concerns at the present meeting. The United States believed that those reports, as well as the current Panel Report, went beyond what the text of the agreements provided and what negotiators had agreed to in the Uruguay Round.

76. Notwithstanding its systemic concerns about the findings in this Report and in earlier Appellate Body reports involving the use of "zeroing", the United States recognized the systemic importance of compliance with dispute settlement findings. To that end, the United States had devoted significant resources to complying with the DSB's recommendations and rulings in these disputes. As the United States had previously explained to the DSB, the US Department of Commerce had announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. With respect to other issues, while the Panel's findings that some US measures had not been consistent with certain obligations in the Anti-Dumping Agreement were disappointing, in general, the United States appreciated the Panel's careful overall examination of the arguments that had been presented by the parties and third parties to this dispute. The US representative thanked the Chairperson and fellow delegates for their attention to the US statement.

77. The representative of the European Union said that the EU welcomed the Panel's findings that the use of zeroing by the United States in administrative reviews was inconsistent with Article 2.4 of the Anti-Dumping Agreement and that the zeroing methodology of the United States, which was still applied in every case, was in breach of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The EU particularly welcomed the Panel's conclusion that the Appellate Body had previously found that zeroing was "inherently inconsistent" with the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement and its decision to adopt this reasoning as its own. This was yet another demonstration that the WTO-inconsistency of zeroing had now been definitively decided and that the United States should take immediate steps to abandon this practice and to bring itself into conformity with its WTO obligations. With regard to the Panel's findings on the rate applied to the Viet Nam-wide entity, the EU understood that this was a difficult issue but continued to believe that, as the Appellate Body had stated in the "EU - Fasteners" dispute, investigating authorities should have the possibility to impose an appropriate level of duty with regard to exporters which were controlled by the state in non-market economies.

78. The DSB took note of the statements and adopted the Panel Report contained in WT/DS404/R.

⁸ Panel Report, para. 7.93.

⁹ Panel Report, para. 7.141.

¹⁰ Panel Report, paras. 7.90, 7.131 and 7.132.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/458)

79. The Chairperson drew attention to document WT/DSB/W/458, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the names contained in document WT/DSB/W/458.

80. The DSB so agreed.

6. Statement by the Chairperson regarding the process for selecting new members of the Appellate Body

81. The Chairperson, speaking under "Other Business", said that, as had been announced at the outset of the meeting, she wished to make a statement concerning the process for the appointment of two Appellate Body members. She said that, as Members were aware, after the expiry of the 31 August 2011 deadline for Members' nominations, four candidates had been nominated for the two positions in the Appellate Body by the following three countries: Pakistan, India and the United States. She recalled that a Selection Committee had been established by the DSB at its meeting on 24 May 2011 to carry out the process. She further recalled that this Selection Committee, as provided in the procedures set out in document WT/DSB/1, was composed of the Chairs of the General Council, the Goods Council, the Services Council and the TRIPS Council, the Director General and the Chair of the DSB. She further recalled that the DSB had agreed to request the Selection Committee to conduct interviews with candidates and to hear views of delegations in September/October 2011 and to make its recommendations by no later than 10 November 2011 so that the DSB could take a decision on appointments at its meeting on 21 November 2011.

82. She informed delegations that, in accordance with the decision of the DSB, she would hold an organizational meeting of the Selection Committee in the week of 12 September 2011 to discuss the process and to agree on a time-table for interviews as well as to set aside some time to hear views of delegations before the final recommendations were made. As soon as the time-table for the process was agreed, she would send a fax to all delegations regarding this matter and would ask the Secretariat to make the necessary arrangements to set up appointments. As in the past, delegations were also free to make their views known to the Selection Committee in writing. Any such written communications should be sent to the Chairperson of the DSB in care of the Council and TNC Division. A deadline for written comments would be communicated to delegations accordingly by fax. Finally, she noted that, consistent with past practice, delegations wishing to meet with the candidates were invited to contact directly the Missions of the respective nominating Members in order to make appropriate arrangements.

83. The DSB took note of the statement.
