WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/312
22 May 2012

(12-2683)

Dispute Settlement Body
22 February 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 February 2012

Chairperson: Mrs. Elin Østebø Johansen (Norway)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB 2
(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States 3
(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States 5
(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States 6
(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union 6
(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States 7
(f) United States – Continued existence and application of zeroing methodology: Status report by the United States 10
(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States 11
(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China 11
(i) United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil: Status report by the United States 12
(j) United States – Definitive anti-dumping and countervailing duties on certain products from China: Status report by the United States 13
2. Philippines – Taxes on distilled spirits 13
(a) Implementation of the recommendations of the DSB 13
3. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB 14
(a) Statements by the European Union and Japan 14
4. United States – Anti-dumping measures on corrosion-resistant carbon steel flat products from Korea 15
(a) Request for the establishment of a panel by Korea 15

5. European Union – Anti-dumping measures on certain footwear from China 16
(a) Report of the Panel..... 16
6. Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric 18
(a) Report of the Panel..... 18
7. China – Measures related to the exportation of various raw materials..... 22
(a) Report of the Appellate Body and Report of the Panel..... 22
(b) Report of the Appellate Body and Report of the Panel..... 22
(c) Report of the Appellate Body and Report of the Panel..... 22
8. Appointment of Appellate Body members..... 29
9. Election of Chairperson..... 30

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.111)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.111)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.86)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.49)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.29)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.26)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.20)

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.13)

(i) 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.2)

(j) United States – Definitive anti-dumping and countervailing duties on certain products from China: Status report by the United States (WT/DS379/12/Add.1)

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 ten 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.111)

2. The Chairperson drew attention to document WT/DS176/11/Add.111, 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 9 February 2012, in accordance with Article 21.6 of the DSU. Legislative proposals had been introduced in the current 112th 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 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 said that 2 February 2012 marked ten years since Section 211 had been found to be inconsistent with the TRIPS Agreement and the Paris Convention. However, as demonstrated by the US status reports, the United States had not taken any action to implement the DSB's rulings and recommendations in relation to this dispute. The US illegal conduct, which could not be justified, demonstrated the US lack of respect for the most basic rules and principles of international law. Consistent with the US position, controversial draft US laws, such as the well-known Stop Online Piracy Act, proposed strict sanctions to combat digital piracy while the United States continued to violate intellectual property rules. Although complaints about the US violations had been made in many forums, the United States failed to comply with its obligations and commitments. The World Radiocommunication Conference, which had recently been held in Geneva, once again, reaffirmed the illegality of the anti-Cuban broadcasts by the US authorities using aircraft. The Conference had also indicated that, despite numerous requests by the ITU Radiocommunication Bureau, the US Administration had not eliminated the prejudicial interference caused by its illegal transmissions to Cuban broadcasting services. This was a clear demonstration of violation of international law by the United States so as to implement its policy of blockade and hostility against Cuba.

6. Section 211 was part of the complex structure of this policy, which not only affected the interests of Cuban companies but also the interests of other Members, such as the French company, Pernod Ricard. The United States remained a permanent offender of the system of international law and, with regard to the Section 211 dispute, the United States undermined the credibility of the dispute settlement system. As it had done every month, Cuba denounced Section 211 as a violation of the rights of owners of Cuban trademarks in order to facilitate the fraudulent sale of products called "Havana Club" by the company Bacardi, even though those products were not of Cuban origin. Cuba would continue to defend its sovereign prerogatives and to call upon the United States to comply with its obligations as a WTO Member and a member of the international community. Cuba urged the United States to comply with the DSB's rulings and recommendations and to repeal Section 211, as this was the only way to settle this dispute.

7. The representative of China said that her country thanked the United States for its status report but regretted that the United States, once again, reported non-compliance. This prolonged situation of non-compliance was highly incompatible with the prompt and effective implementation required under the DSU provisions, in particular when the interests of a developing-country Member

were affected. Thus, China urged the United States to implement the DSB's rulings and recommendations without further delay.

8. The representative of the Bolivarian Republic of Venezuela said that her country regretted that, once again, this dispute was on the DSB's Agenda. Ten years had passed since the DSB had ruled that Section 211 was incompatible with the TRIPS Agreement, but the United States continued to report the same. In Venezuela's view, this qualified as "action without results". The unfortunate consequence of this was the continued application of a law that was contrary to the TRIPS Agreement and was incompatible with the principles of national and most-favoured-nation treatment, and undermined the dispute settlement mechanism which was one of the main achievements of the Uruguay Round. Venezuela had, for almost ten years, observed the US reluctance to comply with the Appellate Body's ruling. As it had done on many occasions, Venezuela called on the United States to put an end to its policy of economic, commercial and financial blockade against Cuba and reminded the United States of its obligation to comply with the DSB's recommendations.

9. The representative of Uruguay said that his country thanked the United States for its status report. As stated on many occasions, Uruguay shared the systemic concerns expressed by previous speakers. Currently, the WTO was going through a critical period as a result of its inability to conclude the Doha Round, and the need to preserve the *acqui*s of the multilateral trading system, including its most valuable asset, namely, the dispute settlement system. It was, therefore, important to protect the dispute settlement system by ensuring prompt compliance with the DSB's recommendations. This was essential in order to ensure the smooth functioning of the dispute settlement system as well as its credibility, legal certainty and the balance of rights and obligations of Members. Uruguay, once again, urged the parties to this dispute to make every effort to end ten years of non-compliance and to find a solution consistent with the DSU provisions.

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

11. The representative of Ecuador said that his country supported the statement made by Cuba and noted that Article 21 of the DSU referred specifically to prompt compliance with the DSB's recommendations and rulings, in particular where the interests of a developing-country Member were affected. Ecuador hoped that the United States would step up its efforts to ensure prompt compliance with the DSB's recommendations and rulings and to fully comply with Article 21 of the DSU.

12. The representative of the Dominican Republic said that his country thanked the United States for its status report. The Dominican Republic noted that Section 211 had been found to be inconsistent with Article 42 of the TRIPS Agreement. In that regard, the Dominican Republic, once again, urged the United States to step up its internal procedures in order to comply with the DSB's recommendations and rulings. The Dominican Republic noted that the long period of time of non-compliance that had passed, almost a decade, undermined the credibility of the DSB's decisions.

13. The representative of Paraguay said that his country shared Cuba's concerns regarding the continued delay in implementing the DSB's recommendations and rulings pertaining to this dispute. This was not just a trade concern but also a systemic concern given the importance of prompt implementation of the DSB's recommendations. In Paraguay's view, this issue should be taken up in the context of the on-going DSU negotiations, in an effort to improve Members' compliance. Paraguay urged the United States to comply with the DSB's recommendations pertaining to Section 211.

14. The representative of Nicaragua said that his country thanked the United States for its status report. Once again, Nicaragua noted that the status report did not contain any information on compliance with the DSB's ruling. Nicaragua urged the United States to bring its measures into compliance with the DSB's recommendations in order to strengthen the dispute settlement system. Nicaragua shared the view that trade was necessary for the creation of employment and that this in turn would improve welfare of countries, in particular small economies. Nicaragua urged the United States to lift the financial restrictions against Cuba, which had been maintained for over six decades, so as to allow Cuba to better integrate into the world economy.

15. The representative of the Plurinational State of Bolivia said that her country, once again, noted that the US status report did not contain any information on progress in this dispute. Bolivia, therefore, reiterated its concern about the US failure to comply with the DSB's rulings. This situation of non-compliance undermined the credibility of the multilateral trading system and caused serious harm to a developing-country Member. Once again, Bolivia urged the United States to comply with the DSB's rulings and to take steps to remove the restrictions imposed under Section 211. Finally, she said that Bolivia supported the concerns raised by Cuba at the present meeting.

16. The representative of Angola said that her country thanked the United States for its status report. Once again, Angola regretted that no concrete progress had been made towards the implementation of the DSB's recommendations and the Appellate Body's conclusion of 12 February 2002 pertaining to Section 211. Angola hoped that concrete actions would be undertaken to resolve this matter and send a positive signal of respect for WTO rules.

17. The representative of Mexico said that his country thanked the United States for its status report. Mexico urged both parties to resolve this dispute through the legal remedies provided under the DSU provisions. Mexico noted that any Member could initiate a dispute if it considered that its rights had been nullified or impaired as a result of non-compliance by another Member. In Mexico's view, the discussion under this Agenda item could provide useful input for the on-going negotiations on improvements and clarifications of the DSU, in particular with regard to 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.111)

19. The Chairperson drew attention to document WT/DS184/15/Add.111, 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 9 February 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 DSB's recommendations and rulings that had not already been addressed by the US authorities, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this dispute.

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".[1] 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.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.86)

23. The Chairperson drew attention to document WT/DS160/24/Add.86, 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 9 February 2012, 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 noted and thanked the United States for its status report. As it had stated many times in the past, the EU remained keen to resolve 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.49)

27. The Chairperson drew attention to document WT/DS291/37/Add.49, 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 the EU hoped that it would continue on the constructive path of dialogue with the United States. Two technical meetings had taken place in 2011. The meetings had offered a good opportunity to discuss directly issues of concern to both sides and to follow up closely on developments in the biotech field. The EU would be happy to have another technical meeting in the course of 2012, if there was interest on the US side. In 2011, the Commission had authorized six more GMOs, and had renewed the authorization of a seventh one.[2] In 2012, the Commission had already authorized three more GMOs[3] and had renewed the authorization of a fourth one.[4] As had been mentioned at the previous DSB meeting, these four decisions had been submitted to the Appeal Committee on 17 January 2012, which had not delivered an opinion. They had been adopted by the Commission on 10 February 2012. Regarding the concerns expressed by the United States on the backlog of approvals, the EU recalled that its approval system was not covered by the DSB's recommendations and rulings. The EU underlined that the GMO regulatory regime was working normally. The functioning of the GMO regime should not be rigidly assessed purely

[1] Article 3.3 of the DSU.
[2] Maize.
[3] A5547-127 soybean, 356043 soybean, MON87701 soybean.
[4] 40-3-2 soybean.

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.

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 the United States had explained at past meetings of the DSB, the United States said that it continued to have substantial concerns regarding EU measures affecting the approval of biotech products. Delays in the consideration of approvals for biotech products had resulted in a lengthy backlog of pending applications, including many applications for products that had been approved by, and were in use in, major markets around the world. The United States took note of the EU statement that the EU had recently approved certain varieties of biotech soybeans. While this development was welcomed, a handful of approvals was not sufficient to address the backlog of pending applications and the resulting barriers to trade. For example, EU imports of US maize and maize products were substantially restricted due to delays in approvals of biotech varieties of maize. The United States looked forward to EU actions to address the effects on trade resulting from the EU's measures affecting the approval of biotech products.

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.29)

31. The Chairperson drew attention to document WT/DS322/36/Add.29, 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 was pleased to report to Members at the present meeting that the United States and Japan had reached an agreement to resolve this dispute involving "zeroing". The United States said that Members would recall that in December 2010, the US Department of Commerce had announced a proposal to implement DSB recommendations and rulings regarding "zeroing" by, among other things, changing the calculation of weighted-average dumping margins and assessment rates in certain anti-dumping proceedings. At the present meeting, the United States could inform the DSB that the US Department of Commerce had finalized that proposal, and that the final modification had been published the previous Tuesday, 14 February 2012, in the US Federal Register.[5] The final modification applied to all reviews initiated after publication, as well as to on-going reviews for which the preliminary determination was issued 60 days or more after publication. The final modification provided that the United States would calculate weighted-average margins of dumping and anti-dumping duty assessment rates in a manner that provided offsets for non-dumped comparisons. The notice also modified US practice in five-year "sunset" reviews such that the Department of Commerce would not rely on weighted-average dumping margins that had been calculated using a methodology found to be inconsistent with WTO rules. In connection with the final modification, on 6 February 2012, the United States and Japan had signed a Memorandum of Understanding regarding this dispute, and the parties had circulated the Memorandum to the DSB in document WT/DS322/44. The Memorandum provided that the United States would take actions to meet Japan's concerns, including by revising US calculation methodologies through issuance of the final modification, and that Japan would withdraw its requests made pursuant to Article 22.2 of the DSU by 6 August 2012. At that time, the United States and Japan would submit a joint letter requesting the Arbitrator to notify the DSB that the issuance of an

[5] Anti-dumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Anti-dumping Duty Proceedings; Final Modification, 77 FR 8101 (14 February 2012).

award was not necessary. Accordingly, and in response to a joint request of the parties, the Arbitrator had continued the suspension of its work through 20 August 2012. The communication of the Arbitrator had been circulated to the DSB in document WT/DS322/45. The United States had repeatedly explained that the Appellate Body, in making its findings on zeroing, had adopted an unsupportable analysis; had departed from the text of the Anti-dumping Agreement; and, therefore, had exceeded its mandate. The United States had presented these explanations in submissions to panels and the Appellate Body; in statements at meetings of the DSB; and in detailed, written communications to the DSB. Rather than repeating those explanations at the present meeting, the United States said that it would refer Members to its prior written communications to the DSB.[6] The United States said that it would also emphasize that it would continue to press in on-going WTO negotiations for affirmation that "zeroing" was consistent with WTO rules. The United States nonetheless welcomed the agreement to end this difficult and long-standing dispute with an important trading partner. The United States had also reached a similar agreement in relation to the disputes with the EU, which it would discuss under the next item on the Agenda. Resolution of these disputes, notwithstanding the US deep disagreement with the Appellate Body's findings on "zeroing", together with its determination to press for correction of these decisions through on-going negotiations, demonstrated the US commitment to strengthening the rules-based trading system.

33. The representative of Japan said that, as explained by the United States, Japan and the United States had concluded a Memorandum of Understanding in this dispute on 6 February 2012. That Memorandum had been notified to the DSB in document WT/DS322/44. The Memorandum set forth parameters and time-frames that must be fulfilled, including a number of steps the United States must take, so as to allow the parties to consult with a view to finding a mutually agreed solution to this dispute. As foreseen by the Memorandum, the United States had, as the first step, completed the Section 123 process under the Uruguay Round Agreement Act by signing the Final Rule, and Final Modification for Reviews had been published in the US Federal Register, dated 14 February 2012.[7] Japan wished to highlight some of the key features of the final modification. First, the United States had adopted the changes to the dumping margin calculation methodology "to provide offsets for non-dumped comparisons when using monthly A-A comparisons in reviews, in a manner that parallel the WTO-consistent methodology the Department [of Commerce] currently applied in original anti-dumping duty investigations". Japan understood that this would mean that, in its administrative review, new shipper review, and expedited anti-dumping review, the United States would normally use weighted-average to weighted-average comparisons, instead of weighted-average to transactions, on a monthly basis and, in aggregating such comparison results, no negative comparison results would be disregarded. Japan understood that, in case of administrative review, this new, modified methodology would apply to both cash deposits and assessment rates. Second, the Final Rule and Final Modification stated that the United States withdrew its practice of using the zeroing methodology in original investigations in which transaction-to-transaction comparisons was used for calculating the margin of dumping. Again, the United States also made a commitment that it would not use zeroing methodology when it used transaction-to-transaction comparisons.

34. Third, according to the Final Rule and Final Modification, the United States "will modify its practice in five-year sunset reviews, such that it would not rely on weighted-average dumping margins that had been calculated using methodology determined by the Appellate Body to be WTO-

[6] Communication by the United States, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/16 (17 May 2006); Communication from the United States, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/18 (19 June 2006); Communication from the United States, United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/16 (26 February 2007); Communication by the United States, United States – Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/11 (20 May 2008).

[7] 77 FR 8101 (14 February 2012).

inconsistent in US - Zeroing (EC), US - Zeroing (Japan), and US - Continued Zeroing (EC)". To translate, unlike its past practice, the United States undertook that it would no longer rely on dumping margins calculated with zeroing found to be WTO-inconsistent in its likelihood of dumping determination in sunset reviews. This was also a distinct feature included in the Final Rule and Final Modification for Reviews. This commitment, together with the modified methodology for administrative review, would apply "to all sunset reviews pending before the Department [of Commerce] for which either the preliminary results or expedited final results of sunset review are issued after 16 April 2012". Fourth, the Final Rule and Final Modification appeared to apply to certain entries of goods that had entered into the United States but were still not liquidated. The Final Rule and Final Modification for Reviews stated that the new revised methodology would be applicable to (i) "all reviews pending before the Department [of Commerce] for which the preliminary results are issued after 16 April 2012", and (ii) "any reviews currently discontinued by the Department [of Commerce] if such reviews are continued after 16 April 2012 by reason of a final and conclusive judgment of a US Court". These were important steps and features for the implementation by the United States of the DSB's recommendations and rulings and the resolution of this dispute. Japan thanked the United States for those steps and its efforts.

35. There were also other steps contemplated by the Memorandum, some of which had been already initiated by the United States. Japan expected that all steps or actions set forth in the Memorandum would be fulfilled and executed by the United States as foreseen in the Memorandum. Japan would continue to monitor the situation and any developments closely to that end. In that respect, Japan wished to note that, under the terms of the Memorandum of Understanding, Japan reserved its right to invoke Article 21.5 compliance proceedings with respect to the Final Rule and Final Modification adopted by the United States under Section 123 and its application, although it was Japan's hope that recourse to such further proceedings would be proven to be unnecessary. This dispute was one of the longest outstanding disputes which was currently under surveillance of the DSB. In fact, more than seven years had passed since Japan had initiated this dispute by requesting consultations with the United States on 24 November 2004. Throughout the history of this dispute, the parties had been vigorously litigating the matter in the original proceedings, in the compliance proceedings and in the Article 22.6 arbitration. Therefore, Japan wished to congratulate and to pay tribute to the Appellate Body, the compliance panel and their respective secretariats for their work in this dispute. Japan also wished to express its appreciation to the Article 22.6 Arbitrator for its time and efforts devoted to this matter. This dispute demonstrated that the WTO dispute settlement system worked and served its very objective of achieving a resolution to a dispute.

36. The representative of the European Union said that although the EU had not intended to speak under this Agenda item, it was forced to do so in order to respond to the statement just made by the United States. The EU representative wished to note that a roadmap between the European Commission and the United States had been notified to the DSB and not an agreement between the EU and the United States. The EU urged the United States to refer to those documents correctly as those references were legally and institutionally relevant.

37. The representative of Canada said that his country welcomed the announcement by the United States, the European Union and Japan with regard to DS322, DS350 and DS294 of their agreement on a way forward in resolving their disputes. Canada also noted the US announcement, as part of these efforts at resolution, of a Final Modification relating to the methodology it would use for calculating weighted-average margins of dumping. The use of "zeroing" by the United States when calculating dumping margins was an important trade issue. In that regard, Canada was pleased to see that, pursuant to its 14 February 2012 Final Modification, the United States would abandon the general use of zeroing in anti-dumping duty proceedings. Canada noted, however, that under the Final Modification the United States may use, in limited circumstances, a method other than the standard monthly average-to-average comparison. Canada joined others in conveying its expectation

that the United States would, when calculating dumping margins in the future, respect its obligations under the Anti-Dumping Agreement.

38. The representative of Mexico said that his country thanked the United States for its status report. Mexico would closely monitor the implementation in this dispute since it was also involved in another dispute with the United States on zeroing (DS344).

39. The representative of China said that her country echoed the views expressed by previous speakers.

40. 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.26)

41. The Chairperson drew attention to document WT/DS350/18/Add.26, 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.

42. The representative of the United States said that his country was pleased to report to Members that it had reached an agreement to resolve both of the on-going disputes, DS350 and DS294, involving "zeroing" for which the EU was a complaining party. Under the prior Agenda item, the United States had discussed the final modification changing the calculation of weighted-average dumping margins and assessment rates in certain anti-dumping proceedings that had been adopted by the United States in order to respond to the DSB recommendations and rulings in this dispute. In connection with the final modification, on 6 February 2012, the United States and the European Commission had agreed to a Memorandum regarding this dispute and dispute DS294. The Memorandum had been circulated to the DSB in document numbers WT/DS294/43 and WT/DS350/20. The Memorandum provided that the United States would take actions to address EU concerns, including by revising US calculation methodologies through issuance of the final modification, and that the EU would withdraw its request in DS294 under Article 22.2 of the DSU and would take no further actions under the DSU with respect to DS350 or DS294. Despite the fundamental disagreement of the United States with the Appellate Body's findings on "zeroing", the United States welcomed the agreement to end this difficult and long-standing dispute.

43. The representative of the European Union said that the EU thanked the United States for its status report. As Members were aware, the European Commission and the United States had signed a roadmap which set out the steps the United States would take in order to ensure full compliance for the future in the two long-standing zeroing disputes. On 14 February 2012, the United States had published a Notice by which it abolished the use of zeroing in review investigations. The new methodology would also apply to on-going review investigations for which preliminary determinations were expected no less than 60 days from the publication of the Notice. The EU welcomed the adoption of the new methodology and trusted that the United States would apply it in accordance with its WTO obligations. The United States had also committed to conduct Section 129 reviews of certain anti-dumping orders that would not be covered by the new methodology. The EU expected those reviews to be completed by mid-June 2012 and zeroing to be removed from all dumping margin calculations. The EU pointed out that the roadmap reflected a spirit of compromise and a pragmatic approach on the European side. The EU continued to maintain that, in its view, the United States was required to do more in order to bring itself into full conformity with the DSB's recommendations and rulings. In particular, the United States had continued to collect anti-dumping duties with zeroing for several years after the end of the reasonable period of time in both DS294 and DS350, in contradiction with the specific findings of the Appellate Body, and had not been willing to

address this issue which, to the EU's understanding, would have been part of the US implementation obligations in order to achieve full compliance. The EU recognized that significant progress had been made and it hoped and expected that the satisfactory completion of all steps under the roadmap would effectively bring the zeroing disputes to an end.

44. 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.20)

45. The Chairperson drew attention to document WT/DS294/38/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 US laws, regulations and methodology for calculating dumping margins.

46. The representative of the United States said that, under Agenda item 1(e), the United States had discussed the final modification adopted by the United States in order to respond to the DSB's recommendations and rulings in this dispute. And under the previous Agenda item, the United States had discussed the Memorandum with the European Commission regarding this dispute and dispute DS350. Under that Memorandum, following the completion of steps to be undertaken by the United States, the EU would withdraw its request under Article 22.2 of the DSU, and the United States and the EU would submit a joint letter to the Arbitrator requesting notification to the DSB that the issuance of an award was not necessary. Until that time, the arbitration was to remain suspended. Accordingly, and in response to a joint request, the Arbitrator in this dispute had continued the suspension of its work through 28 June 2012. The communication of the Arbitrator had been circulated to the DSB in document WT/DS294/44. Again, despite the fundamental disagreement of the United States with the Appellate Body findings on "zeroing", the United States welcomed the agreement to end this difficult and long-standing dispute. The United States noted that, under Agenda item 1(a), certain Members had expressed so-called "systemic" concerns relating to the situation of non-compliance in that dispute. The United States assumed that all those Members intervening under Agenda item 1(a) felt equally strongly, and systemically, that the US announcements under this item and the previous two items contributed to strengthening the WTO dispute settlement system.

47. 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.

48. 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.13)

49. The Chairperson drew attention to document WT/DS363/17/Add.13, 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.

50. The representative of China said that her country had provided a status report in this dispute on 9 February 2012, in accordance with Article 21.6 of the DSU. China had made tremendous efforts to implement the DSB's rulings and recommendations, and had completed amendments to most measures at issue. With regard to the measures concerning film for theatrical release, China had been

discussing with the United States and had recently reached agreement on a Memorandum of Understanding.

51. 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 Members may have been aware, the United States and China had very recently reached agreement on a Memorandum of Understanding regarding films for theatrical release. The United States looked forward to the formal signing of the Memorandum of Understanding in the following days. The United States continued to review China's measures relating to reading materials, audiovisual home entertainment products, and sound recordings in light of the DSB rulings and recommendations.

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

(i) 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.2)

53. The Chairperson drew attention to document WT/DS382/10/Add.2, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil.

54. The representative of the United States said that, as discussed under Agenda item 1(e) of the present meeting, on 14 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. The United States understood that this modification would address the findings in this dispute, as well as the "zeroing" disputes discussed in the prior Agenda items. The United States said that it was currently in the process of arranging discussions with Brazil regarding the final modification published on 14 February 2012.

55. The representative of Brazil said that her country thanked the United States for its status report pertaining to this dispute. Brazil was still analyzing the new legislation published on 14 February 2012 as to whether it would be sufficient to comply with the DSB's recommendations. As mentioned on previous occasions, Brazil remained concerned about the temporal applicability of the changes brought about by the new legislation. As Brazil understood, the legislation indicated that the change in calculation would apply only in relation to new entries of merchandise occurring on or after the date of the Section 129 determination. In order to implement the DSB's recommendations and rulings in the "Orange Juice" dispute, the United States would also be required to revise its calculations, without "zeroing", in relation to past entries that remained unliquidated at the end of the reasonable period of time. Furthermore, the US Department of Commerce had retained the possibility to use a different approach in reviews besides the weighted-average to weighted-average method in some instances. The United States still had some days to meet its WTO obligations in the "Orange Juice" dispute and Brazil hoped that the United States would be able to do so.

56. The representative of the United States said that Brazil had made a number of detailed comments, and the United States looked forward to discussing those issues bilaterally with Brazil. At this point, however, the United States wished to briefly clarify certain issues. The change in methodology applied to all reviews that had been initiated after publication of the final modification. In addition, the change would be applied in on-going reviews for which the preliminary determination was issued 60 days or more after publication of the final modification. Brazil's intervention had appeared to suggest that the United States should go back in time and reopen previously completed reviews so as to refund duties on past entries. As it had noted in several previous DSB meetings, the

United States was not aware of any other instances in which a Member had refunded duties in response to an adverse finding in a WTO dispute.

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

(j) United States – Definitive anti-dumping and countervailing duties on certain products from China: Status report by the United States (WT/DS379/12/Add.1)

58. The Chairperson drew attention to document WT/DS379/12/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US definitive anti-dumping and countervailing duties on certain products from China.

59. The representative of the United States said that his country had provided a status report in this dispute on 9 February 2012, in accordance with Article 21.6 of the DSU. The United States would continue to work on solutions to implement the DSB's recommendations and rulings in this dispute.

60. The representative of China said that her country thanked the United States for its status report and statement made at the present meeting. As almost 11 months had lapsed since the adoption of the Appellate Body Report and Panel Report pertaining to this dispute, China urged the United States to expedite its work and to fully implement the DSB's rulings and recommendations by the end of the reasonable period of time.

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

2. Philippines – Taxes on distilled spirits

(a) Implementation of the recommendations of the DSB

62. 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 this 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 recalled that, at its meeting on 20 January 2012, the DSB had adopted the Appellate Body Reports and the Panel Reports, as modified by the Appellate Body Reports, pertaining to the disputes on: "Philippines – Taxes on Distilled Spirits". The 30-day time-period in this case had expired on 19 February 2012 and, on 17 February 2012, the Philippines had informed the DSB in writing of their intentions in respect of implementation. The relevant communication was contained in document WT/DS396/12 – WT/DS403/12. She then invited the representative of the Philippines to make a statement.

63. The representative of the Philippines said that his country thanked the DSB for the opportunity to make a statement concerning implementation of the DSB's recommendations and rulings pertaining to this dispute. The Philippines reiterated its commitment to the multilateral trading system and said that, in a letter dated 15 February 2012 and circulated to the DSB on 20 February 2012, the Philippines had already stated that it intended to implement the DSB's recommendations and rulings in this dispute, in a manner that respected the Philippines' WTO obligations. However, it would be impracticable for the Philippines to comply immediately with the DSB's recommendations and rulings. The Philippines noted that implementation in this dispute raised

numerous technical and legal issues in the context of a long-standing fiscal regime that for many decades had been fundamentally integrated into the Philippines' domestic policies. Moreover, implementation required extensive consultations and coordination within the Philippines Congress, as well as amongst several governmental agencies and non-governmental stakeholders. Those circumstances were also compounded by particular challenges that the Philippines faced as a developing-country Member. For those and other reasons, the Philippines would need a reasonable period of time in which to comply with the DSB's recommendations and rulings. The Philippines was already engaged in discussions on this matter with the EU and the United States, in accordance with Article 21.3(b) of the DSU. The Philippines would keep the DSB fully apprised of the results of the discussions.

64. The representative of the European Union said that the EU thanked the Philippines for stating its intention to comply. The EU stood ready to discuss with the Philippines a reasonable period of time that they would need to bring themselves into compliance.

65. The representative of the United States said that his country was pleased to receive the letter from the Philippines to the DSB on 15 February 2012 indicating that it intended to implement the recommendations and rulings of the DSB in this dispute, which had been adopted on 20 January 2012. The Philippines had indicated that it would need a reasonable period of time for implementation. The United States said that it stood ready to discuss with the Philippines, together with the EU, what that period of time should be. The excise taxes at issue in this dispute had been a barrier to imported distilled spirits for decades. The United States hoped that the DSB's recommendations and rulings provided the impetus for the Philippines to end quickly the discrimination and open its markets.

66. The DSB took note of the statements, and of the information provided by the Philippines 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

67. 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.

68. The representative of the European Union said that, as it had done many times before, the EU asked the United States to 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, once again, renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports pertaining to this dispute.

69. The representative of Japan said that the latest distributions for FY 2011 announced last December[8] showed that the CDSOA remained operational. As US Customs and Border Protection explained, "the distribution process will continue for an undetermined period".[9] 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 pertaining to this dispute.

[8] See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_11/2011_annual_report/

[9] 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

70. The representative of Brazil said that her country thanked the EU and Japan for keeping this item on the DSB's Agenda. As it had expressed in 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 as 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.

71. The representative of India said that his country thanked the EU and Japan for regularly keeping this item on the DSB's Agenda. India renewed its systemic concerns about continuous non-compliance by Members and the resulting growing lack of credibility and confidence in the dispute settlement system. India urged the United States to report full compliance without any further delay.

72. The representative of Canada said that his country thanked the EU and Japan for, once again, putting this item on the DSB's Agenda. Canada shared the views of the EU and Japan that the Byrd Amendment remained subject to the DSB's surveillance until the United States ceased to apply it.

73. The representative of Thailand said that his country thanked the EU and Japan for continuing to bring this item before the DSB. Thailand supported the statements made by previous speakers and urged the United States to cease the disbursements and fully implement the DSB's rulings and recommendations in this dispute.

74. 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. The United States said that it, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports, the United States failed to see what purpose would be served by further submission of status reports repeating, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

75. The DSB took note of the statements.

4. United States – Anti-dumping measures on corrosion-resistant carbon steel flat products from Korea

(a) Request for the establishment of a panel by Korea (WT/DS420/5)

76. The Chairperson drew attention to the communication from Korea contained in document WT/DS420/5, and invited the representative of Korea to speak.

77. The representative of Korea said that, on 31 January 2011, his country had requested consultations with the United States regarding the practice called "zeroing" in anti-dumping measures imposed by the United States on imports of corrosion-resistant carbon steel flat products from Korea. Korea and the United States had held consultations aimed at finding a mutually satisfactory settlement of the matter. The consultations allowed a better understanding of the positions of the parties, but had failed to resolve the dispute. Korea noted that, in the meantime, the United States had announced on 14 February 2012 that it would no longer utilize "zeroing" practice in annual reviews in order to comply with the DSB's rulings and recommendations in past WTO disputes. Korea welcomed the US efforts but regretted, however, that the announced US plan did not go far enough to fully address

Korea's legitimate concerns in this dispute, which Korea had made clear to the United States during the consultations. Korea noted that zeroing in administrative reviews had repeatedly been found to be inconsistent with the Anti-Dumping Agreement and the United States was expected to amend the methodology accordingly. In that regard, Korea and the United States had agreed to expedite proceedings with a view to a prompt settlement and implementation envisioned in Article 3.3 of the DSU. Korea believed that the dispute at hand could be settled in a constructive and time-saving manner. Accordingly, Korea requested that the DSB establish a panel pursuant to Article 6 of the DSU, to examine the matter set out in Korea's panel request.

78. The representative of the United States said that, as discussed under Agenda item 1(e) of the present meeting, on 14 February 2012, the US Department of Commerce had published a modification to its procedures in order to implement the DSB recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. This modification would address the matter covered in Korea's panel request as well as the "zeroing" disputes that had been discussed in the prior Agenda items. Korea had circulated a procedural agreement reached during the previous year between the United States and Korea. Pursuant to that agreement, the United States would not object to Korea's first request for the establishment of a panel. Nonetheless, the United States was concerned that just two days after the publication of the final modification, Korea had elected to put this panel request on the DSB's Agenda. Now that the process of modifying US methodologies to respond to the DSB recommendations and rulings on "zeroing" had been completed, moving forward with this dispute would serve no purpose. To the contrary, a Member that continued to litigate over a methodology that had been terminated was, in the US view, not strengthening the dispute settlement system but instead was squandering both its own resources and the resources of the dispute settlement system.

79. 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.

80. The representatives of China, the European Union, Japan, Mexico and Norway reserved their third-party rights to participate in the Panel's proceedings.

5. European Union – Anti-dumping measures on certain footwear from China

(a) Report of the Panel (WT/DS405/R)

81. The Chairperson recalled that, at its meeting on 18 May 2010, the DSB had established a Panel to examine the complaint by China, pertaining to this dispute. The Report of the Panel, contained in document WT/DS405/R, had been circulated on 28 October 2011 as an unrestricted document. Subsequently, at its meeting on 19 December 2011 the DSB had adopted a draft decision, set out in document WT/DS405/5, with regard to the time-period for adoption or appeal in this dispute. The Panel Report was before the DSB for adoption at the request of China. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

82. The representative of China said that her country thanked the Panel and the Secretariat for their time and effort devoted to the resolution of this dispute. China also wished to thank the third parties for their constructive participation in the proceedings. China welcomed the Panel's conclusion that Article 9(5) of the EU's Basic Anti-Dumping Regulation was "as such" inconsistent with the EU's obligations under Articles 6.10, 9.2 and 18.4 of the Anti-Dumping Agreement, Article I:1 of the GATT 1994, and Article XVI:4 of the WTO Agreement, and that the application of Article 9(5) of the Basic Anti-Dumping Regulation in the footwear original investigation was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The Panel had also found that the EU had acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement with respect to the determination of the amounts for administrative, selling and general costs and profit, and that the EU had acted inconsistently with its obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping

Agreement with respect to the confidential treatment, or the non-confidential summarization, of certain information in the original investigation and the expiry review.

83. While China was pleased that the anti-dumping measures challenged were no longer in force and that it had prevailed on several key legal claims raised in the dispute, China remained deeply dissatisfied with some aspects of the EU's anti-dumping practice that the Panel had not considered to amount to violations of the provisions cited by China in this dispute. Following the adoption of the Report at the present meeting, this dispute would move on to the implementation stage. With respect to the findings regarding Article 9(5) of the EU's Basic Anti-Dumping Regulation, China urged the EU to take the necessary positive steps to ensure prompt and full compliance with the Report's findings and recommendations. China emphasized that any amendment to Article 9(5) should not fall foul of the universal MFN obligation contained in Article I:1 of the GATT 1994, as the Panel in this dispute had judged to be the case with regard to Article 9(5). In that respect, China recalled the consistent jurisprudence of the Appellate Body, which had clarified that while "[n]either the words *'de jure*' nor *'de facto*' appear in Article I:1… Article I:1 covers also 'in fact', or *de facto*, discrimination".[10] Therefore, China urged that any amendment to Article 9(5), as well as any investigative procedure undertaken pursuant to the amended article, not only avoid explicitly targeting China *vis-à-vis* other WTO Members, but also be neither written nor implemented in such a way that the intent or effect of the article would be to afford China a treatment unequal to that afforded to other WTO Members. China hoped that the EU's termination of the anti-dumping duties on footwear that had been challenged in this dispute would mark, once and for all, the permanent end of over 16 years of trade-distorting protection of its footwear industry at the expense of Chinese producers. China also urged the EU to modify its anti-dumping practice accordingly so as to avoid similar violations in future investigations. China, therefore, requested that the DSB adopt the Report of the Panel in this dispute and called upon the EU to implement the findings and recommendations promptly.

84. The representative of the European Union said that the EU wished to thank the Panel and the Secretariat for their work, time and efforts dedicated to this dispute. The EU regretted that Article 9(5) of its Basic Anti-Dumping Regulation had been found by the Panel to be WTO-inconsistent "as such" and "as applied" in the original investigation. The EU noted that China had challenged this provision by advancing the same claims both in the "EC - Fasteners" and in the "EC - Footwear" disputes. The EU also noted that the two Panels had applied the same reasoning and had made the same findings with respect to the WTO-consistency of this provision. However, the EU wished to make two remarks.

85. First, the EU regretted that the Panel had decided to base its reasoning and its findings on Article 9(5) of the EU Basic Anti-Dumping Regulation entirely on the reasoning and on the findings contained in the Report of the Panel in the "EC - Fasteners" dispute, a Report that, at that time, had not been adopted and was under appellate review. Second, the EU wished to bring to the attention of the DSB that the findings of the Panel in the "EC - Fasteners" dispute on Article 9(5) had been reviewed on appeal. Although the Appellate Body had upheld those findings except for one, the legal argumentation of the Appellate Body had been different in some important respects. Furthermore, the finding of the "EC - Fasteners" Panel that Article 9(5) was in breach of the MFN obligation enshrined in Article I:1 of the GATT 1994 had been declared moot and of no legal effect. The Panel's findings in the "EC - Footwear" dispute on Article I:1 of the GATT were based on the same factual circumstances and legal reasoning as in the "EC - Fasteners" dispute and consequently the EU considered that this finding was at least *de facto* moot. Therefore, and in view of the Appellate Body's current workload, the EU had decided not to appeal this finding. However, having heard China insisting on the findings under Article I:1 of the GATT 1994, the EU wondered whether it had made the right choice and it seemed that the EU might have to come back to this particular issue. With regard to the other findings in the "EC - Footwear" dispute, the EU was pleased with the fact

[10] See for example para. 78, AB Report in Canada - Autos.

that the Panel had rejected almost the entirety of the great number of claims of WTO-inconsistency that had been advanced by China. The EU was also pleased that the Panel had refrained from making any implementation-related recommendations, as the measures at issue had expired on 31 March 2011. The EU took note of the fact that the Panel had taken issue with a detail of the dumping calculation of one producer and with the completeness of the non-confidential file. However, it considered that these circumscribed violations had not affected the overall soundness of the measures.

86. The representative of China said that her country took note of the EU's comments on the relationship between the Panel's findings in this dispute and the Appellate Body's findings in the "EC - Fasteners" dispute. Although there was some overlap in the claims in these two disputes, those two disputes were independent with independent Reports. Once the Panel Report in this dispute was adopted, the legal effect of the Panel Report and its rulings in this dispute was independent of the Appellate Body Report in the "EC - Fasteners" dispute. The EU should, *de jure*, implement the DSB's rulings and recommendations respectively, and the EU's implementation in this dispute should be consistent with all the Panel's findings and the WTO rules.

87. The DSB took note of the statements and adopted the Panel Report contained in document WT/DS405/R.

6. Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric

(a) Report of the Panel (WT/DS415/R – WT/DS416/R – WT/DS417/R – WT/DS418/R and Add.1)

88. The Chairperson recalled that, at its meeting on 7 February 2011, the DSB had established a single Panel to examine the complaints by Costa Rica, Guatemala, Honduras and El Salvador, pertaining to this dispute. The Report of the Panel, contained in document WT/DS415/R – WT/DS416/R – WT/DS417/R – WT/DS418/R and Add.1 had been circulated on 31 January 2012 as an unrestricted document. The Panel Report was before the DSB for adoption at the request of Costa Rica, Guatemala, Honduras and El Salvador. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

89. The representative of Costa Rica said that his country thanked the Panel for the excellent work it had done and the WTO Secretariat for its dedication and efforts. Costa Rica expressed satisfaction that the Panel's proceedings had been conducted entirely in Spanish. As the complainants had stated since the beginning of this dispute, the Panel had found that the preliminary and definitive safeguard measures imposed by the Dominican Republic on polypropylene bags and tubular fabric were inconsistent with its WTO obligations. These measures had serious consequences for Costa Rican exporters of these products and had systemic implications that went far beyond this dispute. In the first place, the Panel had found that Article XIX of the GATT 1994 and the Agreement on Safeguards applied to the measures contested. Indeed, these measures were not simply a tariff increase, rather they were measures other than ordinary customs duties. Their aim was to suspend the Dominican Republic's obligations in light of Articles I and II of the GATT 1994. They had been notified to the relevant Committee as safeguard measures and were justified as safeguard measures under Article XIX of the GATT 1994 and the Agreement on Safeguards. As pointed out before the Panel, Costa Rica believed that the only reasonable explanation of why the Dominican Republic had decided to apply safeguard measures pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards at that time, and not simply impose a tariff increase, was because a straightforward tariff increase would not have allowed the Dominican Republic to exclude the complainants from application of such measures given the existence of preferential bilateral commitments. The Panel Report had clearly determined the Dominican Republic's abusive use of the safeguards provisions in

this case, for highly protectionist purposes and in an unjustifiable manner. The Panel, like the Appellate Body in previous disputes[11], had reaffirmed the mandatory nature of the unforeseen developments criterion mentioned in Article XIX:1(a) of the GATT 1994 and had found that the Dominican Republic had acted inconsistently with that provision and with the Agreement on Safeguards.

90. The Panel had also found that the Dominican Republic defined the domestic industry arbitrarily, adapting it to the features of one enterprise alone, so the definition used was inconsistent with the obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 in this respect. The Panel had also found that the determinations of serious injury, both in the preliminary and the definitive measures, were contrary to the criteria and definitions in Article XIX of the GATT 1994 and the Agreement on Safeguards. In addition, the Panel had considered that, in as much as it had already found that the Dominican Republic had acted inconsistently with its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994, in respect of the finding of serious injury, it was not necessary to issue a finding on whether the Dominican Republic had determined a causal relationship with the serious injury (paragraph 7.328). Moreover, the Panel had also recognized that the Dominican Republic's investigating commission had not provided any explanation on this point (paragraph 7.354). Although Costa Rica respected the Panel's decision not to issue any finding on the causal relationship and understood that it would be difficult to show the existence of a causal link between the increased imports and serious injury that had not been proved, Costa Rica considered that a finding on this point would have helped to prevent such a situation in the future. The measures imposed by the Dominican Republic had led to a total halt of imports of polypropylene bags and tubular fabric from Costa Rica, following their imposition in March 2010. This had a disastrous impact on Costa Rica's industry. Moreover, Costa Rica was concerned that, in October 2011, the Dominican Republic had suspended liberalization of the definitive safeguard measure, contrary to what was indicated in its own time-table for liberalization, as could be seen from paragraph 2.24 of the Panel Report. In light of that and in view of the conclusions and findings in the Panel Report to be adopted at the present meeting, Costa Rica considered that the Dominican Republic should remove the measure immediately and fully.

91. The representative of Guatemala said that his country wished to express its satisfaction with the Panel Report to be adopted by the DSB at the present meeting. Guatemala thanked the Panel and the WTO Secretariat for their work in this dispute. In particular, Guatemala was pleased that the Panel's proceedings had been completed very rapidly and that they had been conducted in Spanish. As the administrative file and the measures contested were only available in Spanish, this not only reduced the high cost of translation, but had also enabled the parties to put forward their arguments effectively. Moreover, the Panel had had the opportunity to form its opinion on the basis of the original documents and did not have to rely on translations. Guatemala noted that the earlier a report was adopted, the earlier a positive solution to the dispute would be found. Guatemala hoped that the adoption of the Report would result in the prompt restoration of stable trade relations, without barriers, between Guatemala and the Dominican Republic. Guatemala considered that the Panel's decision that the measures in question were governed by Article XIX of the GATT 1994 and the Agreement on Safeguards was the right one. In particular, the Panel's finding that the measures suspended the Dominican Republic's obligations under the GATT 1994, notably those in Articles I:1 and II:1(b), second sentence, was relevant. This suspension of obligations, combined with the fact that the Dominican Republic had adopted the measures contested with the aim of remedying a situation of serious injury to the domestic industry brought about by an increase in imports, and that such measures had been notified to the Committee on Safeguards, citing both Article XIX of the GATT 1994 and other provisions in the Agreement on Safeguards, could not have allowed any other interpretation.

[11] Argentina - Footwear (EC) and Korea - Dairy.

92. In light of those conclusions and findings by the Panel, it was clear that when Members decided to increase tariffs to a level lower than the bound tariffs, they had a number of options. Nevertheless, once the Member had decided to initiate an investigation to impose a measure with the aim of remedying an increase in imports that was causing, or threatening to cause, injury to its domestic industry, that Member must necessarily comply with its obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards. Furthermore, in light of the various violations found by the Panel, Guatemala regretted that the Panel had not used its power to make suggestions for compliance, in conformity with Article 19.1 of the DSU. Given the shortcomings of the investigation, noted by the Panel, Guatemala considered that the immediate withdrawal of the definitive safeguard measure would be the only realistic option for compliance. In that regard, Guatemala hoped that the Dominican Republic would promptly withdraw the definitive safeguard measure and thus fully comply with its obligation to bring the measure into conformity with its obligations under the covered Agreements.

93. The representative of Honduras said that his country thanked the members of the Panel for their excellent work on this dispute. Honduras also welcomed the flexibility shown by the Panel and the WTO Secretariat in conducting the Panel's proceedings in Spanish. The Panel had reached important legal findings whose significance went far beyond the particular facts in this dispute. In particular, the Panel had agreed with the complainants that the measures contested constituted a safeguard measure and not a tariff increase, as contended by the Dominican Republic. Consequently, the Panel had found that the provisions under Article XIX of the GATT 1994 and the Agreement on Safeguards applied to these measures. The Panel had also found that, in imposing the safeguard measures, the Dominican Republic had failed to comply with the basic obligations in Article XIX of the GATT 1994 in as much as it had made no determination regarding unforeseen developments. Likewise, the Panel had concluded that the determinations on the domestic industry and the serious injury by the investigating authority were inconsistent with Articles 4.1(c) and 4.2(a) of the Agreement on Safeguards. For those reasons, the Panel had recommended that the Dominican Republic bring its measures into conformity with its obligations under the GATT 1994 and the Agreement on Safeguards. In order to comply with the DSB's recommendations, Honduras requested that the Dominican Republic withdraw its safeguard measure as rapidly as possible.

94. The representative of El Salvador said that his country thanked the Panel and the Secretariat for their work in this dispute. El Salvador was satisfied that the Panel had found that the complainants had managed to successfully challenge the following key issues that were very important in this dispute. First, the measure at issue was a safeguard measure, to which Article XIX of the GATT 1994 and the Agreement on Safeguards were applicable, and not a tariff increase, contrary to what the Dominican Republic had argued in its defence. Second, in light of this, the Panel had concluded that the Dominican Republic acted inconsistently with Article XIX of the GATT 1994 and the Agreement on Safeguards, with respect to the provisional and definitive safeguards in dispute, *inter alia*, in the following ways: (i) the Dominican Republic had acted in a manner inconsistent with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 3.1, last sentence, and 4.2(c) and 11.1(a) of the Agreement on Safeguards, according to the findings, in the preliminary and definitive determinations, on unforeseen developments and the effect of the obligations incurred under the GATT 1994 that were alleged to have resulted in increased imports causing serious injury; (ii) the Dominican Republic had acted in a manner inconsistent with its obligations under Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, according to the findings on the definition of the domestic industry; and (iii) the Dominican Republic had acted in a manner inconsistent with its obligations under Articles 2.1, 3.1, last sentence, 4.1(a), 4.2(a) and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, according to the findings on the existence of a serious injury. The Dominican Republic had also acted inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards, by failing to take all reasonable measures available to exclude Thailand from the application of preliminary and definitive safeguard measures.

95. Third, in view of the foregoing, the Panel, in conformity with Article 3.8 of the DSU, had concluded that the Dominican Republic failed to meet its obligations under the afore-mentioned Agreements, therefore nullifying or impairing the benefits accruing to the complainants under these provisions. As a result of the conclusions reached in its Report, and having found that the Dominican Republic had acted inconsistently with provisions of the GATT 1994 and the Agreement on Safeguards, the Panel had recommended that the Dominican Republic bring its measures into conformity with its obligations under these Agreements.

96. With regard to the implementation of the Panel's findings and recommendations, as El Salvador had pointed out in various forums, including other WTO committees and bodies, as well as during the Panel's proceedings, the Dominican Republic should withdraw this measure as soon as possible so as to stop unduly affecting Salvadoran imports of polypropylene bags and tubular fabric, as determined by the Panel. The industry had incurred substantial losses ever since the Dominican Republic imposed these measures. Furthermore, given that the Panel found that the Dominican Republic had failed to comply with the basic requirements contained in the provisions of the GATT 1994 and the Agreement on Safeguards, there was no reason why this safeguard measure should remain in force.

97. The representative of the Dominican Republic said that, in accordance with Article 16.4 of the DSU, his country wished to express its views on the Panel Report, which was before the DSB for adoption at the present meeting. The Dominican Republic thanked the Panel and the Secretariat for their work in this dispute and expressed satisfaction that the Panel's proceedings had been conducted in Spanish, bearing in mind the limited resources of the Secretariat. The Dominican Republic expressed its regret at the Panel's conclusion that the safeguard measures on imports of tubular fabric and polypropylene bags were inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards. The Dominican Republic was, in particular, concerned about the Panel's findings regarding the relationship between Articles I:1 and XIX:1(a) of the GATT 1994 and the qualification of the measures in light of Article II:1(b) of the GATT 1994. With regard to the relationship between Article I:1 and Article XIX:1(a) of the GATT 1994, the Dominican Republic understood that there may be conflicting opinions regarding the scope of the word "*obligation*" at the end of Article XIX:1(a) of the GATT 1994. Nevertheless, the interpretation that had been adopted by the Panel, according to which this word also applied to Article I:1 of the GATT 1994, despite what was stated in Article 2.2 of the Agreement on Safeguards, allowed for the possibility of applying selective safeguard measures. For that reason, no Member should accept the approach adopted by the Panel in this dispute.

98. With regard to the findings concerning the qualification of the measures as "*other duties and charges*" within the meaning of the second sentence of Article II:1(b) of the GATT 1994, the Dominican Republic believed that serious questions arose in relation to the need to justify measures that had neither been adopted under the WTO Agreement on Safeguards nor exceeded the bound tariff. The Panel's findings appeared to indicate that, even though such measures did not exceed the WTO bound tariff and had been adopted according to domestic or regional rules, they nevertheless had to be justified according to another provision in the GATT 1994 because they constituted "*other duties and charges*". This was another aspect of the Panel Report which the Dominican Republic regretted.

99. On the other hand, the Dominican Republic welcomed the fact that the Panel had reached the conclusion that there was an increase in imports in absolute terms in conformity with Article 2.1 of the Agreement on Safeguards. In that regard, the Dominican Republic wished to point out that the contested measures had helped to enable the domestic industry to carry out its modernization plan, precisely in order to face up to this increase in imports. Taking into account the foregoing, as well as the limited resources of both the Dominican Republic and the multilateral trading system, the Dominican Republic would not exercise its right to appeal. In conformity with Article 21.3 of the

DSU, the Dominican Republic would continue to examine the Panel Report within the next 30 days in order to inform the DSB of its intentions regarding implementation of the DSB's recommendations.

100. The DSB took note of the statements and adopted the Panel Report contained in WT/DS415/R – WT/DS416/R – WT/DS417/R – WT/DS418/R and Add.1.

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

(a) Report of the Appellate Body (WT/DS394/AB/R) and Report of the Panel (WT/DS394/R and Corr.1 and Add.1)

(b) Report of the Appellate Body (WT/DS395/AB/R) and Report of the Panel (WT/DS395/R and Corr.1 and Add.1)

(c) Report of the Appellate Body (WT/DS398/AB/R) and Report of the Panel (WT/DS398/R and Corr.1 and Add.1)

101. The Chairperson proposed that the three sub-items be taken up together. She drew attention to the communication from the Appellate Body contained in document WT/DS394/15 – WT/DS395/14 – WT/DS398/13 transmitting the Appellate Body Reports on: "China – Measures Related to the Exportation of Various Raw Materials", which had been circulated on 30 January 2012 in document WT/DS394/AB/R – WT/DS395/AB/R – WT/DS398/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

102. The representative of the United States said that his country would like to begin by thanking the Panel, the Appellate Body and the Secretariat assisting them for their hard work on this important and economically significant dispute. The United States would also like to give credit to its co-complainants, the EU and Mexico, for the excellent cooperation they had enjoyed throughout this dispute. That cooperation, as well as the active support of a number of third parties, had proved invaluable in confronting the pervasive WTO-inconsistent measures at issue in this dispute. China's export restraints (such as export duties and quotas) on the industrial raw material inputs at issue in this dispute had created significant unfair advantages for Chinese users of these inputs over their foreign competitors. These Chinese export restraints had also put economic pressure on foreign downstream producers to move their operations and their technologies to China. The United States had repeatedly raised its concerns regarding these export restraints through bilateral and multilateral engagement, including in China's annual Transitional Review Mechanism. The United States would have preferred to resolve its concerns through bilateral cooperation. However, when China had proved unwilling to address US concerns and remove its export restraints, the United States did not hesitate to initiate this dispute. The Panel and the Appellate Body Reports being adopted at the present meeting had sided with the United States and its co-complainants on the major issues in this dispute. The Reports were significant for a number of reasons. First, the Reports had confirmed that China's imposition of export duties on these raw materials was not consistent with its WTO obligations. The Reports had further made clear that such duties may not be justified pursuant to the exceptions provided in Article XX of the GATT 1994. The United States welcomed these findings, which affirmed a clear and critical commitment that China had made to all WTO Members when acceding to the WTO. In

addition to the products covered in this dispute, China currently maintained export duties on over 350 products. The United States looked forward to China's elimination of these duties.

103. Second, the Reports had also agreed with the US position that China's export quotas on the raw materials at issue were not justified under WTO rules as environmental protection measures under Article XX(b) of the GATT 1994; conservation measures under Article XX(g) of the GATT 1994; or as short supply measures under Article XI:2(a) of the GATT 1994. The Reports had made clear that any measures sought to be justified pursuant to Article XX(b) and XX(g) must be measures legitimately aimed at protecting health and the environment and conserving exhaustible natural resources, rather than measures aimed at providing economic advantages to domestic users of raw materials. In relation to Article XI:2(a), the Reports had confirmed that this Article was available to justify the temporary imposition of export restraints in cases of crisis. Importantly, the Panel had rejected China's approach that would have allowed Article XI:2(a) to exempt export restrictions in a much broader range of circumstances from the disciplines of Article XI:1.

104. The Reports were also significant for confirming that the DSU was effective and would provide complaining parties with findings and recommendations on measures maintained through legal instruments that may expire or recur in the course of a dispute. China had attempted to evade DSB recommendations, and, therefore, any implementation obligation, by arguing that the legal instruments maintaining its quotas and duties had expired after the Panel had been established. China's argument would have permitted it to create a "moving target", evading its obligations by withdrawing and later reintroducing its measures. Both the Panel and Appellate Body had decisively rejected this approach.

105. The United States said that it did note two areas of concern with the Appellate Body Report. First, the Appellate Body had concluded that one part of the panel requests, covering a number of other types of Chinese export restraints, had not drawn sufficiently "clear connections" for purposes of Article 6.2 of the DSU between legal instruments (that were set out in the requests) and claims (that were also set out in the requests). The United States believed this approach amounted to a new standard, which was not reflected in the text of the DSU, nor had been applied in prior reports or followed in other Members' panel requests. Unfortunately, as a result of adopting and applying the new standard in this dispute, a number of potentially distortive trade problems that had been identified in the Panel Report remained unaddressed.

106. Finally, as for several Appellate Body Reports that had been considered by the DSB in 2011, the United States wished to draw the DSB's attention to a procedural issue in relation to Article 17.5 of the DSU. In the Appellate Body's 60-day notice pursuant to Article 17.5 of the DSU, the Appellate Body had provided an estimated circulation date of 31 January 2012, or, if the US representative had counted correctly, 153 days after initiation of the appeal.[12] However, contrary to past practice[13], the Appellate Body had not mentioned in its notification that the parties had agreed at the outset that the appeal would exceed 90 days. Further, the agreement by the parties had not been reflected in the Report of the Appellate Body, as had also been the practice of the Appellate Body in prior disputes.[14] In order to provide transparency to the DSB, the United States and China had circulated their letter to the Appellate Body Division confirming that they would each deem a report in this proceeding, issued no later than 31 January 2012, to be an Appellate Body report pursuant to Article 17.5 of the DSU. While the United States welcomed the cooperation of China in providing transparency to the DSB, the United States did not consider that it was desirable for the Appellate Body to provide less

[12] WT/DS394/13 (8 December 2011).

[13] See, e.g., communication from the Appellate Body, US - Continued Suspension/Canada - Continued Suspension, WT/DS320/14, WT/DS321/14 (24 July 2008).

[14] See, e.g., Canada - Continued Suspension, WT/DS321/AB/R, at para. 29; EC - Export Subsidies on Sugar, WT/DS265/AB/R, at para. 7. 17.

transparency for Members on the circumstances leading to consideration by the DSB of a report that had been circulated outside the 90-day period. The United States said that it continues to believe that Members should be provided with the level of transparency that had been provided by the Appellate Body in all proceedings exceeding 90 days prior to 2011. Setting this issue of procedure to one side, in conclusion, the United States was extremely pleased to propose that the DSB adopt these important Reports. The United States said that all WTO Members are bound together through a global interdependence in the trade of raw materials. The policies of China, as had been reflected in the measures covered in this dispute, had caused massive distortions and harmful disruptions in supply chains throughout the global marketplace. The United States looked forward to action by China to address its export restraints on the raw materials at issue in this dispute and, more broadly, to meet its WTO obligations in light of these Reports.

107. The representative of the European Union said that the EU thanked the Appellate Body, the Panel, and their respective Secretariats for the work in this dispute. The EU welcomed the findings of the Panel and of the Appellate Body, according to which China's export restrictions on the raw materials at issue were in breach of China's WTO obligations and had not been justified under the exceptions foreseen in the GATT. The EU believed that these rulings were of systemic importance and in the interest of all WTO Members, as all countries were interdependent in terms of their raw materials supplies and global production chains. The EU particularly welcomed that the Appellate Body had confirmed that China had committed unconditionally in its Accession Protocol to the WTO not to levy export duties, and that this commitment could not be reduced by reverting to the general exceptions of the GATT. The language used in this Protocol made it clear that the commitment had not been intended to be subject to any exceptions apart from those specifically listed. Applying exceptions to these specific obligations would significantly distort the balance of rights and obligations negotiated between China and the WTO when China acceded to the WTO. The EU recalled that the Chinese export restrictions at issue had significantly distorted the market and had created competitive advantages of the Chinese manufacturing industry to the detriment of foreign competitors. Furthermore, these policies had put pressure on foreign producers to move their operations and technologies to China, as companies outside China were either cut off supplies or had access only at much higher prices than companies in China. The EU supported and encouraged all countries to promote a cleaner and sustainable production of raw materials. Environmental protection and sustainable resource management were legitimate aims, recognized and fully achievable within WTO rules. However, the EU strongly believed that export restrictions were not the appropriate tool to promote these aims.

108. The EU, therefore, welcomed the clear findings that these aims could not be used as a pretext to pursue protectionist industrial policies that aimed at protecting domestic industry from foreign competition, or to force foreign firms to relocate their businesses. In light of the clear findings of the Panel and the Appellate Body, the EU trusted that China would promptly take the necessary step to remedy this long-standing discrimination and thus provide for WTO compatibility. Furthermore, the EU believed that these clear findings had an effect beyond the products at issue in this dispute and expected China to revisit its overall export restrictions regime in this light.

109. The representative of Mexico said that his country welcomed the opportunity to express its views regarding this matter. Mexico thanked the Panel and the Appellate Body for their work on this dispute, as well as the WTO Secretariat and the Appellate Body Secretariat. Mexico welcomed the adoption of the Reports of the Panel and the Appellate Body in this dispute regarding the exportation of various raw materials. Mexico had initiated this case, with the support of its co-complainants because the restrictions improperly imposed by China on Mexican raw materials were seriously affecting the competitiveness of Mexican steel producers, making it difficult for them to compete with Chinese steel producers. Chinese steel producers benefitted unfairly from China's industrialization policies, whose effect was to raise the price of raw materials from abroad and to lower the price in China so that Chinese producers could export finished products at prices which Mexican-finished

products found hard to compete with. During the negotiations on China's accession to the WTO, some Members had, at the Working Party, expressed their concern about the various taxes and charges imposed then by China on exports. Consequently, as one of the conditions for its accession to the WTO, in its Protocol of Accession, China had undertaken to abolish all export taxes and charges, except export duties on 84 products listed in Annex VI to its Protocol of Accession.

110. Nonetheless, disregarding that commitment, China had imposed export duties on a large number of products that were not listed in Annex VI when it had acceded to the WTO. The Panel had concluded, and the Appellate Body had confirmed, that China had acted inconsistently with paragraph 11.3 of its Protocol of Accession by maintaining export duties on the raw materials that were the subject of this dispute and that the general exceptions in the GATT 1994 did not apply to this paragraph in its Protocol of Accession. In view of those conclusions and the relevant recommendations, Mexico hoped that China would respect the commitment made following its accession to the WTO and would lift the export duties imposed on the products that were the subject of this dispute. Furthermore, Mexico hoped that, with the adoption of the Reports, China would review its tariff policy, under which it continued to impose export duties on a large number of products, the majority of which were not listed among the 84 products exempted from this obligation. In addition, during its negotiations on accession to the WTO, some Members had also expressed their concern about the restrictions then being imposed by China on the export of several raw materials. In light of those concerns, China had confirmed that it would comply with the WTO rules with regard to non-automatic export licences and export restrictions. The Panel had concluded, and the Appellate Body had confirmed, however, that China had acted inconsistently with Article XI of the GATT 1994 by maintaining export quotas for the raw materials that were the subject of this dispute, which were not shown to be justified either in terms of environmental measures, for the conservation of natural resources or for preventing or remedying acute scarcity of essential goods. In view of these conclusions and the relevant recommendations, Mexico hoped that China would respect the commitment made upon its accession to the WTO and abolish the export quotas imposed on the products that were the subject of this dispute.

111. Finally, Mexico regretted that, because of a decision on procedural issues, the co-complainants had remained without any conclusions or recommendations on various aspects of China's administration of quotas, the administration of export licences or its scheme applying minimum prices. The fact that there were many claims regarding a large number of measures to be found in numerous legal instruments should not lay an additional burden on the complainant as far as the requirements of Article 6.2 of the DSU were concerned. What was certain was that, even though there were no recommendations on these claims, there were various aspects of China's administration of export restrictions on raw materials that were inconsistent with WTO rules. That should suffice for China to take into account the Panel's conclusions on these measures and to modify its policy on the administration of quotas, licences and minimum prices. Mexico expressed its concern that, because of preliminary objections concerning Article 6.2 of the DSU, some claims could be eliminated from the Panel's mandate right up to the appeal stage even though both the co complainants and the respondent had invested a considerable amount of time in examining and explaining them throughout the whole proceedings. This was perhaps an important point to be considered when improving the WTO dispute settlement system. Moreover, Mexico considered that preliminary objections should not become a mere dispute strategy intended to avoid going into the substance of a matter instead of being a legitimate recourse to ensure that the defence in a case could be put forward properly. Mexico reaffirmed its confidence in the rules-based international trading system.

112. The representative of China said that her country thanked the Appellate Body, the Panel and the Secretariat for their time and efforts devoted to this dispute. China welcomed the fact that the Appellate Body had found that Section III of the complainants' panel requests did not meet the requirements of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", and, therefore, had declared moot and of no legal effect the

Panel's findings regarding claims alleged on export quota administration and allocation, export licensing requirements, minimum export price requirement, and quota bidding. In fact, China had made a number of legal and factual arguments on these issues, and most of them had been supported by the Panel. The Appellate Body had also found that the Panel had erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994, and consequently reversed the interpretation by the Panel. However, China deeply regretted that the Panel and the Appellate Body had concluded that the exceptions under Article XX of the GATT 1994 could not be available to China to defend its export duties obligation under Paragraph 11.3 of China's Accession Protocol. This finding related to a Member's fundamental right under the WTO Agreement, and some of its interpretation had an impact not only on China but also on other WTO Members. Thus, China wished to raise a number of systemic concerns. First, Members had the right to promote "fundamental societal interests" besides trade liberalization under the WTO Agreement. In that regard, the resort to exceptions was important to allow Members to balance trade commitments with the right to pursue non-trade interests, such as the protection of human health and the conservation of exhaustible natural resources. China had not, in acceding to the WTO, given up its right to promote these interests when regulating trade in goods. It was not proper for the Appellate Body and the Panel to arrive at its finding based on the fact that Paragraph 11.3 of China's Accession Protocol did not include a reference to Article XX of the GATT. Given the fundamental importance of Article XX to the rules governing the trade in goods, it could not be lightly concluded that a Member had abandoned its inherent right to pursue "fundamental societal interests" other than trade, unless the Member concerned had given up such right through explicit and specific language.

113. Second, the accession of China should apply to the WTO Agreement and the Multilateral Trade Agreement annexed thereto, and China's Accession Protocol should be an integral part of the WTO Agreement, which included GATT 1994. Therefore, China's Protocol of Accession and the multilateral agreement, including the GATT 1994, formed an organic single body of rules that underlay China's rights and obligations under the WTO Membership. Some provisions in China's Accession Protocol and Working Party Report also demonstrated the links between China's Accession Protocol and the GATT 1994. In the "China - Audiovisual" dispute, the Appellate Body had stated that "…bearing in mind that treaty interpretations is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise…". Unfortunately, the Appellate Body and the Panel had not accomplished the "holistic exercise" in this dispute. The reasoning of the Appellate Body and the Panel was mainly based on the text of Paragraph 11.3 of China's Accession Protocol and "so-called" context, but it was quite weaker than it seemed. Furthermore, it had not deepened the "objective and purpose", despite citing Article 31 of the Vienna Convention.

114. Third, China recalled that "new" WTO Members should be placed on equal footing with "old" WTO Members in this regard. The accession protocols of Members that had acceded prior to the WTO Agreement's entry into force were part of the GATT 1994, automatically allowing these Members to rely on Article XX with respect to goods-related obligations assumed in the accession protocols. The same principle must apply to Members acceding after the WTO Agreement's entry into force. Hence, newly acceding Members may also rely on Article XX with respect to the goods-related obligations they had assumed in their accession protocols. Otherwise, there would be a two-tier membership, which was neither legally sustainable, nor systemically desirable. For the purpose of protecting the environment and exhaustible natural resources, the Chinese government had, in recent years, reinforced its administration on certain resource products, especially the "high-pollution, high-energy-consuming and resource-dependent" products. In China's view, the WTO rules, at the time of liberalizing trade, allowed a Member to take necessary means to realize its policy objectives such as protection of the exhaustible resources and the environment. China would further assess the rulings of the Panel and the Appellate Body in this dispute, and apply reasonable policies to administer resource products in accordance with the WTO rules, so as to realize sustainable development.

115. The representative of Colombia said that his country thanked the Appellate Body for its work in this dispute. In particular, Colombia wished to thank the Appellate Body for its conclusion with respect to Section III of the complainants' panel requests. In this regard, Colombia noted there were two issues: one was the identification of the specific measures in the dispute and the other one the legal claims. In Colombia's view, the Panel had erred by finding that the complainants, in their requests, had not made a clear link between the challenged measures and the WTO obligations claimed to have been in breach. Fortunately, the Appellate Body had corrected that finding. Colombia also thanked the Appellate Body for its clarification that measures aimed at conservation of exhaustible natural resources could be covered by the exceptions under Article XX(g) of the GATT 1994.

116. The representative of Canada said that his country welcomed the Appellate Body's confirmation of the Panel's main findings in this dispute, as had been described in some detail by the parties to the dispute. Canada encouraged China to take prompt action in bringing the export measures in question into conformity with its WTO obligations. This would improve fairness in international trade and strengthen certainty in the marketplace for the materials in question. From a more systemic perspective, and without making a comment on the consequences in this dispute, Canada also appreciated the additional guidance provided by the Appellate Body on how panels should address requests for preliminary rulings. This guidance would help bring about more consistent and predictable practice. Canada was disappointed with the Panel's refusal to grant extended third-party rights in this dispute. Canada was a strong proponent of providing third parties greater access to dispute proceedings, and had worked with many others in the DSU negotiations to extend existing rights. The Panel's decision in this dispute was a reminder that Members could not continue to count on ad hoc solutions to accomplish widely-shared objectives for systemic improvements to the dispute settlement system. On a procedural matter, Canada supported the US concern about inconsistencies in the transparency practices regarding extensions to the time-lines for the circulation of Appellate Body reports and looked forward to return to the regularized practice.

117. The representative of Japan said that his country thanked the Appellate Body and the Panel for the time and effort they had devoted in these disputes and for their respective Reports. As a third party, Japan had actively participated in these proceedings. Even though these disputes had presented complex issues of facts and had raised difficult legal questions over export restrictions, the Panel's and the Appellate Body's analyses were thorough, and their overall findings were sound and well-reasoned. In the wake of the increasing trend of the export restrictions being observed, these Reports would not only provide a useful guidance for the future implementation efforts by China and for the ultimate resolution of this dispute, but would also send Members a clear message against the proliferation of export restrictions. In that regard, Japan wished to note two important points contained in the Reports of the Panel and Appellate Body. First, the Panel had noted that "Article XX(g) cannot be invoked for GATT-inconsistent measures whose goal or effects is to insulate domestic producers from foreign competition in the name of conservation".[15] China had not appealed this finding. This finding, among others, had effectively established the principle of non-discrimination between products sold for domestic users and those exported for foreign users for non-tariff export restrictions that were introduced for the resource conservation objective. In Japan's view, not only China but also all Members were required to respect this non-discrimination principle immediately.

118. Second, Japan understood that the Appellate Body had endorsed the unconditional nature of China's commitment on export duty elimination or reduction undertaken in Paragraph 11.3 of China's Accession Protocol by finding that the proper interpretation of that paragraph did not make available to China the exceptions under Article XX of the GATT 1994. There appeared to be no reason to deny that this was also valid with respect to products other than the raw materials at issue in these cases.

[15] Panel Report, para. 7.408.

Having interest in regulating export duties, Japan hoped that China would fully and promptly implement this commitment, which it had promised to undertake as a condition to its accession to the WTO. Furthermore, Japan hoped that this finding would give the opportunity for the Members who implement export duties to reflect on their practice.

119. Japan wished to briefly touch upon two questions of a procedural but systemic nature that had been addressed in the Reports of the Appellate Body and the Panel. First, the Appellate Body and the Panel had opened the door for future panels to issue recommendations on a measure at issue found to be WTO-inconsistent when it existed at the time of the panel establishment, but had been removed before the issuance of the final report. If a measure at issue was found to be WTO-inconsistent without recommendations, the complaining Member had no way to pursue the claim in the compliance proceedings, but to endlessly initiate a new case. This potential loophole for the "moving-target" tactics, which would render the WTO dispute settlement process useless, had been examined and addressed by the Appellate Body and the Panel. Specifically: (i) the Appellate Body had squarely rejected China's argument that, because the subsequent measures replacing the measures that had existed at the time of the panel establishment, the recommendations on the latter should have no consequences for the former replacement measures. While recognizing the problem of "a moving target" China's approach would create, the Appellate Body had found "[t]he fact that the Panel directed its findings and recommendations at the legal situation prevailing in 2009 does not mean that China has no compliance obligations with respect to the Panel's findings".[16] As the Appellate Body further explained, "a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption"[17] of the DSB; and (ii) the Appellate Body also made it clear that its previous reports "did not suggest that a panel was precluded from making a recommendation on 'expired measures'".[18] The Appellate Body had acknowledged that "[t]he absence of a recommendation […] would effectively mean that a finding of inconsistency involving such measures would not result in implementation obligations for a responding member, and in that sense would merely be declaratory".[19] Although Japan had certain reservations as to whether the notion of the "series of measures" was needed in order for challenged measures to be the subject of recommendations, Japan was of the view that the Appellate Body's finding in these disputes was a good step forward in the right direction.

120. Second, with respect to the issue of the sufficiency of the complainants' panel request under Article 6.2 of the DSU, Japan duly noted that the Appellate Body reaffirmed its previous finding that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction"[20], indicating that due process claim or analysis had no place in the examination of whether a panel request was defective under Article 6.2 of the DSU. In any event, Japan would carefully examine the possible implication of the Appellate Body's findings for the extent of "clear linkages" that a panel request must provide under Article 6.2 between the challenged measure and the WTO obligations claimed to have been breached. Finally, with respect to the issue relating to Article 17.5 of the DSU which the United States had referred to, Japan agreed that, for the purpose of full transparency, parties' consents should have been mentioned in the Appellate Body Report, as had been the customary practice of the Appellate Body in the past.

121. The representative of Costa Rica said that his country had not participated as a third party to this dispute and would, therefore, not comment on the substance of the matter. However, he wished to state that Costa Rica supported the concerns raised by Canada, the United States and Japan

[16] Appellate Body Report, para. 262.
[17] Appellate Body Report, para. 260.
[18] Appellate Body Report, para. 264.
[19] Appellate Body Report, para. 264.
[20] Appellate Body Report, para. 233 (quoting the Appellate Body Report, EC and Certain member States – Large Civil Aircraft, para. 640).

regarding the circulation of the Appellate Body Report outside of the 90-day period and the need for transparency for all Members when such delays were to take place.

122. The representative of Norway said that her country had participated in this dispute as a third party and wished to thank the Panel, the Appellate Body and the Secretariat for their work on this dispute. Norway had no comments with regard to the findings of the Appellate Body but noted that the Report had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. In Norway's view, it was of systemic importance that the Appellate Body ensured transparency regarding this issue. As had been pointed out by previous speakers, the proceedings in this case had raised some concerns about the lack of such transparency.

123. The representative of Australia said that her country was not a third party in this dispute but noted that this was in fact a dispute of fundamental systemic importance. Australia looked forward to examining the findings in greater detail and to China's status reports on implementation. Australia supported the statements made by the United States, Japan, Canada, Norway and Costa Rica on the issue of transparency. Australia had made interventions in the past on this issue, in particular where a report was circulated outside the normal 60 or 90-day time period provided for appeals. It was of fundamental importance that Members were made aware of the circumstances, including that the consent of the parties had been provided for the circulation of the report outside the normal time-frames. Australia urged the Appellate Body to reconsider its more recent practice of not providing the necessary level of transparency. That level of transparency was in the interest of not only the Members but the Appellate Body and the Secretariat as a whole.

124. The representative of Guatemala said that his country had not participated as a third party in this dispute and, therefore, it would not comment on the substance. However, Guatemala wished to comment on the procedural issues regarding Article 17.5 of the DSU. First, for the well-known reasons, the Appellate Body required more time than the 90-day period provided for in Article 17.5 of the DSU in order to complete its reports. Second, the Appellate Body had changed its practice regarding transparency in cases where it was necessary to go beyond that 90-day period. In Guatemala's view, this matter should be discussed by Members so as to ensure that the Appellate Body had sufficient time to produce high-quality reports and that disputes were resolved promptly. Finally, Guatemala did not understand why the Appellate Body had changed its practice on transparency. Guatemala hoped that, in future cases, the Appellate Body would be able to ensure full transparency in matters related to the procedural issues under Article 17.5 of the DSU.

125. The DSB took note of the statements, and adopted the Appellate Body Reports contained in WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R and the Panel Reports contained in WT/DS394/R and Corr.1 and Add.1; WT/DS395/R and Corr.1 and Add.1; WT/DS398/R and Corr.1 and Add.1, as modified by the Appellate Body Reports.

8. Appointment of Appellate Body members

126. The Chairperson recalled that, at the 20 January 2012 DSB meeting, she had made a statement under "Other Business" informing delegations about certain matters related to the Appellate Body. She had drawn attention to the communication from the Appellate Body that was circulated in document WT/DSB/56 containing the letter of resignation of Mr. Shotaro Oshima, Appellate Body member. In that regard, she had informed delegations that, pursuant to Rule 14 of the Working Procedures for Appellate Review, Mr. Oshima's resignation would take effect 90 days from the date of his letter, which would mean that effectively after 6 April 2012 there would be a vacancy in the Appellate Body, which would have to be filled. She had also indicated that the first four-year term of office of Mr. Oshima was to expire on 31 May 2012. At the January meeting, she had also informed delegations that the first four-year term of office of Ms. Yuejiao Zhang would expire on 31 May 2012 and that Ms. Zhang had expressed her interest and willingness to be reappointed for a second four-

year term. The Chairperson recalled that, at the DSB meeting on 20 January 2012, she had announced her proposal with regard to the selection process for appointment of a new Appellate Body member to replace Mr. Oshima and the process of consultations on the possible reappointment of Ms. Zhang. She had also indicated to delegations that her door was open to discuss these matters, if necessary, and that, if there had been no objection, she would submit her proposal to the DSB for action at the regular DSB meeting in February 2012. In light of this, it was her intention at the present meeting to propose that the DSB agree to six elements along the lines proposed at the January 2012 meeting: (i) to agree to launch as from 22 February 2012 the selection process for appointment of a new member of the Appellate Body for the position currently held by Mr. Shotaro Oshima; (ii) to agree that the new member be appointed for a four year term beginning 1 June 2012 or as soon thereafter as possible; (iii) to agree to set a deadline of 30 March 2012 for Members' nominations of candidates for Mr. Oshima's position; (iv) to agree to establish a Selection Committee based on the procedures set forth in document WT/DSB/1, which would consist of the Director-General and the 2012 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council and the DSB, and would be chaired by the 2012 Chair of the DSB; (v) to request the Selection Committee to conduct interviews with candidates in April 2012, to hear the views of WTO Members in the first half of May 2012, and to make its recommendation to the DSB by 11 May 2012, if possible, so that the DSB could take a decision at its regular meeting on 24 May 2012; and (vi) to ask the DSB Chair to carry out consultations on the possible reappointment of Ms. Yuejiao Zhang, who was eligible for reappointment for a second four-year term beginning on 1 June 2012, and who had expressed her interest and willingness to be reappointed.

127. The DSB took note of the statement and agreed to the Chairperson's proposal.

128. The Chairperson said that, as it had been done in the past, nominations of candidates, together with their Curricula Vitae, should be addressed to the Chair of the DSB in care of the Council and TNC Division. Subsequently, the CVs would be circulated as Job documents to all Members.

129. The DSB took note of the statement.

9. Election of Chairperson

130. The Chairperson said that the consultations on a slate of names for the appointment of Chairpersons to WTO Bodies, including the DSB, were on-going. As Members were aware, at its meeting on 14 February 2012, the General Council had agreed to reconvene at an appropriate time once a consensus was reached on a slate of names following the consultations. It was her hope that the consultations would be concluded shortly and that a new DSB Chair would be elected at the regular meeting of the DSB to be held in March 2012.

131. The DSB took note of the statement.