

# WORLD TRADE ORGANIZATION

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**Dispute Settlement Body**  
**21 September 2010**

## **MINUTES OF MEETING**

Held in the Centre William Rappard  
on 21 September 2010

*Chairman: Mr. Yonov Frederick Agah (Nigeria)*

Prior to the adoption of the Agenda, the Chairman made a statement to welcome the new Director of the Legal Affairs Division, Ms. Valerie Hughes.

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<sup>1</sup> On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

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1. The Chairman recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue was resolved.

- (a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.94)

2. The Chairman drew attention to document WT/DS176/11/Add.94, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning 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 7 September 2010, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the First Session of the current, 111th Congress. The Second Session

of the 111th Congress had begun in January 2010. The Committee on the Judiciary of the US House of Representatives had held a hearing on certain of those proposals on 3 March 2010. In addition, the US administration was working with Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Union said that, at the present meeting, the United States was presenting yet another status report in this dispute. The EU hoped that the US authorities would very soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba said that October 2010 would mark twelve years since Section 211 was enacted. According to the Appellate Body Report issued in 2002, Section 211 was inconsistent with national treatment and the most-favoured-nation principles. Cuba was extremely concerned that the United States failed to comply with what had been agreed at the international level and continued to do nothing about this dispute. Cuba reiterated that, pursuant to Article XVI:4 of the Marrakesh Agreement, each Member was required to ensure the conformity of its laws, regulations and administrative procedures with its WTO obligations. At many DSB meetings, the United States had reiterated that the concerns raised by Members in relation to the situation of protracted non-compliance were unfounded. But how could Members possibly be told not to be concerned about this dispute which, in spite of the Appellate Body's ruling dating back more than eight years, had not yet been resolved? This dispute was a matter of concern to many Members not only because it involved a developing-country Member, but because the United States continued to push other Members to establish and enforce high standards of intellectual property rights, including criminal penalties. A Member that ignored an Appellate Body ruling, as was the case in this dispute, undermined the dispute settlement system. What was the point of having recourse to the system in order to find a solution if the rulings were not respected? Pursuant to Article 23 of the DSU, Members seeking to redress a violation of obligations under the covered agreements shall have recourse to the rules and procedures of the DSU. This would avoid adverse effects of unilateral actions on the multilateral trading system. By choosing not to respect the ruling, the United States, *de facto*, opted for unilateral action, which could, in turn, lead to other actions in response. The rules which all Members, without exception, had undertaken to abide by were, therefore, not being observed. The point was not to comply with the recommendations and rulings in the majority of disputes, but to comply with the Appellate Body's rulings in all disputes. The United States constantly reminded its trading partners that compliance with intellectual property rules was imperative. The USTR spokesman had recently stated that the Special 301 Report was an essential tool which enabled the US administration to protect intellectual property rights beyond its borders. Cuba asked the United States who was ensuring that third-party intellectual property rights were respected in the United States? The fact that the United States permitted and facilitated the theft of renowned trade marks such as the HAVANA CLUB trade mark was a serious matter. Cuba, once again, called upon the parties to this dispute to take urgent action to fully repeal Section 211 as this was the only way to end this dispute.

6. The representative of Ecuador said that his country noted the US status report but, once again, was compelled to reiterate its previous statement on this matter. Ecuador regretted that the United States did not mention when it expected to comply with the DSB's recommendations and rulings. Ecuador fully supported Cuba's statement. At the present meeting, Ecuador did not wish to refer to the provisions of Article 21 of the DSU but wished to register its regret that a dispute that affected the interests of a developing-country Member had not been resolved for a long period of time. Cuba's intellectual property rights were usurped and, if Cuba were to file its own complaint, it would have to engage in a lengthy and costly litigation. Ecuador, once again, urged the US administration and Congress to repeal Section 211. Finally, Ecuador, once again, stressed the need for the EU to provide detailed information on the steps being taken to resolve this dispute.

7. The representative of the Bolivarian Republic of Venezuela said that her country, once again, supported Cuba on this matter and asked the United States to put an end to the economic, trade and

financial embargo, which had been imposed on Cuba. Since the 1960s, the embargo had led to a series of actions on the part of the United States. In this case, the United States failed to comply, for more than eight years, with the Appellate Body's ruling to repeal the legislation that was inconsistent with the TRIPS Agreement and the Paris Convention for the Protection of Intellectual Property. As a WTO Member, Venezuela was yet again disappointed with the US status report, which remained the same for many years, stating that "the US Administration will continue to work with the US Congress with respect to appropriate statutory measures that would resolve this matter". In Venezuela's view, this constituted "action without results". Venezuela, therefore, asked the United States to provide further information on the work supposedly being carried out with Congress, so that Members would know whether there had been any progress, after so many years, regarding the US compliance with the Appellate Body's decision. In addition to the prejudice caused to Cuba, Venezuela was concerned that the DSB's credibility would be undermined and weakened by the US failure to comply with the WTO obligations. As it had done on previous occasions, Venezuela urged the United States to comply with the Appellate Body's rulings.

8. The representative of Brazil said that his country thanked the United States for its status report. Once again, the United States reported no progress in the implementation of the DSB's recommendations and rulings in this dispute. Thus, Brazil joined previous speakers in urging the United States to bring its measures into conformity with the multilateral trade disciplines without further delay.

9. The representative of China said that her country thanked the United States for its status report. China, once again, regretted that the report simply reiterated what had been stated over the past several years and that, after more than eight years since the adoption of relevant Reports by the DSB, there was no sign of compliance in this dispute. In China's view, this situation was not in line with the principle of prompt implementation stipulated in the DSU provisions, and that it was highly inappropriate for a developed-country Member to maintain such prolonged non-compliance in a dispute that involved the interests of a developing-country Member. China, therefore, strongly supported Cuba and urged the United States to implement the DSB's decision without further delay.

10. The representative of Argentina said that his country thanked the United States for its status report and reiterated its concern about the lack of progress on implementation in this dispute. US failure to implement the DSB's recommendations undermined the credibility of the system and had an impact that went beyond trade implications. Argentina, once again, urged the parties, and in particular the United States, to take the necessary measures to ensure full implementation of the DSB's ruling.

11. The representative of Nicaragua said that her country regretted that the United States failed to implement the DSB's recommendations and rulings. Nicaragua hoped that the United States was working towards putting into place necessary measures in order to bring its legislation into compliance with the DSB's rulings in order to end this long-standing dispute. Once again, Nicaragua urged the United States to comply with its obligations so as to ensure the effective functioning of the WTO and to maintain the balance between the rights and obligations of Members.

12. The representative of Mexico said that his country thanked the United States for its status report. At each DSB meeting, in the context of the consideration of the present item, Members urged the United States to comply with the DSB's rulings and recommendations. Mexico noted that one of the issues discussed in the ongoing DSU negotiations was the issue of how to improve compliance. In Mexico's view, the Section 211 dispute could be a good case study in this regard.

13. The representative of Chile said that his country thanked the United States for its status report and regretted the lack of progress in the implementation of the DSB's rulings and recommendations in this dispute. Chile, once again, called upon the parties to take all necessary measures to fully implement the DSB's recommendations in order to resolve this long-standing dispute.

14. The representative of the Dominican Republic said that her country thanked the United States for its status report, which, however, did not report on any progress. The Dominican Republic supported the statements made by previous speakers urging the United States to comply with the DSB's decisions and to implement the DSB's recommendations as soon as possible.

15. The representative of the United States said that, in light of the DSB's rules of procedure that encouraged delegations to keep their statements brief and to avoid repetition, the United States noted that it had addressed the "systemic" concerns expressed by some Members at previous DSB meetings, including the 31 August 2010 DSB meeting. Thus, the United States referred Members to its previous statements.

16. The representative of Cuba said that, once again, her country wished to thank those delegations who had urged the parties to resolve this dispute and to respect Cuba's rights. In Cuba's view, the United States was not interested in the concerns raised by Members over the past eight years. This was a mockery of those Members who had expressed concerns over the lack of compliance in this dispute. The US hegemonic attitude undermined not only the multilateral trading system, but also the system of international relations.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.94)

18. The Chairman drew attention to document WT/DS184/15/Add.94, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

19. The representative of the United States said that his country had provided a status report in this dispute on 7 September 2010, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. With respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

20. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. Japan took note of the US report that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. With respect to the remaining part of the DSB's recommendations and rulings, Japan was still waiting for statutory action to be taken by the United States. Japan hoped that the United States would soon be in a position to report to the DSB on more tangible progress. Japan noted that 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".<sup>2</sup>

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<sup>2</sup> Article 3.3 of the DSU.

Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.69)

22. The Chairman drew attention to document WT/DS160/24/Add.69, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

23. The representative of the United States said that his country had provided a status report in this dispute on 7 September 2010, in accordance with Article 21.6 of the DSU. The US administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

24. The representative of the European Union said that his delegation remained disappointed that the United States had again reported non-compliance. As had regularly been stated, the EU remained ready to work with the US authorities towards the resolution of this dispute.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.32)

26. The Chairman drew attention to document WT/DS291/37/Add.32, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

27. The representative of the European Union said that, once again, his delegation noted that the EU regulatory procedures on biotech products continued to work as foreseen in the legislation. At the 31 August 2010 DSB meeting, the EU had already referred to the adoption by the Commission, on 28 July 2010, of five new authorizations for GM maize MON89034xNK603, Bt11xGA21, MON88017xMON810, 59122x1507xNK603 and 1507x59122. Those five authorization decisions raised the number of GMOs authorized since the date of establishment of the Panel to thirty-four. In addition, the Commission had adopted a decision for the renewal of the authorization of another GM maize (Bt11). Progress had also been made on other applications for authorization. For example, the European Food Safety Agency had delivered favourable opinions on four GM events (GM maize MIR604xGA21, GM maize Bt11xMIR604 and GM maize Bt11xMIR604xGA21 and GM cotton 281-24-236 x 3006-210-23). The EU hoped that the United States and the EU would continue their constructive technical dialogue on which they had re-engaged on 20 July 2010. The EU hoped this constructive approach based on dialogue would allow the parties to leave litigation aside.

28. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. As the United States had explained at previous DSB meetings, the EU had not resolved the fundamental problems in the operation of its regulatory system for biotech products. The United States urged the EU to address those matters and would continue to monitor any new developments.

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

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.12)

30. The Chairman drew attention to document WT/DS322/36/Add.12, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

31. The representative of the United States said that his country had provided a status report in this dispute on 7 September 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

32. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. The United States had stated in its status reports that it "will continue to consult with interested parties in order to address the findings contained in [the Appellate Body and the panel] reports" adopted by the DSB on 31 August 2009. Japan took this statement as an expression of commitment by the United States to fully implement the DSB's recommendations and rulings. Once again, Japan called on the United States to meet its commitment by taking immediate and concrete action so as to resolve this dispute.

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

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

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.9)

35. The Chairman drew attention to document WT/DS350/18/Add.9, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

36. The representative of the United States said that his country had provided a status report in this dispute on 7 September 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

37. The representative of the European Union said that the EU's concerns about the US lack of implementation in this dispute were well known and were recorded in the minutes of past DSB meetings. The EU continued to urge the United States to reconsider its Section 129 determination immediately and to implement the DSB's rulings.

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

- (g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.3)

39. The Chairman drew attention to document WT/DS294/38/Add.3, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

40. The representative of the United States said that his country had provided a status report in this dispute on 7 September 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had already taken a number of steps to implement the DSB's recommendations and rulings in this dispute. The United States would continue to consult with interested parties, including with the EU, with regard to the remaining issues. As Members were aware, the EU had requested authorization from the DSB to suspend concessions or other obligations in this dispute, and the United States had objected to the EU's request. Therefore, pursuant to Article 22.6 of the DSU, the matter had been referred to arbitration. Furthermore, the United States was pleased to announce that, in response to a joint request by the United States and the EU, on 8 September 2010, the Arbitrator had issued a communication stating that it had decided to suspend its work. The communication of the Arbitrator had been circulated as document WT/DS294/39.

41. The representative of the European Union said that his delegation thanked the United States for its status report. The EU would continue consulting with the United States concerning the next steps in the implementation. The EU welcomed US reassurances that it was taking the necessary steps to bring itself into compliance and that the imposition of sanctions would not be necessary. The EU was confident that the United States would endeavour to fully meet its WTO obligations and had, therefore, made a joint request to the Article 22.6 DSU Arbitration Panel in this dispute to suspend the arbitration proceedings. On 8 September 2010, the Arbitrator accepted the request. Having said that, the EU wished to stress that its position on the issue of US zeroing remained unaltered, and there should be no doubt that the EU would not hesitate to resume the arbitration proceedings should there be no progress or insufficient progress on the side of the United States in the foreseeable future.

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

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

- (a) Statements by the European Union and Japan

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

44. The representative of the European Union said that, as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry and, hence, put an end to the condemned measure. The 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 in this dispute.

45. The representative of Japan said that the US Customs and Border Protection had published in June 2010, "FY2010 Preliminary CDSOA Amount Available" and in September 2010, "FY 2010 Certifications Received", which was a list of the claims filed by US domestic industries for FY2010



distributions.<sup>3</sup> Thus, a new round of distributions under the CDSOA appeared to be underway. Those latest actions showed that the CDSOA remained operational. As US Customs and Border Protection had explained, "the distribution process will continue for an undetermined period".<sup>4</sup> 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 once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report pertaining to this dispute.

46. The representative of India said that his country thanked the EU and Japan for regularly including this issue on the DSB's Agenda. India wished to reiterate that disbursements made by the United States under the Byrd Amendment continued to be in force, thus affecting the rights of other WTO Members. India was concerned that Members' non-compliance would lead to a growing lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to cease its WTO-inconsistent disbursements.

47. The representative of Thailand said that his country thanked Japan and the EU for continuing to bring this item before the DSB and supported the statements made by previous speakers. Thailand continued to urge the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume the submission of status reports until such actions had been taken and this matter was fully resolved.

48. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Since the United States continued to make disbursements pursuant to the Byrd Amendment, it was clear that this dispute had not been resolved. Once again, Brazil urged the United States to fully implement the DSB's recommendations and rulings in this dispute and to provide regular status reports, as required by Article 21.6 of the DSU. One purpose of such reports would be, for example, to indicate to Members the steps the United States was taking or would take to cease its illegal disbursements.

49. The representative of Canada said that her country thanked Japan and the EU for placing this item on the DSB's Agenda once again. As had previously been stated many times, Canada reiterated that it agreed with the EU and Japan that the CDSOA remained subject to the surveillance of the DSB until the United States ceased to administer it.

50. The representative of China said that her country thanked the EU and Japan for raising this item at the DSB meeting. China shared the concerns expressed by previous speakers and joined them in urging the United States to fully comply with the DSB's rulings.

51. The representative of the United States said that, as his country had already 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 those disputes. Furthermore, the United States recalled that Members, including the EU and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, nearly three years ago. The United States, 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 in this matter, as it had already been explained at previous DSB meetings, the United States failed to see what purpose would be served by further

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<sup>3</sup> See US Customs and Border Protection's website at:  
[http://www.cbp.gov/xp/cgov/trade/priority\\_trade/add\\_cvd/cont\\_dump/cdsoa\\_10/](http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_10/)

<sup>4</sup> 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](http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml)

submission of status reports repeating, yet again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

52. The DSB took note of the statements.

**3. United States – Final anti-dumping measures on stainless steel from Mexico**

(a) Recourse to Article 21.5 of the DSU by Mexico: Request for the establishment of a panel (WT/DS344/20)

53. The Chairman drew attention to the communication from Mexico contained in document WT/DS344/20, and invited the representative of Mexico to speak.

54. The representative of Mexico said that, pursuant to Article 21.5 of the DSU, his country wished to request the establishment of a panel in the dispute: "US – Final Anti-dumping Measures on Stainless Steel from Mexico" (DS344). Mexico patiently expected full compliance by the United States with the recommendations adopted by the DSB, and was disappointed that nothing close to full compliance had taken place. The DSB had issued multiple binding rulings, including those issued and adopted in the dispute under consideration, declaring that the use by the United States of "simple zeroing" to determine margins of dumping in periodic reviews was contrary to the US obligation under Article VI:2 of the GATT 1994 and Article 9.3 of the WTO Anti-Dumping Agreement, both "as such" and "as applied" in the various measures that were brought before dispute settlement panels. Despite past cases of cooperation in resolving anti-dumping and other issues amicably between Mexico and the United States, it had not been possible to find a positive solution during the Article 21.5 consultations. It was unfortunate that Mexico had to request the establishment of an Article 21.5 panel at the present meeting, but the continued lack of full compliance by the United States in this dispute had left Mexico with no other option. Mexico highlighted that pursuant to the sequencing agreement between Mexico and the United States, the United States had agreed that at " ... the first DSB meeting at which Mexico's request for the establishment of a compliance panel appears as an item on the Agenda, the United States will accept the establishment of that panel"<sup>5</sup>.

55. The representative of the United States said that his country was disappointed that Mexico had requested the establishment of a compliance panel in this dispute. In accordance with the sequencing agreement between the United States and Mexico in this dispute, the United States would not object to the establishment of the panel at the present meeting. However, the United States remained open to discussions with Mexico, as with some other Members, for a more productive way of addressing issues of concern to Mexico. The United States continued to recommend that Mexico take this course and, therefore, disagreed that there was no option available other than a compliance panel.

56. The representative of Mexico said that his country would be happy to continue discussions with the United States, but wished to note the following facts regarding this dispute: (i) the Panel Report had been circulated on 20 December 2007; (ii) the Appellate Body Report had been circulated on 30 April 2008; (iii) those Reports had been adopted by the DSB on 20 May 2008; (iv) the Award of the Arbitrator under Article 21.3(c) of the DSU regarding the reasonable period of time for implementation had been circulated on 31 October 2008; and (v) the reasonable period of time had expired on 30 April 2009. This meant that the United States had 11 months and ten days from the date of adoption of the Panel and Appellate Body Reports as a reasonable period of time for compliance. Furthermore, the United States had 16 months and 21 days beyond the reasonable period of time before the Article 21.5 panel request was filed. Hence, time had been available to the

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<sup>5</sup> WT/DS344/17, para. 3.

United States to comply in this dispute. In addition, during that period of time, Mexico had been closely negotiating with the United States.

57. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Mexico in document WT/DS344/20. The Panel would have standard terms of reference.

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

#### **4. European Communities and its member States – Tariff treatment of certain information technology products**

(a) Report of the Panel (WT/DS375/R)

(b) Report of the Panel (WT/DS376/R)

(c) Report of the Panel (WT/DS377/R)

59. The Chairman proposed that the three sub-items be considered together. He then recalled that at its meeting on 23 September 2008, the DSB had established a single Panel to examine the joint complaint by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei") pertaining to these disputes. The Reports of the Panel, contained in document WT/DS375/R; WT/DS376/R; WT/DS377/R had been circulated on 16 August 2010 as an unrestricted document. He said that the Panel Reports were before the DSB for adoption at the request of the United States, Japan and Chinese Taipei. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Reports.

60. The representative of the United States said that his country thanked the panelists and the Secretariat for their work in this matter. The United States also wished to thank its co-complainants for the very close cooperation throughout this proceeding and was pleased to propose the adoption of the Panel Report in the dispute brought by the United States (WT/DS375/R). The Report was thorough and generally well reasoned, and represented a strong affirmation of key commitments that Members had undertaken in their WTO Schedules pursuant to the WTO Information Technology Agreement (ITA). The ITA was widely regarded as creating important new opportunities for trade and economic growth for developed and developing Members alike. This dispute related to duties the EU had imposed on three technology products. The first product was set top boxes with a communication function, in other words, cable and satellite boxes that could access the internet. The second product was flat panel computer monitors. The third product was certain multifunctional digital machines, in other words, computer peripherals that could scan, print, copy and/or fax. All three products were covered by the ITA. For all three products, the EU relied on arbitrary technical characteristics to disqualify products from receiving duty-free treatment, characteristics such as the number of pages per minute that a multifunctional digital machine could produce, or the specific interfaces installed on a flat panel computer monitor, or the specific type of technology a set top box used to communicate with the internet. For all three products, the Panel had found that the EU measures were inconsistent with its obligations under GATT Article II:1(a) and (b).

61. This Report had major systemic importance in at least two respects. First, the Report affirmed that the scope of those tariff concessions were not dictated by classification technicalities. Both in its findings with respect to products covered by so-called "Attachment A" of the ITA, as well as for products covered by "Attachment B", the Panel had interpreted the terms of the Schedules based on their ordinary meaning in context, in light of the object and purpose of the GATT 1994. The Panel had not accepted EU arguments suggesting that its WTO tariff concessions were circumscribed

by customs classification matters, whether classification decisions of individual Members, or technical characteristics of a product nowhere referenced in the concession. Likewise, the Panel had rejected the EU's position that the head note in its Schedule implementing Attachment B was, in the EU's words, "exhausted" by the particular tariff headings listed in that head note. Attachment B required participants to provide duty-free treatment "wherever...classified". The Panel had agreed with the co-complainants on the interpretation of the EU head note implementing this concession and had found that the Attachment B product descriptions – not particular tariff headings – determined the scope of the products for which the EU was required to provide duty-free treatment "wherever ... classified". In so finding, the Report recognized Attachment B as an important innovation of the ITA, critical to preserving the value of tariff concessions on key products.

62. Second, the Report affirmed that the product coverage of a tariff concession was not, as the EU had argued, circumscribed by the state of technology at the time the concession was made. Tariff concessions were defined by the ordinary meaning of the concession, in context, and in light of the object and purpose of the GATT 1994. The Panel had recognized this fact and had declined to accept an EU theory suggesting that, the moment the ITA had been concluded, technological change began undoing the negotiators' hard work. The Report thus represented a strong affirmation of ITA participants' achievement in 1996. In cementing the value of the tariff concessions resulting from ITA, including for products entitled to duty-free treatment "wherever...classified", the Report confirmed the breadth of existing duty-free commitments for information technology products and provided an important foundation for the Doha negotiations on duty-free treatment for additional electronics products. As the United States had explained to the DSB when it had requested the establishment of the Panel, this dispute had begun after extensive discussions, over the course of two years, which had failed to resolve the dispute. The United States welcomed the adoption of the Panel Reports at the present meeting and looked forward to the EU moving promptly to bring its measures into compliance with its obligations.

63. The representative of Japan said that his country wished to thank the Panel and the Secretariat for the time and efforts devoted to these proceedings. The thorough, rigorous and well-reasoned analyses in the Report testified that the Panel had taken its task very seriously and had faithfully discharged its duty to "make an objective assessment of the matter before it" and to make necessary findings "as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".<sup>6</sup> As Japan had argued throughout the proceedings, this dispute was about the scope of the tariff concessions on certain information technology products assumed by the EU and its member States in their Schedules of Concessions to the GATT 1994, as a result of the Ministerial Declaration on Trade in Information Technology Products<sup>7</sup>. In simpler terms, the issue before the Panel was whether technological innovations in those products would remove them out of the scope of the EU's tariff concessions. The Panel had said no and had found that the EU had acted inconsistently with Article II:1(a) and (b) of the GATT 1994. In so finding, the Panel had left little doubt as to the scope and meaning of the relevant concessions, making it clear that the information technology products should not be treated less favourably nor be penalized as out of the scope of duty-free commitments simply because, with additional features and functions, they had become smarter, more sophisticated and more advanced. Japan welcomed the Panel's findings and conclusions as they would provide a clear basis for "achieving a satisfactory settlement of the matter".<sup>8</sup> Japan, therefore, asked that the DSB adopt the Report of the Panel at the present meeting.

64. Japan considered that the Panel Report was also a significant victory from the perspective of the world economy at large. Information technology industry was one of the key sectors that had increased the productivity in the world economy, and had facilitated rapid expansion of

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<sup>6</sup> Article 11 of the DSU.

<sup>7</sup> WT/MIN(96)/16.

<sup>8</sup> DSU Article 3.5.

communication network on a global scale. The participants in the ITA negotiations, including Japan, the United States, Chinese Taipei and the EU, had recognized the enormous "contribution information technology makes to global economic growth and welfare"<sup>9</sup> and had adopted the ITA in December 1996. As had been noted by the Ministers then, trade in information technology products played "the key role ... in the development of information industries and in the dynamic expansion of the world economy".<sup>10</sup> By ruling in favour of Japan and other co-complainants, the Panel had reaffirmed the very objective of the ITA which was to "achieve maximum freedom of world trade in information technology products".<sup>11</sup> The Panel's message was clear, the scope of the duty-free tariff commitments as a result of the ITA was broad enough and trade liberalization of information technology products was irreversible.

65. Following the DSB's adoption of the Panel Report, this dispute would move on to the implementation stage. As the DSU provided, "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes"<sup>12</sup> and, as a general rule, the Member concerned must "comply immediately with the recommendations and rulings".<sup>13</sup> In that regard, Japan applauded the EU for its honourable decision not to appeal, which would certainly contribute to the prompt resolution of this dispute. Japan took this decision as a clear expression of the EU's commitment to the prompt resolution of this dispute and stood ready to engage in constructive dialogue with the EU to this end. Finally, Japan thanked the other co-complainants for their cooperation and coordination.

66. The representative of Chinese Taipei said that his delegation wished to thank the Panel and the Secretariat for the time and great efforts they had devoted throughout the proceedings of this dispute. Chinese Taipei also thanked the other parties and the third parties for their useful participation in the proceedings. Chinese Taipei welcomed the Panel's findings that the tariff measures imposed by the EU on all three products at issue, namely, certain Flat Panel Displays (FPDs), set-top boxes which had a communication function and multifunctional digital machines, violated Article II:1(a) and (b) of the GATT 1994, and that the EU violated Articles X:1 and X:2 of the same Agreement in terms of, *inter alia*, the publication and enforcement of certain measures relating to set-top boxes which had a communication function. Trade in information technology products was of vital importance to Chinese Taipei, as such products made up a very significant portion of its international trade. The potential exclusion of important categories of information technology products from the tariff concessions as agreed in the ITA was, therefore, of fundamental concern to Chinese Taipei's traders and economy. The Panel had correctly rejected the arguments put forward by the EU whereby it had sought to justify inconsistency of its measures with WTO obligations. As the DSB would adopt the Panel Report at the present meeting, Chinese Taipei wished to highlight a few valuable points made by the Panel. Chinese Taipei was pleased that the Panel had confirmed that the complainants were not obliged to identify all aspects of the products at issue in order to succeed with their "as such" claims, but that the identification of certain characteristics which automatically excluded the products concerned from duty-free treatment was sufficient. The issue was, therefore, whether it was permissible to exclude certain products from duty-free treatment simply because they had certain identified characteristics. Furthermore, Chinese Taipei welcomed the Panel's conclusion in relation to the products described in or for Attachment B of the ITA that it was the product description that determined the scope of the products for which the EU was required to grant duty-free treatment but not the tariff item numbers listed next to each of the product descriptions in the EU's Schedule.

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<sup>9</sup> ITA, 6th preambular paragraph.

<sup>10</sup> ITA, 2nd preambular paragraph.

<sup>11</sup> ITA, 4th preambular paragraph.

<sup>12</sup> DSU Article 21.1.

<sup>13</sup> DSU Article 21.3.

67. Chinese Taipei was also pleased that the Panel had found that on FPDs narrative description that "there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI" and that "there is no requirement for exclusivity, such that the FPDs concession would be limited to apparatus that may only display or reproduce signals from products falling within the ITA."<sup>14</sup> The Panel's conclusion and findings were important and had clarified several issues concerning interpretation of the concessions made pursuant to the ITA. Chinese Taipei believed that the Panel's findings would have a significant impact on the development of information technology as well as world trade in information technology products. Chinese Taipei welcomed the adoption of the Panel Report and urged the EU to promptly bring its measures into conformity with its obligations under the GATT 1994. Chinese Taipei stood ready to work with the EU to resolve this dispute and looked forward to hearing from the EU what positive steps the EU, together with its member States, intended to take to ensure prompt and full compliance with the DSB's rulings and recommendations.

68. The representative of the European Union said that first his delegation wished to thank the Panel and the Secretariat for their work. While disagreeing with some aspects of the findings reached, the EU agreed with other aspects of the Panel Report and acknowledged the time and efforts dedicated to this legally and technically complex dispute. The EU wished to commend the Panel on rejecting the over-simplistic reading of the EU's commitments pursuant to the ITA, advanced by the complainants and confirming that not all multifunctional copy machines, television set-top boxes and flat panel display devices necessarily fell within the scope of the EU's concessions, pursuant to the ITA. Whether or not a product fell within the scope of a particular concession had to be determined on a case-by-case basis, taking into account all the objective characteristics of a particular product.<sup>15</sup> This reasoning of the Panel was of crucial importance. On the other hand, the EU was disappointed that the Panel had adopted an overbroad reading of certain commitments. Extending commitments in such a way may tend to blur the scope of commitments and hence may make it more difficult for negotiators to agree on new commitments because of the risk that those commitments may be understood in a manner which at least some of the parties had not intended. The EU remained of the view that, it was by negotiation, not by litigation, that the scope of the ITA needed to be extended, and renewed its call for an update of the ITA. Litigation on a small set of products should never divert attention from negotiations on a broad set of products, not to mention all the other issues that still needed to be agreed behind the negotiating table to further liberalize trade in information technology products. As a result, and despite its reservations concerning certain conclusions of the Panel, the EU had decided not to appeal and would instead focus its efforts on implementation and, in the hope other WTO Members would now engage, negotiations of an updated ITA which would be fit for the twenty-first century. The EU hoped that its decision not to appeal would also help to avoid overburdening the Appellate Body and the dispute settlement mechanism.

69. In the context of this matter, the EU wished to express its serious concern with the fact that the issuance of panel reports, including the present one, was subject to considerable delays in a number of disputes recently, without any proper justification having been advanced. Speeding up the translation work, as in the present dispute, could not make up for inordinate delays at earlier procedural stages. On the contrary, it could create additional uncertainty and strain the parties' internal decision-making process. The EU, therefore, urged the actors involved in panel proceedings to make serious efforts with measurable results in the direction of better respecting the mandatory DSU deadlines and to avoid such inordinate delays in the future. The average duration of panel proceedings had kept increasing over the years and the trend must not continue but, on the contrary, it needed to be reversed as a matter of urgency. Members must quickly move towards a situation that was in line with the binding rules of the DSU.

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<sup>14</sup> Panel Reports para. 7.728.

<sup>15</sup> See Panel Report at, for example, paras 7.734, 7.986, etc.

70. The representative of Hong Kong, China said that, being a third party to these proceedings, her delegation wished to thank the Panel for its efforts in considering the case and preparing the Report. Hong Kong, China was encouraged by the decision of the Panel that certain information technology products in this dispute, which were subject to the EU's dutiable treatment, should fall within the scope of the duty-free concessions provided for those products under the EC's Schedule of Concessions to the GATT 1994. The Panel had also reaffirmed the understanding that products described in or for Attachment B to the Annex of the Ministerial Declaration on Trade in Information Technology Products should be granted duty-free treatment irrespective of where they were classified in a Member's Schedule of Concessions. Both issues carried important systemic implications and the rulings of the Panel would certainly provide guidance to ITA participants in the faithful implementation of the ITA. Hong Kong, China supported the adoption of the Panel Reports and looked forward to a smooth and expeditious implementation of the DSB's recommendations.

71. The representative of Costa Rica said that his country thanked the Panel and the Secretariat for the Report. Costa Rica had participated in this dispute as a third party, due to its systemic and commercial interests in the proper interpretation of the tariff concessions made by WTO Members pursuant to the ITA. As a developing country, Costa Rica had greatly benefited from its participation in the ITA. In the past year, information technology products had accounted for approximately 18.5 per cent of all imports to Costa Rica and approximately 25 per cent of Costa Rica's total exports. Costa Rica supported the views expressed by the complaining parties and was pleased that the Panel had adopted an interpretation consistent with the objectives of the ITA, which sought to create new market opportunities for all WTO Members. The Ministerial Declaration on the ITA reflected the participants' intention to have a broad interpretation of the product coverage of the Agreement. Had this not have been the case, any technological change in a covered product would have led to that product being excluded from the scope of the ITA, and the number of products that would benefit from duty-free treatment pursuant to ITA obligations would decrease irremediably in the light of the rapid technological developments that occurred in the field of information technology.

72. The representative of China said that her country welcomed the Panel Reports and thanked the Panel and the Secretariat for their hard work on these cases. China wished to highlight one issue, the so-called evolutionary interpretation on commitments made by Members either upon their accession or when they joined certain WTO Agreements. This had happened not only in this case, but in several other cases before the Panel. China shared the EU's concerns that the commitments of WTO Members was determined by WTO negotiations and not by litigation.

73. The representative of the United States said that his country noted that the EU had mentioned concerns regarding the delay in the completion of this Panel Report and others. The United States also wished that this Panel Report finding that the EU had breached its WTO obligations could have been adopted sooner. The United States recognized that the EU was also raising a systemic issue that could be discussed at another time, including in the DSU negotiations, where the important issue of time-savings in dispute settlement had been raised. The United States noted that the interests of Members and the dispute settlement system as a whole were well served by reports that were completed as soon as possible but were also of high quality. The United States, therefore, reiterated its appreciation to the Panel for the high quality Reports being adopted at the present meeting.

74. The representative of Japan said that the issue of delays in the issuance of panel reports needed to be addressed by Members and Japan was ready to engage in such discussions. At the same time, Japan agreed with the statement made by the United States regarding the importance of the quality of panel reports. The Panel in this case had taken longer than expected but, at the same time, this dispute involved quite technical and factual issues that needed to be addressed by the Panel. Japan considered that the Panel's analysis and assessment in this dispute had been very thorough, rigorous and well-reasoned, and that the quality of the Panel Report outweighed a delay in the issuance of this Report.

75. The representative of Chinese Taipei said that his delegation supported the statements made by the United States and Japan and agreed that the high quality of panel reports was of significant importance to the dispute settlement system.

76. The DSB took note of the statements and adopted the Panel Reports contained in WT/DS375/R; WT/DS376/R and WT/DS377/R.

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