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Dispute Settlement Body
21 April 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 April 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

Subjects discussed: Page

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

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.101)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.101)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.76)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.39)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.19)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.16)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.10)

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.3)

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 eight 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.101)

2. The Chairperson drew attention to document WT/DS176/11/Add.101, 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 8 April 2011, in accordance with Article 21.6 of the DSU. Legislative proposals that would implement the DSB's recommendations and rulings had been introduced in the current 112th Congress. In the Senate, S. 603 had been introduced on 16 March 2011. This bill had been referred

to the Senate Committee on the Judiciary. In the House of Representatives, H.R. 1166 had been introduced on 17 March 2011. The bill had been referred to the House Committee on the Judiciary. The US administration would continue to work with Congress 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 the United States had just presented its 102 status report, which was not different from the previous status reports submitted by the United States. At the present meeting, Cuba wished to share with other Members a new piece of information, which would only add to the long list of US violations. Cuba recalled that Section 211 had been presented before the Judiciary Sub-Committee on Courts and Intellectual Property of the US Senate by an attorney and adviser of the Bacardi company in the context of a lawsuit in the Southern District of New York concerning Bacardi's fraudulent use of the "Havana Club" trademark. On 29 March 2011, the Court of Appeal for the District of Columbia Circuit had upheld, in a two-to-one vote, the US Office of Foreign Assets Control's refusal to allow the Cuban company Cubaexport to renew the registration of the Havana Club trademark: a right that that company had obtained in 1976. Subsequently, the media had reported that the French company, Pernod Ricard, which marketed the well-known rum in association with Cuban companies, had lost its right to the trademark in the United States, and that Bacardi was, once again, allowed to continue to use the trademark, which legally belonged to another owner. Cuba questioned the legal basis for the US courts' decision, which was Section 211 found in 2002 to be inconsistent with the TRIPS Agreement. Regrettably, in practice Section 211 was applied retroactively to a trademark that had been registered before its enactment. A trademark that had been abandoned for more than 15 years before it was granted to Cubaexport. This was despite the fact that during the Panel's proceedings, the United States had indicated that Section 211 would not apply to previously abandoned trademarks since there was no original owner and thus no consent was required.

6. Section 211 was part of the US policy against Cuba, which imposed great losses on Cuba, in particular in the area of rum marketing, and its negative effects were felt by foreign companies such as Pernod Ricard. In addition to the market restriction, there was also a high financial cost of legal proceedings against actions that were inconsistent with the rules of international law. Cuba wondered how long the United States would continue to disregard the rules of international law and the recommendations of the Panel and the Appellate Body Reports and to act in a manner inconsistent with its statements. A Member who advocated the protection of intellectual property rights should not disregard the most basic provisions of the existing international rules in this area. Cuba wondered whether the United States considered that the international protection of these rights only applied to US interests, and if US trademark holders were the only ones to be respected. What authority the United States had to demand that other Members should establish and enforce high standards in the area of intellectual property rights? The United States could no longer continue to delay its implementation. Such conduct would seem entirely consistent with US policy which gave more importance to its own intangible assets. Cuba would continue to raise its concerns, stand up for its rights, seek the prompt settlement of this dispute and demand the immediate repeal of Section 21, which was inconsistent with international agreements.

7. The representative of the Plurinational State of Bolivia said that her country regretted that the US status report was merely a repetition of its previous reports and that no progress had been made in this dispute. In that regard, Bolivia wished to express its concern over the consequences of non-compliance with the DSB's rulings and recommendations. If the United States wished to preserve the integrity of the system, it should comply with the DSB's rulings and recommendations and lift the restrictions imposed under Section 211. Given the importance of the DSB for the WTO and the multilateral trading system, Bolivia hoped that this dispute could be resolved promptly and fully supported Cuba's statement.

8. The representative of the Bolivarian Republic of Venezuela said that her country fully supported Cuba on this matter. Venezuela thanked the United States for its status report and noted that the United States had been repeating the same statement for more than nine years. The continued use of Section 211 was inconsistent with the TRIPS Agreement and the MFN principle. Such non-compliance undermined the credibility of the dispute settlement system and weakened the WTO system. Venezuela hoped that, after so many years, the United States would finally respect the DSB's rulings and recommendations. As had been done on previous occasions, Venezuela urged the United States to reconsider its political and economic embargo against Cuba and to comply with the DSB's recommendations and rulings.

9. The representative of Zimbabwe said that his country thanked the United States for its status report pertaining to this dispute. Zimbabwe regretted that, despite the DSB ruling almost a decade ago, there was no indication thus far that the United States would implement that ruling. In the meantime, Cuba as well as many Members expected positive actions to be taken by the United States. The continued US failure to comply with the DSB's recommendations undermined the WTO credibility. Zimbabwe, therefore, urged the United States not only to respect the DSB's decision but also to abide by it, as that would enhance the WTO's credibility.

10. The representative of Paraguay said that his country shared the concerns expressed by Cuba and other delegations about the lengthy delay in the implementation of the DSB's recommendations pertaining to this dispute. In Paraguay's view, this was not only a trade-related concern, but also a systemic one. Thus, Paraguay urged the United States to comply with the DSB's rulings and recommendations and to repeal Section 211.

11. The representative of Ecuador said that his country supported Cuba's statement and wished to emphasize that Article 21 of the DSU referred to prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing countries. Ecuador hoped that the United States would accelerate its efforts to ensure compliance with the DSB's recommendations and rulings by fully repealing Section 211.

12. The representative of China said that her country thanked the United States for its status report. However, China regretted that the situation of non-compliance had not changed since the adoption of the DSB's decision more than nine years ago. In China's view, this situation was highly incompatible with the principle of prompt implementation stipulated in the DSU, in particular since the interests of a developing-country Member were affected. China, therefore, supported Cuba and urged the United States to implement the DSB's rulings without any further delay.

13. The representative of Brazil said that his country thanked the United States for its status report pertaining to this dispute. Brazil remained concerned about the US lack of compliance with the DSB's recommendations and rulings. Once again, Brazil urged the United States to take the steps necessary to comply with the DSB's recommendations and rulings without further delay.

14. The representative of Nicaragua said that her country thanked the United States for its status report, but regretted that the report confirmed the continued failure by the United States to comply with the DSB's recommendations and rulings. Nicaragua hoped that the United States would soon take the necessary steps to comply with the DSB's recommendations and resolve this long-standing dispute. Nicaragua, once again, urged the United States to implement the DSB's recommendations so as to ensure that the dispute settlement system worked well.

15. The representative of Angola said that her country thanked the United States for providing information on the implementation of the DSB's decision and the Appellate Body's recommendations of 2002 regarding Section 211. Angola recalled that prompt compliance with the DSB's recommendations and rulings was fundamental to ensuring the effective resolution of disputes to the benefit of all WTO Members. The delay in the implementation of the DSB's decision affected the

central element of the multilateral trading system that provided security and predictability for all Members, and set a negative precedent for other cases. Angola hoped that the parties to the dispute would take concrete action in order to send a positive signal of respect for WTO rules.

16. The representative of Uruguay said that his country thanked the United States for its status report. However, as had been stated on many occasions, Uruguay shared the systemic concerns expressed by previous speakers. The WTO was going through a critical period, given its inability to conclude the Doha Development Round that had begun almost ten years ago. Therefore, it was important to preserve the *acqui*s of the multilateral trading system and its most valuable asset, namely the DSU. More than ever before, it was extremely important that Members maintained the credibility of the dispute settlement system by ensuring the prompt compliance with the DSB's recommendations and rulings as well as the legal certainty and the effective balance of rights and obligations provided under the multilateral trading system. Uruguay, once again, urged the United States to make every effort to comply with the DSB's recommendations in this dispute, which affected the interests of a developing-country.

17. The representative of Viet Nam said that his country thanked the United States for its status report and urged the United States to implement the DSB's decision and recommendations immediately. Viet Nam supported Cuba's statement.

18. The representative of Argentina said that his country thanked the United States for its status report. As at previous DSB meetings, Argentina called for the effective implementation of the DSB's recommendations and rulings pertaining to this dispute. The US failure to comply had consequences which went beyond this dispute and affected all Members. Argentina, once again, urged the parties to this dispute, and in particular the United States, to take every step necessary to ensure compliance.

19. The representative of Mexico said that his country thanked the United States for its status report. As at previous DSB meetings, Mexico urged the parties to resolve this dispute through legal remedies provided for under the DSU. Mexico noted that any Member could initiate its own dispute if it considered that the matter was not resolved and that its rights were being nullified or impaired. Mexico also noted that the discussion under this Agenda item could provide useful input for the discussions carried out in the DSU negotiations, in particular with regard to the issue of effective compliance.

20. 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.101)

21. The Chairperson drew attention to document WT/DS184/15/Add.101, 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.

22. The representative of the United States said that his country had provided a status report in this dispute on 8 April 2011, in accordance with Article 21.6 of the DSU. As of November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. With respect to the 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.

23. The representative of Japan said that her 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. As for the remaining part of the DSB's recommendations, Japan hoped that the United States would soon be in a position to report to the DSB on more tangible progress. Full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[2] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

24. 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.76)

25. The Chairperson drew attention to document WT/DS160/24/Add.76, 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.

26. The representative of the United States said that his country had provided a status report in this dispute on 8 April 2011, in accordance with Article 21.6 of the DSU. The US administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

27. The representative of the European Union said that the EU thanked the United States for its status report and noted that the United States was again reporting non-compliance. The EU remained keen to work with the US authorities towards the complete resolution of this case.

28. 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.39)

29. The Chairperson drew attention to document WT/DS291/37/Add.39, 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.

30. The representative of the European Union said that the EU was pleased to report on the constructive technical meeting it had held with the United States on 28 March 2011. The EU welcomed the continuation of this technical dialogue with the United States which gave both parties an opportunity to discuss directly, issues of their concern regarding biotechnology. The meeting had followed an earlier meeting held on 20 July 2010. The EU hoped that this constructive approach based on dialogue would allow the parties to leave litigation aside. Once again, the EU noted that its regulatory procedures on biotech products continued to work as foreseen in the legislation. The number of GMOs authorized since the date of establishment of the Panel was thirty-four. In 2010, 11 applications had been authorized, which was more than double the number of authorizations in 2009, including one authorization for cultivation. At the Agriculture Council held on 17 March 2011, two authorizations had been examined, together with the renewal of the authorization of maize 1507. Progress had also been made on other applications for authorization. Four more draft applications had been voted in the Standing Committee in February 2011. The Council would examine those applications in the following weeks.

[2] Article 3.3 of the DSU.

31. The representative of the United States said that his country thanked the EU for its status report and its statement at the present meeting. On 28 March 2011, as noted by the EU, a US delegation had met with EU officials in Brussels to discuss delays in the EU's approval system for biotech products and related issues. The United States believed that the discussions had been constructive. Based on those discussions, the United States was hopeful that the EU would make significant progress in the coming months with respect to its approvals of biotech products.

32. 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.19)

33. The Chairperson drew attention to document WT/DS322/36/Add.19, 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.

34. The representative of the United States said that his country had provided a status report in this dispute on 8 April 2011, in accordance with Article 21.6 of the DSU. As the United States had explained in its status report, in December 2010, the US Department of Commerce had announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. At the present time, the US Department of Commerce was continuing with its ongoing work on the December proposal.

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

36. The representative of China said that her country welcomed the steps taken by the United States towards the implementation of the DSB's rulings and recommendations on zeroing issues. At the 25 March 2011 DSB meeting, China had provided some comments on the proposal of the US Department of Commerce, which had been published in the Federal Register on 28 December 2010. China looked forward to the US feedback regarding this issue.

37. 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.16)

38. The Chairperson drew attention to document WT/DS350/18/Add.16, 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.

39. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 8 April 2011, and earlier in the context of the discussion under Agenda item 1(e) of the present meeting. The United States, therefore, referred Members to that report and statement for further details.

40. The representative of the European Union said that the EU thanked the United States for its most recent status report. Since the United States had not reported on any steps taken to address the concerns raised by the EU in the DSB, the EU referred Members to its statements made at the DSB meetings in January and February 2011. The EU remained ready to engage with the United States in multilateral and bilateral discussions in order to ensure that its concerns were addressed by the United States.

41. 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.10)

42. The Chairperson drew attention to document WT/DS294/38/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

43. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 8 April 2011, and earlier in the context of the discussion under Agenda item 1(e) of the present meeting. The United States, therefore, referred Members to that report and statement for further details.

44. 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 concerning the US proposal of 28 December 2010.

45. 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.3)

46. The Chairperson drew attention to document WT/DS363/17/Add.3, 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.

47. The representative of China said that her country had provided a status report in this dispute on 8 April 2011, in accordance with Article 21.6 of the DSU. China had made tremendous efforts to implement the DSB's rulings and recommendations, and had thus far completed amendments to most measures at issue, including Regulations on the Management of Publications, Regulations on the Management of Audiovisual Products, and Provisions on the Administration of the Publications Market. The draft amendment to the Catalogue of Industries for Guiding Foreign Investment had been published for public comment. This demonstrated China's sincerity towards the implementation of the DSB's recommendations and rulings. China and the United States had signed the Agreed Procedures under Articles 21 and 22 of the DSU in this dispute on 8 April 2011. China believed that this matter would be resolved properly through joint efforts and mutual cooperation with relevant parties.

48. The representative of the United States said that his country thanked China for its status report and its statement. The United States remained concerned about the lack of progress by China in bringing its measures relating to films for theatrical release into compliance with the DSB's recommendations and rulings. The United States also had significant concerns about the incomplete progress relative to China's measures relating to audiovisual home entertainment products, reading

materials, and sound recordings. The United States was conferring closely with China on these matters. In that regard, the United States and China had entered into a sequencing agreement, which would govern the procedural aspects of any eventual request for a compliance proceeding under Article 21.5 of the DSU and any eventual request for authorization to suspend concessions under Article 22.6 of the DSU. That agreement had been circulated to Members in document WT/DS363/18.

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

2. United States – Definitive anti-dumping and countervailing duties on certain products from China

(a) Implementation of the recommendations of the DSB

50. The Chairperson recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In that respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. She recalled that at its meeting on 25 March 2011, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, pertaining to the dispute on: "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China". She invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

51. The representative of the United States said that, on 25 March 2011, the DSB had adopted the Panel and the Appellate Body Reports in the dispute: "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China" (DS379). At the March 2011 DSB meeting, the United States and a number of other Members had raised serious concerns with the Appellate Body Report in this dispute. The United States looked forward to further conversations with interested Members on the implications of that Report. The United States did not, however, seek to engage in a further discussion of those concerns at the present meeting, which it and other delegations had expressed in their statements to the DSB on 25 March 2011. At the present meeting, as provided in the first sentence of Article 21.3 of the DSU, the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time in which to implement the DSB's recommendations.

52. The representative of China said that Article 21 of the DSU provided clearly that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China welcomed the US declaration of its explicit intentions in respect of implementation of the DSB's recommendations and rulings in this dispute. China hoped that the United States would take all the necessary measures to fully comply with the DSB's rulings and recommendations as soon as possible. China took note that the United States would need a reasonable period of time to comply, and was ready to enter into discussion on this matter with the United States as soon as possible.

53. The DSB took note of the statements, and of the information provided by the United States 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

54. 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.

55. The representative of Japan said that, as the latest distributions showed[3], the CDSOA remained operational. According to US Customs and Border Protection, "the distribution process will continue for an undetermined period".[4] Japan urged the United States to stop the illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute.

56. The representative of the European Union said that it had already informed the DSB about the annual adjustment in the level of duties applied by the EU in this case in a document circulated on 12 April 2011. At the present meeting, and as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry and, hence, put an end to the condemned measure. The fact that the United States had stopped disbursing duties collected after a certain point in time did not achieve full compliance. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations. Once again, the EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports pertaining to this dispute.

57. The representative of Brazil said that his country thanked Japan and the EU for keeping this item on the DSB's Agenda. As stated at previous meetings, Brazil believed that non-compliance in this dispute would persist until the United States ceased all disbursements made pursuant to the CDSOA. Until then, the issue in this dispute would not be "resolved" within the meaning of Article 21.6 of the DSU and the United States would be required to submit status reports.

58. The representative of Canada said that her country thanked the EU and Japan for placing this item on the DSB's Agenda. In Canada's view, the CDSOA remained subject to the surveillance of the DSB until the United States ceased to administer it.

59. The representative of India said that his country thanked the EU and Japan for bringing this issue before the DSB once again. India wished to renew its systemic concerns about the continuous non-compliance by Members and the resultant growing lack of credibility and confidence of the system. India urged the United States to report full compliance without any further delay.

60. The representative of Thailand said that his country thanked the EU and Japan for bringing this issue before the DSB again. Thailand agreed with previous speakers and urged the United Sates to cease the disbursements and fully comply with the DSB's rulings and recommendations in this matter.

61. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President 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

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

[4] 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

recommendations and rulings in these 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. With respect to comments regarding further status reports in this matter, as the United States had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. With respect to the EU's statement at the present meeting, the United States continued to review the action by the EU. As the United States had observed previously, the DSB only authorized the suspension of concessions or other obligations as provided in the Award of the Arbitrator.

62. The DSB took note of the statements.

4. European Communities – Measures prohibiting the importation and marketing of seal products

(a) Request for the establishment of a panel by Norway (WT/DS401/5)

63. The Chairperson recalled that the DSB had considered this matter at its meeting on 25 March 2011 and had agreed to revert to it. She then drew attention to the communication from Norway contained in document WT/DS401/5, and invited the representative of Norway to speak.

64. The representative of Norway said that, at the DSB meeting of 25 March 2011, Norway had requested the establishment of a panel in the long-standing dispute with the EU regarding its ban on trade in seal products. At that meeting, Norway had outlined some important points related to the dispute and did not wish to repeat them at the present meeting. It was, however, Norway's firm view that the EU's seal regime was inconsistent with its WTO obligations, including under the Agreement on Agriculture, the TBT Agreement and the GATT 1994. Norway, therefore, requested, once again, that a panel be established with standard terms of reference. In line with Article 9.1 of the DSU, Norway requested that the matter be referred to the Panel established at the 25 March 2011 DSB meeting to examine Canada's complaint regarding the same matter (DS400).

65. The representative of the European Union said that the EU took note of Norway's request for the establishment of a panel. The EU recalled that, while it had agreed to hold consultations with Norway, it believed that the WTO was not the appropriate forum to discuss Norway's concerns with regard to the seals regulation and its implementing regulation. Unlike previous EU measures which had been the subject of WTO dispute settlement between Norway and the EU, the seals regulation concerned products that fell within the scope of the EEA Agreement. The parties to the EEA Agreement were bound by a special duty of loyal cooperation under Article 3 of that agreement. They should not seek to evade the application of the specific rules governing the "privileged relationship" established by the EEA Agreement by resorting to dispute settlement under a different agreement, which pursued a very different objective. The EU further recalled that the EU institutions had taken the view that the seals regulation was of "EEA relevance" and that this had consequences under the EEA Agreement. The EU, therefore, reserved all rights to pursue these matters under the EEA Agreement. Norway's panel request was little more than a long list of provisions. Norway had provided no meaningful explanation of the reasons why the EU measures were deemed inconsistent with each of the provisions listed. The EU considered that the request lacked the degree of specificity required by the DSU provisions. Furthermore, the Norwegian request raised some new claims under the TBT Agreement, which were not identified in any of the two requests for consultations. Thus, the EU reserved the right to raise those issues before the panel. The EU was strongly convinced of the strength of its case and stood ready to defend its measures which it considered to be fully consistent with WTO law. Finally, the EU wished to express its agreement with the request for a single panel to examine the DS400 and DS401 disputes.

66. The representative of Namibia said that his country supported Norway's request to establish a panel in the dispute concerning the EU's measures prohibiting the importation and marketing of seal products. Namibian products to the EU market were affected and, therefore, Namibia wished to express its strong dissatisfaction with the import ban by Belgium and the Netherlands. The measures adopted by those countries were inconsistent with the EU's obligations under the GATT 1994 and the TBT Agreement. Furthermore, Namibia believed that the internationally recognized principles on which conservation and management of marine resources were regulated were being undermined. Specifically, the trade in endangered species was undertaken and regulated in terms of the provisions of the CITES Convention. To Namibia's knowledge, all EU member States were parties to that Convention. The measures adopted by Belgium and the Netherlands actively undermined the authority of the Convention. Therefore, Namibia wished to participate as a third-party in the proceedings of the Panel to be established at Norway's request.

67. He further stated that the exploitation of the Cape fur seal along the Namibian coast represented one of the oldest commercial utilization forms in the region and dated back to the 17th century. The Cape fur seal occupied 25 colonies along the Namibian coastline. The harvesting of seals in Namibia was done in line with the Marine Resources Act of 2000, and was harvested in the presence of a fisheries inspector. Moreover, Namibia took cognizance of the UN Code of Conduct for Responsible Fisheries whenever seals were harvested. It was worth noting that the principle of sustainable management was also taken into consideration whenever seals were harvested. This was in line with the FAO Code of Conduct for responsible Fisheries, which was contained in the Constitution of the Republic of Namibia, Chapter 11, Article 95. That provision read and directed as follows: "The State shall actively promote and maintain the welfare of the people by adopting, *inter-alia*, policies aimed at maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future".

68. Namibia also wished to turn to some specific seals concerns, which highlighted the importance of trade in seal products for Namibia. The seal population in Namibia had grown to enormous numbers over the years and consumed high qualities of fish, such as hake and sardines, which were of high commercial importance to the fishing sector. In addition, seal harvesting interactions which caused heavy losses to the line fish industry were occurring frequently. Therefore, Namibia needed to keep the seal population in balance. Regular aerial surveys were conducted to ensure that the population did not decline to endangered levels. It was worth noting that the seal industry was very important in terms of employment and GDP contribution to Namibia's economy. Employees in the seal sector were all Namibians and had acquired harvesting skills as per the Marine Resource Act of 2000. It was important to note that, those that were doing the harvesting normally underwent training as to how to harvest and handle the seals during the harvesting season. Indirect employments were also created from other workplaces such as shops, tannery and manufacturers, specialized in manufacturing and exporting for international designers. It was also important to note that there were two factories which processed the seal oil for local consumption. There were two commercial uses for seal oil, as industrial grade oil and for the production of cosmetics, paints, soaps and manufacturing of low-grade margarine. Namibia had become aware of the importance of seal derivatives to the health and medical fraternity. Health products such as the Omega 3 oils and capsules derived from seal products had already been part of over-the-counter medicine in some countries, including Namibia. Possible surgical implants from seal tissue had been on the table from an international scientific point of view and that would also have a positive impact on human health globally and in Namibia. Usage of seal heart valves for human heart surgery had recently shown to be promising. In terms of seal products trading, that was a key issue for Namibian exporters as Namibia had established traditional markets for seal products. Namibia did not see any reason to stop the harvesting of seals. Namibia had not been shown any evidence that the Cape fur seal populations along its coastline were threatened. Namibia, as a country, had an obligation to make sure that laws were adhered to. Equally, it had a responsibility towards its citizens in terms of creating jobs that were sustaining families, utilizing resources in the best way that Namibia could maximize the benefit

and also produce products that would display the Namibian image. It was from that historical background that Namibia would continue with the sustainable management of all its natural resources, both renewable as well as non-renewable. This would continue to include seals.

69. In conclusion, he said that the Namibia's seal harvest was labelled "inhumane" by animal activists. However, the Ministry of Fisheries and Marine Resources responsible for seals had, on several occasions, asked for public opinion on a more "humane" way of harvesting, but to date no animal rights organization had come up with an alternative method. He said that he believed that Namibia had the most ethical laws of harvesting seals. The Government's main objective for all fisheries sectors was to utilize the country's marine resources on a sustainable basis and to develop industries based on them in a way that ensured their lasting contribution to the country's economy and overall development objectives. Seals were considered as a natural resource from which Namibians could derive economic benefits through consumptive and non-consumptive use. The Namibian Government's approach to seal harvesting was guided by the same principles which were applied to the utilization of any other natural resource falling within its jurisdiction, namely sustainable utilization, whereby the main management objectives for the Cape fur seal in Namibia were to ensure the sustainable utilization and ecological role of the Cape fur seal. Namibia was a member of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Animals and Plants were protected by CITES against over-exploitation through international trade. Cape Fur Seals were listed in Appendix II of the CITES Convention. Namibia noted that species on this Appendix were not necessarily threatened with extinction but the trade of them should be closely controlled to prevent their extinction in future. It was against this background that Namibia would continue with the sustainable management of all of its natural resources, both living and non-living, including seals. Namibia supported an outcome that would result in an increase of exports of seal products. Such an outcome should involve substantial improvements in market access and eliminate any ban on seal products.

70. The representative of Canada said that his country welcomed the establishment of a panel as requested by Norway. That panel would examine the same EU measures raised by Canada in previous DSB meetings, and for which a separate panel had been established on 25 March 2011 at Canada's request. Canada and Norway had long made efforts to ensure that the seal hunt was humane, well managed and sustainable. Therefore, Canada wished to reserve its third-party rights in the DS401 dispute. Given the similarities between Norway and Canada's complaints, Canada also requested that, pursuant to Article 9.1 of the DSU, panels under the DS400 and DS401 disputes be joined so that a single group of panelists would hear the two disputes. In addition, Canada reiterated its preference to have DS369 heard by the same panelists as those that would be selected for the DS400 and DS401 disputes. Canada hoped that these disputes would cast meaningful light on what it considered to be unjust and unnecessary measures.

71. The representative of Iceland said that, as at the 25 March 2011 DSB meeting, Iceland again took note of Norway's request for the establishment of a panel in the long-standing dispute concerning the EU measures prohibiting the importation and marketing of seal products. Those measures were also a source of concern for Iceland. It had repeatedly been pointed out, in the DSB, including in Iceland's statement made at the 25 March 2011 DSB meeting, that this dispute was not just about seal products. It related also to the principle of sustainable utilization of all living marine resources and the right to market the products stemming from such legitimate practices. Iceland agreed with Norway that there were no justifiable grounds for the EU's ban. The seal populations around Iceland were subject to management, their existence was not threatened, and their utilization was considered desirable. Iceland had a substantial interest in the matter. Therefore, Iceland supported Norway's request for a panel and wished to participate in the Panel's proceedings as a third-party.

72. The representative of the United States said that his country noted Norway's reference to Article 9.1 of the DSU and also that the EU was amenable to having a single panel. The United States was pleased that the parties had cooperated and had reached an agreement on this issue. The

United States understood, therefore, that the decision to be taken by the DSB at the present meeting was to refer the matter set out by Norway in WT/DS401/5 to the Panel previously established by the DSB to consider the matter raised by Canada in the DS400 dispute.

73. The DSB took note of the statements and agreed that the request by Norway for the establishment of a panel with standard terms of reference was accepted, and that as provided for in Article 9.1 of the DSU in respect of multiple complainants, the Panel that was established at the 25 March 2011 DSB meeting to examine the complaint by Canada contained in document WT/DS400/4 would also examine the complaint by Norway contained in document WT/DS401/5.

74. The Chairperson said that, since a single Panel had been established, those delegations that had reserved their third-party rights to participate in the Panel established at the request of Canada shall be considered as third-parties in the single Panel. She recalled that the following countries had reserved their third-party rights to participate in the Panel established at the request of Canada: Argentina, China, Colombia, Ecuador, Iceland, Japan, Mexico, Norway and the United States.

75. The representatives of Canada and Namibia also reserved their third-party rights to participate in the Panel's proceedings.

5. United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil

(a) Joint request by Brazil and the United States for a decision by the DSB (WT/DS382/7)

76. The Chairperson drew attention to the communication from Brazil and the United States contained in document WT/DS382/7 and invited the representative of Brazil to speak.

77. The representative of Brazil said that, in response to an informal request by the Appellate Body, Brazil and the United States had agreed to ask the DSB to adopt a decision providing additional time for the adoption or appeal of the Panel Report in this dispute. A draft decision was contained in document WT/DS382/7. If approved, the decision would extend to 17 June 2011, the period within which the parties may appeal the Panel Report or request its adoption by the DSB by negative consensus, thus providing greater flexibility in the scheduling of any possible appeal.

78. The representative of the United States said that his country joined Brazil in asking that the DSB agree to provide additional time for adoption or appeal of the Panel Report in this dispute by adopting the draft decision set forth in document WT/DS382/7. To facilitate its work, the Appellate Body had informally requested the parties to delay any appeal in this dispute until June 2011. After discussions with Brazil, the United States had agreed to join Brazil in making the request before the DSB at the present meeting. The United States noted that this was the fourth decision that the DSB had been asked to take in recent months to delay a possible appeal. In taking the previous three decisions, all Members had cooperated to permit adoption or appeal to be delayed. Furthermore, the parties to those disputes had cooperated by delaying the filing of any appeal. It should be clear, however, that the cooperation of Members in this dispute, as well as any others, was contingent on not viewing themselves as being prejudiced by that cooperation, for example, by accepting a delay while seeing another Member gain a timing or other procedural advantage through its non-cooperation. The draft decision would provide for the DSB's adoption of the Panel Report by negative consensus until 17 June 2011, unless either party appealed the Report. The United States appreciated the DSB's support for the draft decision.

79. The representative of Australia said that her country recently noted that a number of Members had agreed to postpone the adoption, and therefore potential appeal, of panel reports to assist the Appellate Body to manage its current workload. The joint request by Brazil and the United States was just the most recent example of such action. In Australia's view, Members who had cooperated in

this way should not be disadvantaged by the subsequent scheduling of other appeal actions. In particular, Australia considered that, to ensure fairness and predictability in the appellate process, all Members should be accorded the same procedural treatment, including in the scheduling of the appellate proceedings.

80. The representative of the European Union said that the EU was slightly puzzled about the apparent possibility that there might be an appeal in this dispute taking also into account that other recent "zeroing" reports had not been appealed. The EU had just heard from the United States about US efforts to implement the previous "zeroing" cases and had now understood that the United States might be appealing the "zeroing" Report pertaining to this dispute. The EU did not intend to be polemic but it was difficult to avoid the feeling of a mixed message. The EU did not wish to block consensus, but it would appreciate if the United States could elaborate on how the possibility of an appeal could be squared with its intentions to implement the previous "zeroing" reports.

81. The representative of Japan said that, with respect to panel reports issued since November 2010 which were likely to be appealed, the parties to the disputes had requested, and the DSB had decided, to extend the 60-day time period in Article 16.4 of the DSU for adoption and appeal of those panel reports. Those decisions were not just a collection of a single isolated act of the DSB, but rather a series of acts that would allow possible appeals from those reports to be staggered and thus enable the Appellate Body to organize its work in a fair, efficient and orderly manner. The draft decision that Brazil and the United States had jointly proposed to be adopted by the DSB at the present meeting was the latest of a series of those decisions. Given recent decisions, Japan wished to offer the following three observations from the systemic point of view. First, the decision to be adopted at the present meeting and similar preceding decisions "would provide greater flexibility in scheduling" recent appeals[5] and, consequently, would allow the Appellate Body to manage its recent heavy workload. But, more importantly, those decisions would give greater transparency and legal certainty as to adoptions and appeals of the panel reports subject to those decisions because Members had committed themselves to abide by the rule set out in the decisions by adopting them.

82. Second, it should be recalled, however, that Article 3.3 of the DSU set out the general principle of "prompt settlement" of disputes in the WTO dispute settlement and time limits and automaticity in the process provided for throughout the DSU, including the time period in Article 16.4, were specific expressions of this general principle of "prompt settlement". Since a series of the latest decisions by the DSB to postpone adoption and appeal of the panel reports was a clear departure from the text of the DSU and the general principle of "prompt settlement", these decisions and an arrangement created by them must be deemed to be of a temporal or emergency nature that purported to address very exceptional circumstances. In other words, this arrangement should not become a norm or general rule, it must remain as an exception.

83. Third, the principle of "prompt settlement" of disputes set out in Article 3.3 applied equally to all Members and all disputes brought under the DSU. Japan understood that nothing in the DSU established hierarchy among such disputes in terms of their significance or urgency, or gave particular preference to one dispute over the others.[6] All Members and all cases were expected to be treated even-handedly. Furthermore, the temporal arrangement created by a series of the DSB decisions was dependent on consent by the parties to the disputes to delay the initiation of their appellate proceedings. It appeared that the parties to the disputes had been willing to do so, contrary to their legitimate interests in prompt resolution of their disputes, to support, in good faith, the proper and orderly functioning of the Appellate Body. If all cases were not treated equally, though, as previous

[5] See e.g. WT/DS382/7.

[6] Japan would note, though, that a case that would solely involve prohibited subsidies shall be subject to expedited proceedings under Article 4 of the SCM Agreement, and in urgent cases that typically concerned perishable goods, "panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible" under the best endeavour provision of Article 4.9 of the DSU.

speakers had pointed out, the parties may be less likely and less willing to agree to this temporal arrangement. Given the current and prospective caseload, this could further hinder the Appellate Body from organizing its work orderly and efficiently. Therefore, the temporal arrangement created to address current unusual circumstances must be implemented and managed in a fair, consistent and equitable manner. In short, Japan believed that: (i) the temporal arrangements were exceptional in nature, and (ii) the dispute settlement system would be better served if Members who were willing to support the system would have confidence in the fairness and equity in the way in which the system worked.

84. The representative of Canada said that, as in other cases and as other delegations had stated, parties had agreed to delay the adoption of the Panel Report in order to assist the Appellate Body in managing its heavy work load. At the present meeting, Brazil and the United States were asking the DSB to adopt a decision to endorse that agreement. Canada supported the cooperative approach that Members had taken to assist the Appellate Body in recent months and agreed with the adoption of the decision. That being said, Canada believed that Members would be more likely to continue such cooperation if all Members and all cases were treated equitably.

85. The representative of the United States said that his country was also puzzled by one of the preceding interventions, namely, that of the EU. The issue was very simple. It was clear that both parties to this dispute had rights under Article 17 of the DSU. The Appellate Body had requested the assistance of the parties and, through the draft decision put forward by the parties, the assistance of all Members, including the EU. The parties had jointly put forward a decision to the DSB at the present meeting and both parties to this dispute supported that decision.

86. The DSB took note of the statements.

87. The Chairperson proposed that: "The DSB agree that, upon a request by Brazil or the United States, the DSB shall, no later than 17 June 2011, adopt the Report of the Panel in the dispute: *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, contained in document WT/DS382/R, unless (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU".

88. The DSB so agreed.

6. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/447)

89. The Chairperson drew attention to document WT/DSB/W/447, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the name contained in document WT/DSB/W/447.

90. The DSB so agreed.

7. Statement by the Chairperson regarding some matters concerning the Appellate Body

91. The Chairperson, speaking under "Other Business", said that, as she had announced at the outset of the present meeting, she wished to make a statement under "Other Business" concerning some matters related to the Appellate Body. As Members may have been aware, the first terms of office of two Appellate Body members, Ms. Lilia Bautista and Ms. Jennifer Hillman, would expire on 10 December 2011. In that regard, she recalled that under Article 17.2 of the DSU, "the DSB shall appoint persons to serve on the Appellate Body for a four-year term and each person may be reappointed once". As Members were aware, the appointment of any individual on the Appellate

Body required a formal decision of the DSB. The Chairperson said that she had been informed by Ms Bautista that she would not seek reappointment for a second term. Ms Hillman had informed the Chairperson that she was not requesting the DSB to consider her for reappointment. Therefore, on behalf of all WTO Members, the Chairperson thanked Ms. Bautista and Ms. Hillman for their contribution to the work of the Appellate Body and wished them success in their future endeavours. The Chairperson drew attention to the fact that, under the circumstances, the DSB would be required, in the near future, to take certain actions with respect to those Appellate Body positions. It was, therefore, her intention to include this matter on the Agenda of the 24 May 2011 DSB meeting in order to propose the following: (i) to launch as from 24 May 2011 the selection process for the two positions in the Appellate Body; (ii) to set a deadline of 31 August 2011 for Members' nomination of candidates for the two positions; (iii) to agree to establish a Selection Committee, based on the procedure set out in document WT/DSB/1, which would consist of the Director-General and the 2011 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, which would be presided by the 2011 DSB Chair; and (iv) to request the Selection Committee to conduct interviews with candidates and to hear views of WTO Members in September/October 2011, and to make recommendations to the DSB by no later than 10 November 2011 so that the DSB could take a final decision on this matter at the latest at its regular meeting on 21 November 2011.

92. The DSB took note of the statement.