# WORLD TRADE ORGANIZATION

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**Dispute Settlement Body**
**23 October 2012**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 23 October 2012

*Chairman: Mr. Shahid Bashir (Pakistan)*

Subjects discussed: Page

**1. Surveillance of implementation of recommendations adopted by the DSB**

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.119)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.119)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.94)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.57)

(e) United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil: Status report by the United States (WT/DS382/10/Add.10)

(f) Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.6)

(g) United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.5)

(h) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Status report by the European Union (WT/DS397/15/Add.3)

(i) Philippines – Taxes on distilled spirits: Status report by the Philippines (WT/DS396/15 – WT/DS403/15)

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 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.119)

2. The Chairman drew attention to document WT/DS176/11/Add.119, 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 11 October 2012, in accordance with Article 21.6 of the DSU. Legislative proposals had been introduced in the current Congress to 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 most recent status report and statement made at the present meeting. The EU 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 said that, once again, her country wished to place on the record its concerns about the repeated failure by the United States to repeal Section 211. The DSB had ruled, over ten years ago, that Section 211 was inconsistent with the TRIPS Agreement and the Paris Convention. However, the United States had yet to take any action to implement the DSB's recommendations and rulings. The 119th status report provided by the United States did not contain any information on progress in implementation in this dispute. It confirmed that the United States continued to ignore the DSB's rulings and to undermine the credibility of the dispute settlement system, which was an important pillar of the WTO. Cuba noted that the annual reports of the DSB demonstrated that the United States was one of the Members frequently initiating complaints under the dispute settlement system and that the United States benefited greatly from the dispute settlement system. Many developing countries were making considerable efforts and sacrificed their vital national interests in order to respect their WTO commitments. Therefore, there was no justification for a major trading power, such as the United States, to continue to violate with impunity other Members' fundamental rights, which in many cases had been upheld by the DSB, including the intellectual property rights and the principles of national and most-favoured-nation treatment. The lack of will was preventing the United States from complying with the DSB's rulings. The US attitude in this dispute was not due to its institutional limitations. It was in line with the US unlawful policies such as the economic, commercial and financial blockade that the United States had maintained against Cuba for more than 50 years, in spite of the fact that the blockade had been condemned by the international community for 18 years before the UN General Assembly. In the following days, there would be a vote, once again, on Cuba's report in the General Assembly Resolution 66/6 entitled: "Necessity of Ending the Economic, Commercial and Financial Blockade imposed by the United States of America against Cuba". However, none of this appeared to be of any concern to the United States. Under Article 21.6 of the DSU, the Member concerned must provide the DSB with a status report in writing on its progress in the implementation of the recommendations or rulings. In other words, the United States was under obligation to report, in a transparent manner, on the actual events and actions which it claimed were taking place. Until the United States showed real commitment to meet its legal obligations, Cuba would continue to condemn the US violations. Cuba would act accordingly in order to ensure that justice be done and that the rights enshrined in the legal texts, which underpinned the functioning of the WTO, prevailed. Once again, Cuba reaffirmed and reiterated that the only satisfactory solution to this dispute would be to repeal Section 211, without further delay.

6. The representative of Brazil said that his country thanked the United States for its status report but noted that, once again, the United States reported lack of progress in this dispute. Brazil remained concerned about this situation of non-compliance with the DSB's recommendations and urged the United States to bring its measures into conformity with WTO rules.

7. The representative of the Bolivarian Republic of Venezuela said that her country regretted that it had to take the floor, once again, under this Agenda item to express its concerns about this situation. Venezuela had no choice, given that the most recent status report submitted by the United States contained the same information as the previous reports by the United States. Venezuela supported Cuba's statement to the effect that despite the Appellate Body's ruling more than ten years ago, the United States continued to maintain Section 211, the purpose of which was to usurp the well-

known Cuban trademark, the Havana Club. Therefore, Venezuela renewed its support for Cuba and requested the United States to end is policy of economic, trade and financial blockade against Cuba. That policy adversely affected Cuba and resulted in the US failure to comply with the DSB's decision to bring Section 211 into conformity with the TRIPS Agreement and the Paris Convention. Venezuela was disappointed with the non-compliance and the lack of action by the United States. Venezuela, therefore, urged the United States not only to intensify the work being done with Congress, but more specifically to comply immediately with the DSB's recommendations and rulings. Venezuela was concerned that the US non-compliance affected Cuba by this action without results, undermined the credibility of the DSB and the multilateral trading system.

8. The representative of the Plurinational State of Bolivia said that his country was, once again, presented with the same status report submitted by the United States, in which the United States did not report any progress over the past ten years. Therefore, Bolivia wished to reiterate its concerns about the US failure to meet its WTO obligations and the lack of political will on the part of the United States to resolve this dispute. This lack of compliance not only undermined the credibility and integrity of the multilateral trading system, it also caused harm to a developing-country Member. Once again, Bolivia urged the United States to comply with the DSB's recommendations and rulings and to take steps to remove the restrictions imposed under Section 211. Finally, Bolivia reiterated that it supported the concerns raised by Cuba in its statement made at the present meeting.

9. The representative of China said that his country thanked the United States for its status report and its statement made at the present meeting. The prolonged situation of non-compliance in this dispute was highly incompatible with the prompt and effective implementation required under the DSU provisions, in particular since the interests of a developing-country Member were affected. China urged the United States to implement the DSB's rulings and recommendations without further delay.

10. The representative of Mexico said that his country supported the statements made by previous speakers under this Agenda item. Mexico noted that Article 21.1 of the DSU required prompt compliance with the DSB's recommendations and rulings. In that respect, Mexico urged the United States to immediately and fully comply with the DSB's recommendations and rulings.

11. The representative of Nicaragua said that her country, once again, supported Cuba's concerns in this dispute on Section 211, which disregarded the rights of Cuban owners of the Havana Club Rum trademark. Nicaragua noted that the US status report was identical to previous status reports submitted by the United States over the past ten years. The United States had, for ten years, repeatedly informed Members that it was working on the implementation of the DSB's recommendations in this dispute. However, no results were forthcoming. Nicaragua was concerned that the US failure to comply with its obligations undermined the credibility of the DSB and the multilateral trading system. It could set a negative precedent for other Members, in particular developing countries. Nicaragua urged the United States to bring its legislation into conformity with the DSB's rulings and recommendations in this dispute.

12. The representative of Ecuador said that his country supported the statement made by Cuba. Ecuador stressed, once again, that Article 21 of the DSU specifically referred to prompt compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Ecuador hoped that the United States would step up its efforts in order to promptly comply with the DSB's recommendations and rulings by repealing Section 211. In Ecuador's view, ten years of non-compliance with the DSB's recommendations and rulings in this dispute demonstrated the major failure of the WTO dispute settlement system.

13. The representative of Uruguay said that his country thanked the United States for its status report. Uruguay shared the systemic concerns expressed by previous speakers and regretted that, once again, it had to call upon the parties in this dispute to take the necessary measures to comply with the DSB's decision taken over ten years ago.

14. The representative of Argentina said that his country thanked the United States for its status report and its statement made at the present meeting. However, Argentina noted that, once again, the United States reported non-compliance in this dispute. This situation was inconsistent with the principle of prompt implementation and the interests of a developing country were affected. Argentina, therefore, supported the statements made by Cuba and other delegations. Argentina urged the United States to take all necessary measures in order to be able to remove this matter from the DSB's Agenda.

15. The representative of Viet Nam said that his country thanked the United States for its status report and statement made at the present meeting. Viet Nam was concerned about the US lack of progress in implementing the DSB's recommendations and rulings in this case. Thus, Viet Nam urged the United States to implement the DSB's recommendations and rulings without any further delay.

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.119)

17. The Chairman drew attention to document WT/DS184/15/Add.119, 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 11 October 2012, 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.

19. The representative of Japan said that his country thanked the United States for, and took note of, its statement and status report. Japan, once again, called on the United States to fully implement the DSB's 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.94)

21. The Chairman drew attention to document WT/DS160/24/Add.94, 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 11 October 2012, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Union said that the EU thanked the United States for its status report and its statement made at the present meeting. The EU referred to its previous statements on its wish to resolve this case as soon as possible.

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 Union (WT/DS291/37/Add.57)

25. The Chairman drew attention to document WT/DS291/37/Add.57, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

26. The representative of the European Union said that the EU, once again, wished to express its hope that it would continue on the constructive path of dialogue with the United States. The EU authorization system continued to function normally and on 18 October 2012, a new GMO, maize MIR162 had been authorized in the EU. In 2012, the Commission had authorized five new GMOs[1] and had renewed the authorization of a sixth one.[2] Three of those decisions[3] had been adopted only six months after the relevant EFSA opinions had been published, while the recent decision on MIR162 had been adopted less than four months after the EFSA opinion.[4] Regarding the concerns expressed by the United States on the back-log of approvals, the EU, once again, recalled that the EU approval system was not covered by the DSB's recommendations and rulings. The EU underlined that the GMO regulatory regime was working normally as evidenced by the approval decisions just mentioned. The functioning of the GMO regime should not be rigidly assessed purely quantitatively and in the abstract, in terms of the 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 EFSA on additional scientific information.

27. 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 the United States had explained at past meetings of the DSB, the United States said that it continued to have serious concerns regarding EU measures affecting the approval of biotech products. The EU measures, including delays in approvals, had resulted in substantial restrictions on the importation of US agricultural products. The EU had mentioned at the present meeting that the variety of biotech corn known as MIR162 had been approved. Although the United States welcomed the approval of any delayed biotech product application, the United States noted that this approval would not result in normalized trade in biotech corn products. Several other varieties of biotech corn – all of which had been approved in major markets – were still pending in the EU system. Without the approval of those varieties, the EU's biotech approval measures would continue to result in restrictions on the importation of US corn products. The United States urged the EU to address the problems affecting the approval of biotech products.

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

[1] A5547-127 soybean, 356043 soybean, MON87701 soybean, MON87701 X MON89788 soybean, MIR162 maize.
[2] 40-3-2 soybean.
[3] Authorization decision for 356043 and MON87701 soybeans, MON87701 X MON89788 soybean.
[4] EFSA opinion: 21 June 2012; decision on authorization: 18 October 2012.

(e) United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil: Status report by the United States (WT/DS382/10/Add.10)

29. The Chairman drew attention to document WT/DS382/10/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil.

30. The representative of the United States said that his country had provided a status report in this dispute on 11 October 2012. Pursuant to the sequencing agreement between Brazil and the United States[5], the United States was ready to engage with Brazil should it have any further questions regarding this matter.

31. The representative of Brazil said that his country thanked the United States for its status report. Brazil was following closely the implementation of the final rule published by the US Department of Commerce, which had modified the calculation of dumping margins in reviews. Brazil would consult with the United States with a view to reaching a solution to this dispute.

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

(f) Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.6)

33. The Chairman drew attention to document WT/DS371/15/Add.6, which contained the status report by Thailand on progress in the implementation of the DSB's recommendations in the case concerning Thailand's customs and fiscal measures on cigarettes from the Philippines.

34. The representative of Thailand said that her country wished to refer Members to its most recent status report in this dispute, which had been circulated on 12 October 2012. As noted in that report, a Royal Decree implementing the findings of the Panel under Article III:4 of the GATT 1994 regarding the administrative requirements of Thailand's VAT system had come into effect on 15 October 2012, which was the date of expiry of the reasonable period of time with respect to that finding. Thus, the sole outstanding issue appeared to be Thailand's Customs Board of Appeals' consideration of outstanding appeals of certain entries of cigarettes. Following a request for further information from the Board, the importer had submitted extensive documentation on 12 October 2012. The Board of Appeals was reviewing this documentation and hoped to issue its ruling as soon as possible. In addition, with respect to measures already taken to implement, Thailand continued its bilateral discussions with the Philippines at a technical level, to explain measures already taken to comply and, where possible, to provide any additional details or modifications proposed by the Philippines. Thailand looked forward to continuing to discuss the technical details of its implementation with the Philippines in this process.

35. The representative of the Philippines said that her country thanked Thailand for its status report and its statement made at the present meeting. The second reasonable period of time granted to Thailand in order to implement the DSB's recommendations and rulings in this dispute had expired on 15 October 2012. The second reasonable period of time concerned the WTO's finding that imported cigarettes had been subject to discriminatory tax treatment, relative to domestic cigarettes. Specifically, under Thai law, re-sales of domestic cigarettes were exempted entirely from value-added tax, without extending similar treatment to re-sales of imported cigarettes. The Philippines welcomed Thailand's adoption of a Royal Decree that had abolished the discriminatory exemption extended to re-sales of domestic cigarettes. Thailand's effort to fulfil its obligations signalled its commitment to

[5] WT/DS382/11.

achieving compliance with the DSB's ruling. The Philippines and Thailand had actively engaged in a series of bilateral discussions designed to facilitate Thailand's compliance, and the most recent development demonstrated the benefits of that approach. However, the Philippines noted that other matters covered by the DSB's ruling, which were subject to the first reasonable period of time that had expired on 15 May 2012, had still not been definitively resolved in a WTO-consistent manner. The Philippines awaited urgently further input from Thailand on those matters. For example, the Philippines noted that the Thai Board of Appeals had yet to issue a ruling concerning the proper customs valuation of a series of 210 entries of imported cigarettes dating from as early as 2002. The Panel in this dispute had found that Thailand failed to ensure the timely resolution of those appeals, and yet the Board of Appeals had still not issued a ruling some ten years after the appeals were first filed. Similarly, Thailand was also engaged in other continuing actions that called into question, with no valid factual basis, the customs valuation of those 210 and other entries at issue in this dispute. Consistent with Thailand's WTO obligations, and the spirit in which it had engaged in bilateral discussions with the Philippines, the Philippines anticipated a fully WTO-consistent result very soon. While reserving its rights to pursue enforcement of Thailand's WTO obligations, the Philippines was encouraged by the efforts Thailand had made recently, and looked forward to the prompt resolution of the remaining issues to both parties mutual satisfaction.

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

(g) United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.5)

37. The Chairman drew attention to document WT/DS404/11/Add.5, 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 shrimp from Viet Nam.

38. The representative of the United States said that his country had provided a status report in this dispute on 11 October 2012, in accordance with Article 21.6 of the DSU. In February 2012, the US Department of Commerce had published a modification to its procedures in order to implement DSB recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. This modification addressed certain findings in this dispute. On 28 June 2012, the US Trade Representative had requested, pursuant to Section 129 of the Uruguay Round Agreements Act, that the Department of Commerce take action necessary to implement the DSB recommendations and rulings in this dispute. The United States would continue to consult with interested parties as it worked to address the recommendations and rulings of the DSB.

39. The representative of Viet Nam said that his country thanked the United States for its status report and noted that the reasonable period of time in this dispute had expired on 2 July 2012. Viet Nam was concerned about the lack of compliance by the United States in this dispute. In that regard, Viet Nam requested the United States to implement, without any further delay, the DSB's recommendations and rulings pertaining to this dispute.

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

(h) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Status report by the European Union (WT/DS397/15/Add.3)

41. The Chairman drew attention to document WT/DS397/15/Add.3, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning EU anti-dumping measures on certain iron or steel fasteners from China.

42. The representative of the European Union said that the EU had completed the implementation of the DSB's recommendations and rulings in this dispute before the expiry of the reasonable period of time on 12 October 2012. First, as had been announced in the previous DSB meeting, the provision of the EU Basic Anti-Dumping Regulation, which had been found to be "as such" incompatible with the Anti-Dumping Agreement, had been amended in a manner that fully respected the EU's WTO obligations. Second, the specific EU anti-dumping measures on certain iron or steel fasteners originating in China had been reviewed in order to fully implement the DSB's recommendations and rulings. The new measures had been published on 10 October 2012 and had entered into force on 11 October 2012. The adoption of those measures ensured the full implementation of the DSB's recommendations and rulings in this dispute. In addition, the EU recalled that the DSB's recommendations and rulings in DS405 ("EU-Footwear" dispute) concerned exclusively the same provision of the EU Basic Anti-Dumping Regulation that had been disputed in this dispute. Therefore, the amendment of the EU Basic Anti-Dumping Regulation also ensured the full implementation of the DSB's recommendations and rulings in DS405 ("EU - Footwear" dispute).

43. The representative of China said that his country thanked the EU for its status report and noted that the EU had made efforts to implement the DSB's rulings and recommendations. However, China did not agree with the EU's view that the EU had fully implemented the DSB's recommendations and rulings in this dispute. As China had stated at previous DSB meetings, the criterion of the "economic structure" provided in the EU Regulation amending Article 9(5) of the Basic Anti-Dumping Regulation, among others, was not consistent with the findings of the Appellate Body. In addition, as the Regulation did not specify the terms of how the individual treatment and the factors would be applied, China was also concerned about its application and would pay close attention to whether it would impose unreasonable burden on the exporters. China also had concerns about the EU Council Implementing Regulation (EU) No 924/2012 of 4 October 2012, including that the EU had subjected the granting of individual treatment to exporting producers to certain conditions, it had failed to fully disclose normal value product type and to ensure fair price comparison, and had declined to redefine the domestic industry. China urged the EU to make adequate efforts to fully implement the DSB's recommendations and rulings. Regarding DS405 ("EU - Footwear"), the Panel had made a similar ruling with respect to the same Article and the EU had claimed that it had taken the same implementing measures. China did not agree that the EU had fully implemented the DSB's recommendations and rulings in that dispute. China and the EU were in the process of negotiating sequencing agreements in both this dispute and the DS405 dispute. The sequencing agreements would be circulated to Members after signature. China looked forward to discussing its concerns with the EU in the near future.

44. The representative of the European Union said that, according to the amendment, "the economic structure of the supplying country" was one of the factors that may be taken into account when deciding whether different suppliers should be treated as a single entity for the purpose of specifying the duty. That factor was based on the Appellate Body Report. Indeed, paragraph 367 of the Report read "…the economic structure of a WTO Member may be used as evidence before an investigating authority to determine whether the State and a number of exporters or producers subject to an investigation are sufficiently related to constitute a single entity such that a single margin should be calculated and a single duty be imposed on them…". It should also be noted that the possible consideration of the "economic structure" applied in all investigations where the issue of a "single entity" arose, and was not limited to investigations regarding particular WTO Members. Therefore, the EU could not accept the suggestion that this factor was incompatible with the Appellate Body Report.

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

(i) Philippines – Taxes on distilled spirits: Status report by the Philippines (WT/DS396/15 – WT/DS403/15)

46. The Chairman drew attention to document WT/DS396/15 – WT/DS403/15 which contained the status report by the Philippines on progress in the implementation of the DSB's recommendations in the case concerning the Philippines taxes on distilled spirits.

47. The representative of the Philippines said that her country wished to refer Members to its first status report on DS396 and DS403, which had been circulated on 12 October 2012. As stated in the report, the Philippine Congress was in the process of deliberating on certain legislative proposals with a view to amending the Philippines' Excise Tax law. This particular legislation was multi-faceted, with amendments trying to achieve three main policy objectives: public health considerations, revenue targets, and WTO-compatibility. In that regard, the Finance and Health departments had been working closely in order to strike a balance to be able to meet the health and revenue objectives of the Administration. In parallel, the Trade and Foreign Affairs departments, including the Office of the Solicitor General, had been working with the Finance Department and Congress with respect to the DSB's recommendations and rulings. The Philippines expected the legislative process to be completed by the end of the reasonable period of time on 8 March 2013. The Philippines hoped that the United States and the EU would continue to be constructive partners towards the full implementation of the DSB's rulings in DS396 and DS403.

48. The representative of the European Union said that the EU thanked the Philippines for its status report and its statement made at the present meeting. As stated at the DSB meeting upon the adoption of the Panel and Appellate Body Reports, the EU was pleased with the relevant findings in this case. In light of those clear findings, the EU had previously stated that it would trust that the Philippines would promptly take the necessary steps to remedy this long-standing discrimination and re-establish WTO-compatibility. During the past months, the EU had been closely following the Philippines' internal discussion on reform of its current tax legislation for spirits, which had been found to be incompatible with WTO law. The draft Bill on the reform of the tax legislation for spirits, so called Abaya 2, currently under discussion in the Congress, would not bring the spirits taxation law into conformity with WTO obligations. Thus, the EU urged the Philippines to reconsider the text of the tax reform and ensure that it removed the violation of the national treatment principle and hence the discrimination of imported spirits, in line with its international commitments.

49. The representative of the United States said that his country thanked the Philippines for its status report and its statement made at the present meeting. In its status report, the Philippines stated that its administration was working closely with the Philippine Congress on implementing the DSB recommendations and rulings regarding the Philippine tax system for distilled spirits. Unfortunately, the United States had serious concerns with some of the legislative proposals. Those concerns applied, for example, with respect to the bill passed by the Philippine House in June, and to the committee report in the Senate. If such proposals were to be adopted, imported distilled spirits would be taxed at significantly higher rates than domestic Philippine spirits. It would be hard for the United States to see how those proposals, if adopted, would address the DSB findings that the Philippines had breached its WTO obligations by treating imported products less favourably than domestic products. The status of the Senate committee report was unclear. Although the United States understood that there would be further discussions on this issue in the full Senate when it reconvened the following month, the United States remained uncertain about how the Philippines planned to reform its tax measures to comply with the DSB recommendations and rulings. The United States looked forward to progress on this issue, keeping in mind the expiration of the reasonable period of time on 8 March 2013.

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 Union and Japan

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

52. The representative of the European Union said that, once again, the EU requested that the United States stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports pertaining to this dispute.

53. The representative of Japan said that FY 2012 distribution process was well underway[6] and thus the CDSOA continued to be operational. 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. Pursuant to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute.

54. The representative of Canada said that his country wished to refer to its statements made under this Agenda item at previous DSB meetings. Canada's position remained unchanged.

55. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. As had been stated at previous DSB meetings, Brazil was of the view that the United States was under obligation to submit status reports in this dispute until such time that no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue be resolved within the meaning of the DSU and the United States would be released from its obligation to provide status reports in this dispute.

56. The representative of India said that his country shared the concerns of the EU and Japan regarding the continued disbursement of the anti-dumping and countervailing duties to the US industry. In that regard, India also requested the United States to submit its status report pursuant to Article 21.6 of the DSU.

57. The representative of Thailand said that her country thanked the EU and Japan for inscribing this item on the Agenda of the present meeting. Thailand referred to its previous statements made under this Agenda item. Thailand's position on this matter had not changed.

58. The representative of the United States said that, as his country had explained at previous DSB meetings, the President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that Members had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. With respect to comments regarding further status reports in this matter, as the United States had 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 implementing the DSB's recommendations and rulings in these disputes.

59. The DSB took note of the statements.

[6] http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_fy12/

## 3. United States – Subsidies on upland cotton

(a) Statement by Brazil

60. The Chairman said that this item was on the Agenda of the present meeting at the request of Brazil. He then invited the representative of Brazil to speak.

61. The representative of Brazil said that his country welcomed the opportunity to submit a brief update regarding this dispute. As previously indicated, in 2010 Brazil and the United States had signed a Memorandum of Understanding and a Framework Agreement, by which the parties set out parameters for an agreed solution with respect to domestic support programs for upland cotton in the United States, as well as a process of joint operation reviews regarding export credit guarantees under the US GSM-102 Program. In accordance with those parameters, the United States had agreed to make payments as a temporary compensation to a Cotton Fund for technical assistance and capacity building related to the Brazilian cotton sector. In exchange, Brazil had agreed to postpone the imposition of countermeasures against the United States, as previously authorized by the DSB. Both parties had also agreed that this arrangement would not terminate until the enactment of a successor legislation to the 2008 Farm Bill, whose support programs for upland cotton had been considered inconsistent with WTO obligations. More recently, on 30 September 2012, the 2008 Farm Bill had expired without the passing of a successor legislation. That notwithstanding, taking into account that the current US agricultural support programs had been kept unchanged, Brazil had decided not to terminate the Memorandum of Understanding and the Framework Agreement. Therefore, there would be no imposition of countermeasures by Brazil at the present time. Brazil was closely and attentively following the ongoing discussions of the new Farm Bill in the US Congress. Brazil had noted, not without concern, that some of the proposals under discussion did not seem to be in line with the decisions adopted by the DSB in the cotton dispute and may even increase the levels of distortion of the agricultural support program. Brazil, however, remained engaged in search for a mutually agreed solution to the Cotton dispute and hoped that the United States would fully comply with the DSB's recommendations and rulings in this dispute.

62. The representative of the United States said that his country took note of Brazil's remarks made at the present meeting. The United States took note of Brazil's statements, in particular, concerning versions of the Farm Bill currently under consideration. In that regard, the United States noted that the US Congress had primary responsibility for drafting and passing the Farm Bill. The US Administration looked forward to engaging constructively with Congress as it continued its work, including with respect to those elements of the Bill that related to the Framework and to this dispute. The work that Brazil and the United States had accomplished under the Cotton Framework had been constructive. The United States understood that these cooperative efforts would facilitate a mutually agreed solution to this dispute.

63. The DSB took note of the statements.

## 4. China – Anti-dumping and countervailing duties on certain automobiles from the United States

(a) Request for the establishment of a panel by the United States (WT/DS440/2)

64. The Chairman recalled that the DSB considered this matter at its meeting on 28 September 2012 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS440/2, and invited the representative of the United States to speak.

65. The representative of the United States said that, on 5 July 2012, his country had requested consultations with China regarding China's imposition of anti-dumping and countervailing duties on certain automobiles from the United States. After attempts to resolve these concerns through dialogue with China were unsuccessful, the United States had requested at the September 2012 DSB meeting that the DSB establish a dispute settlement panel. As had been set out in the request for the establishment of a panel, and as had been discussed at the 28 September DSB meeting, China's dumping and subsidy determinations in the autos investigations appeared to involve profound procedural and substantive deficiencies. And in conducting those investigations, China appeared to have breached a number of its obligations under the GATT 1994, the Anti-Dumping Agreement, and the Subsidies Agreement. Accordingly, the United States at the present meeting requested for a second time that the DSB establish a panel to examine the matter set out in the US panel request, with standard terms of reference.

66. The representative of China said that, following the United States request for consultations in this dispute, China had held sincere consultations with the United States and had positively responded to the US questions, which were relevant. China had hoped that the dispute could have been resolved through consultations and regretted that the United States had requested the DSB to establish a panel in this dispute for the second time. In the investigations concerned, the Chinese Investigating Authority had determined that the imports of the product concerned, originating in the United States, constituted dumping and benefited from the US government's subsidizations, and that the dumped and subsidized imports had caused material injury to the domestic industry of China. As a result, an anti-dumping measure and a countervailing measure had been imposed by the Chinese Investigating Authority after investigations. The impositions of the anti-dumping measure and the countervailing measure were consistent with China's obligations under the WTO rules. China understood that a panel would be established at the present meeting. China would work together with the panel and the United States to resolve the dispute in accordance with the WTO rules.

67. 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.

68. The representatives of Colombia, the European Union, India, Japan, Korea, Oman, Saudi Arabia and Turkey reserved their third-party rights to participate in the Panel's proceedings.

**5. United States – Measures affecting trade in large civil aircraft (second complaint)**

(a) Recourse to Article 22.2 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement by the European Union (WT/DS353/17)

(b) Recourse to Article 21.5 of the DSU by the European Union: Request for the establishment of a panel (WT/DS353/18)

(c) Initiation of the procedure for developing information concerning serious prejudice under Annex V of the SCM Agreement (WT/DS353/18)

(d) Designation of the representative referred to in paragraph 4 of Annex V of the SCM Agreement (WT/DS353/18)

69. The Chairman proposed that the four sub-items under this Agenda item be taken up separately.

(a) Recourse to Article 22.2 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement by the European Union (WT/DS353/17)

70. The Chairman drew attention to the communication from the European Union contained in document WT/DS353/17, and invited the representative of the European Union to speak.

71. The representative of the European Union said that, on 23 March 2012, the DSB had adopted the recommendations and rulings in this dispute concerning the US subsidies for its large civil aircraft industry. The United States had six months to withdraw the subsidies or to take appropriate steps to remove the adverse effects of the subsidies. By the end of the six-month period on 24 September 2012, the EU considered that the United States had failed to comply with the DSB's recommendations and rulings. In the absence of a satisfactory compensation, the EU, therefore, requested the DSB to authorize countermeasures against the United States that were appropriate and commensurate with the degree and nature of the adverse effects determined to exist. The EU estimated that the US subsidies were causing adverse effects to the EU industry in a total amount of approximately US$12 billion (equivalent to €9.35 billion) annually. The EU therefore requested the DSB to authorize it to take countermeasures against the United States in an equal amount of US$12 billion/€9.35 billion. The EU had not taken this step lightly and would have preferred that the United States fully complied with its obligations under the respective WTO Agreements. However, in the absence of US compliance, the EU had no other choice than to preserve its rights and to counterbalance the adverse effects caused by the unprecedented amount of subsidization that the United States continued to grant to its large civil aircraft industry. The EU hoped that its request would induce the United States to fully abide by its obligations.

72. The representative of the United States said that on 22 October 2012, his country had filed an objection to the request of the EU to impose countermeasures. Therefore, by operation of Article 22.6 of the DSU, this matter had already been referred to arbitration. The United States had no objection to the DSB agreeing at the present meeting that the matter was referred to arbitration. However, as noted in the US objection to the EU request, including that the EU request did not follow the principles and procedures set forth in Article 22.3 of the DSU, the United States was also surprised at the EU's attempt to request authorization under Article 4 of the SCM Agreement. As the EU was well aware, the DSB's recommendations and rulings did not include any recommendation with respect to Article 4 of the SCM Agreement. Therefore, the EU request under Article 4 contradicted the express findings of the Panel and the Appellate Body in this dispute. Accordingly, there was no legal basis for the DSB to grant this authorization even apart from the US objection to the other parts of the EU's request.

73. The representative of the European Union said that the EU took note of the US objection pursuant to Article 22.6 DSU. Following the referral of this matter to arbitration by the DSB, the EU would confirm its readiness to request, together with the United States, the arbitration panel to suspend its work in accordance with the sequencing agreement concluded by the EU and the United States.

74. The DSB took note of the statements and it was agreed that the matter raised by the United States in document WT/DS353/19 is referred to arbitration, as required by Article 22.6 of the DSU.

(b) Recourse to Article 21.5 of the DSU by the European Union: Request for the establishment of a panel (WT/DS353/18)

75. The Chairman drew attention to the communication from the European Union contained in document WT/DS353/18, and invited the representative of the European Union to speak.

76. The representative of the European Union said that, on 23 September 2012, the United States had circulated a two-page long communication summarizing the actions that it had taken in this dispute in order to withdraw the subsidies or remove the adverse effects. On 25 September 2012, the EU had requested consultations with the United States in an effort to provide the United States with an opportunity to explain in detail the basis for its claim that it had actually complied with its WTO obligations. Consultations had been held on 10 October 2012 but they had failed to resolve the dispute. The EU was seriously concerned about the lack of specificity of the US compliance communication which contained merely statements of alleged compliance without actually setting out how this had been achieved and what steps had been taken. Since then the EU had not received any further information from the United States. Furthermore, the United States appeared to have granted a number of new subsidies at federal and local level which were closely related to those programs that had been found to be in violation of the US WTO obligations. The EU very much regretted the US attitude and considered that, in this dispute, the United States had not lived up to its own purported standards of specificity and transparency which it requested, with good reasons, from other WTO Members. The EU was concerned not only for systemic reasons under the DSU. Even more, this lack of engagement was not conducive for an eventual resolution of this dispute. Eight years of litigation had, thus far, failed to resolve this dispute and the impression was that the United States continued as usual with the subsidization of its large civil aircraft industry. This behaviour by the United States made it difficult to create an atmosphere that would allow both sides to find a mutually satisfactory solution. Therefore, the EU had no other choice than to request the establishment of a compliance panel. Pursuant to paragraph 2 of the sequencing agreement, the United States had agreed to accept the establishment of the panel at the present meeting.

77. The representative of the United States said that his country did not agree that there should be any question as to the US compliance in this dispute. On 23 September 2012, the United States had submitted to the DSB a notification of the withdrawal of subsidies and removal of adverse effects in this dispute.[7] The US notification had explained that the United States had fully complied with the recommendations and rulings of the Dispute Settlement Body. The notification set out steps taken by the United States to achieve full compliance. Those steps included the modification of rights under contracts and agreements, the termination of programs, and changes in policy. The United States had participated in consultations with the EU regarding those compliance steps. Accordingly, the United States was disappointed that the EU was now seeking recourse to proceedings under Article 21.5.

78. As Members were aware, the United States and the EU had reached a procedural agreement in this dispute providing for sequencing of Article 21.5 and Article 22.6 proceedings. That agreement had been circulated to Members back in April (WT/DS353/14). Under that agreement, the United States and the EU had agreed that the EU could request the establishment of a panel pursuant to Article 21.5 of the DSU, and that the United States would accept the establishment of that Article 21.5 panel at the first DSB meeting at which the EU request appeared on the Agenda. The United States understood from the EU that its request was to be understood as seeking a standard Article 21.5 proceeding. Accordingly, at the present meeting, the United States accepted the referral under Article 21.5 of the DSU of the matter to the original panel, if possible. In that respect, it was useful to remark on another aspect of the EU's request. The United States noted that, in addition to the reference to Article 21.5 of the DSU, the EU request referred to other provisions of the covered agreements, for example, in paragraphs 3 and 34 of its request. The EU and other Members had included such references in a few past requests under Article 21.5, but they had been without legal effect, as the DSB had referred the matter exclusively under Article 21.5 of the DSU, without reference to any other provision. The United States understood that that was what was being contemplated here.

[7] WT/DS353/15 (26 September 2012).

79. The United States noted that the EU request for panel establishment appeared twice in the panel request document, with different requirements listed for each. The requests in this regard were inconsistent, with different provisions listed for each. But what was clear was that those provisions other than Article 21.5 were not, and could not be, operative for purposes of the present meeting's DSB decision. Among other things, there was no legal basis for requesting anything other than a standard Article 21.5 compliance proceeding. For example, the DSB could not authorize the establishment of a panel under any provision other than Article 21.5 of the DSU since a request under any of those provisions would require that there first be a 60-day period for consultations. And that 60-day period for consultations had not yet expired. And with respect to the EU's reference to the sequencing agreement, this was not a covered agreement so it could not, under any circumstances, form the basis for the DSB to establish a panel. Nor would any other interpretation be consistent with the US acceptance at the present meeting under the terms of the sequencing agreement. That acceptance was limited to the referral of the matter to a panel under Article 21.5 of the DSU. Accordingly, the United States was not accepting at the present meeting and was not required to accept at the present meeting, the establishment of a panel under any provision of the covered agreements other than Article 21.5 of the DSU.

80. The representative of the European Union said that at the end of its statement, the United States had expressed some criticism in relation to the EU panel request. The EU had difficulties in understanding the US concerns. However, the EU did not wish to engage in a detailed discussion at the DSB meeting. The EU stood behind its request for a compliance panel which, in its view, was entirely straightforward.

81. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the European Union in document WT/DS353/18. The Panel would have standard terms of reference.

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

(c) Initiation of the procedure for developing information concerning serious prejudice under Annex V of the SCM Agreement (WT/DS353/18)

83. The Chairman drew attention to the communication from the European Union contained in document WT/DS353/18, and invited the representative of the European Union to speak.

84. The representative of the European Union said that the EU had also requested the initiation of an Annex V procedure under the SCM Agreement in this case. As the EU had just explained, the United States had failed to provide any detailed and substantial information in its compliance communication of 23 September 2012. Since then, the EU had not obtained any further information. In order to remedy that failure, the EU requested the initiation of an Annex V procedure. According to paragraph 2 of Annex V: "In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized product". As the Appellate Body had found in "US - Large Civil Aircraft"(DS353), the initiation of an information-gathering procedure was automatic once the DSB decided to establish a panel.[8]

[8] Appellate Body Report: "US - Large Civil Aircraft" (DS353), paras. 511, 524 and 549.

85. The representative of the United States said that the EU's request for initiation of an Annex V process was unprecedented, contrary to the text of the DSU, and contrary to what the Appellate Body had said in its Report in the original Panel proceeding in this dispute. In its Report in the original Panel proceeding, the Appellate Body had explained that two conditions were necessary for the initiation of an Annex V procedure. One of those conditions was that the relevant matter "must be referred to the DSB" under Article 7.4 of the SCM Agreement. The United States noted that when the EU in its request cited to the Appellate Body Report, the EU omitted the reference in that Report to Article 7.4 of the SCM Agreement. As discussed under the previous Agenda item, the DSB at the present meeting was not, and could not be, establishing a panel under anything other than Article 21.5 of the DSU. Accordingly, there was no legal basis for the EU's request and the DSB could not initiate a procedure under Annex V of the SCM Agreement. Nor was the EU correct in asserting that DSB action to initiate an Annex V procedure occurred "automatically". That same Appellate Body Report explained that DSB action was necessary, and as the United States had explained, such action was not possible in the current circumstances. Of course, this was not a surprise to the EU since this very issue had already been discussed in another dispute between the parties. At the same time, the United States said that it would like to be clear that it was willing to work cooperatively with the EU to develop information to assist the compliance panel in its work. The United States had offered to the EU to work to develop procedures for an information gathering process, including procedures that would have the information available before the filing of the first submissions to the compliance panel. The United States repeated that offer at the present meeting. In fact, it had been suggested that one option for such procedures would be to have ones analogous to the Annex V procedure, such that there would be a specified timeframe and the procedure would be assisted by a neutral entity. This would require working out the specifics with the EU and would most likely call for obtaining a DSB decision to implement such a procedure once agreement was achieved on the specifics, and the United States would anticipate that with the EU's cooperation this could be achieved in a timely manner.

86. The representative of the European Union said that, in view of the clear wording of Annex V, as well as the interpretation by the Appellate Body, there was no basis for the United States to object to the initiation of the Annex V procedure.

87. The DSB took note of the statements.

(d) Designation of the representative referred to in paragraph 4 of Annex V of the SCM Agreement (WT/DS353/18)

88. The Chairman drew attention to the communication from the European Union contained in document WT/DS353/18, and invited the representative of the European Union to speak.

89. The representative of the European Union said that, prior to the present DSB meeting, the EU had consulted with the United States in order to agree on a common name for a representative that could serve to facilitate the information-gathering proceedings under Annex V, other than the Chairman of the DSB. Unfortunately, those consultations had failed to identify a commonly agreeable individual. The EU nevertheless maintained its proposal to appoint the facilitator from DS316/DS317 and it hoped that the United States would be able to state its agreement at the present meeting. In the absence of such an agreement, the EU recalled that the Appellate Body had clarified that the Chairman of the DSB was responsible for discharging the function of facilitating an Annex V procedure until such time as that function was delegated through the DSB's designation of another individual as facilitator pursuant to paragraph 4 of Annex V.

90. The representative of the United States said that since, as the United States had explained, the EU's request for an Annex V procedure did not meet the conditions for initiating such a procedure, the DSB also could not appoint a facilitator for a procedure that did not exist. Accordingly, no action could be taken on this item. Furthermore, the United States did not accept the EU's argument that absent agreement on the appointment of a facilitator prior to the present meeting, the DSB chair

would need to begin acting as a facilitator. The EU was incorrect. The United States had been clear that the EU's Annex V request was not authorized. There was no basis for the DSB to initiate an Annex V procedure at the present meeting, even if this had not been a situation involving Article 21.5. Accordingly, since the DSB could not initiate an Annex V procedure, there could be no one acting as the facilitator.

91. The representative of the European Union said that, with regard to the US position on whether an Annex V procedure had been initiated or not, the EU referred to its statements made under sub-item (c) of this Agenda item.

92. The DSB took note of the statements.