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Dispute Settlement Body
22 June 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 June 2010

Chairman: Mr. Yonov Frederick Agah (Nigeria)

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.91)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.91)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.66)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.29)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.9)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.6)

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

1. The Chairman recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the DSB's 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.91)

2. The Chairman drew attention to document WT/DS176/11/Add.91, 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 10 June 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 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 noted that, at the present meeting, the United States was presenting its ninety-second status report pertaining to this dispute. The EU hoped that the US authorities would take steps to finally implement the DSB's ruling and resolve this matter.

5. The representative of Cuba said that the United States yet had to provide the DSB with any new information. Cuba recalled that at the May DSB meeting the United States had acknowledged, in its brief statement, that efforts to resolve this dispute had failed to produce results. The United States could perhaps explain what those efforts had been to date. It could no longer keep giving excuses and avoid compliance with its obligations. What was at stake was the credibility of one of the countries – if not the country – that had the greatest interest in the smooth functioning of intellectual property regulations and the WTO dispute settlement system. Section 211 prohibited, in certain instances, the registration and/or renewal of Cuban trademarks. This was contrary to the principles of national and most-favoured-nation treatment. Article XVI:4 of the Marrakesh Agreement was very clear: each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations, as provided in the Agreements. What had happened in this case was simply undermining the confidence that Members had in the system. Unfortunately, the WTO Director-General's statement made in 2009 to the effect that "all the political muscle-flexing and grandiloquence is discarded at the door once the case enters the WTO" had no meaning. This was a dispute in which "might had made right" since the delay in finding a solution was closely linked to the economic, commercial and financial embargo imposed by Cuba since 1962.

6. In 2010, in connection with the celebration of World Intellectual Property Day, the US Trade Representative had dwelt on the importance of proper protection of intellectual property for the workers and companies of his country. He had noted that one of the trade policy tools that could contribute to this protection was the right to file complaints before the WTO when intellectual property rights were infringed. In this regard, Cuba noted that perhaps the United States should review the disputes in which compliance was still pending and in which the United States was the infringing party. The United States would do well by first respecting the rules, and then proposing measures to ensure that its rights were respected. What would happen if one deliberately started using US trademarks in violation of their registration and rights of use? On what grounds the United States could demand compliance if it was infringing the trademarks of other parties. Although Cuba could no longer talk of "prompt compliance" – since in this case the ruling had been issued more than eight years ago – it must demand, once again, that the United States and the EU act urgently to settle this dispute. In the current context – with the proliferation of TRIPS PLUS agreements and with the parties to this case insisting in all international forums that there were serious piracy and counterfeiting problems – nothing could justify this legislative aberration, which favoured acts contrary to the laws of intellectual property and competition.

7. The representative of China said that her country thanked the United States for its status report. China regretted that the status report simply confirmed the continuation of non-compliance after more than eight years since the adoption by the DSB of the reports pertaining to this dispute. China believed that the situation of prolonged non-compliance was not in line with the principle of prompt implementation, as provided for in the DSU provisions. In addition, it was highly inappropriate for a developed-country Member to maintain such prolonged non-compliance in the cases that involved the interests of developing-country Members. China strongly supported Cuba and urged the United States to implement the DSB's decision as soon as possible.

8. The representative of India said that his country thanked the United States for its status report and its statement. India again noted that there was no substantive change in the situation, as had been

communicated on previous occasions. Unfortunately, the US status report only confirmed the continuation of non-compliance and India felt compelled, yet again, to stress that the principle of prompt compliance was missing in this dispute. India was concerned that this situation of non-compliance undermined the credibility and confidence that Members reposed in the WTO dispute settlement system. India, therefore, urged the United States to fully implement the DSB's recommendations in this dispute without further delay.

9. The representative of the Bolivarian Republic of Venezuela said that, once again, her delegation wished to make a statement under the Agenda item on surveillance of implementation of the DSB's recommendations in the case concerning US Section 211, in order to express the support for the Cuban Government and people. The most recent US status report of 11 June 2010, contained in document WT/DS176/11/Add.91, stated, once again, in the last paragraph that "[t]he US administration will continue to work with the US Congress with respect to appropriate statutory measures that would resolve this matter". This was clearly a repetition of previous status reports. As Venezuela had pointed out on numerous occasions, this constituted "action without results", which ultimately kept in place legislation contrary to the TRIPS Agreement, perpetuated inconsistency with the principles of national and most-favoured-nation treatment, and prolonged the harm that had been caused and was still being caused to Cuba, while further undermining the credibility of the DSB. Cuba had been awaiting positive signals on the part of the United States for more than eight years now; i.e. in concrete terms, compliance with the Appellate Body's ruling. WTO Members would very much like to see a positive development required under the multilateral trading system, which was weakened by the lack of compliance on the part of some Members. As had already been done on many occasions, her country called upon the United States to put an end to this economic, commercial and financial embargo policy against Cuba and to respect its commitment towards the DSB by complying with the DSB's recommendations.

10. The representative of Viet Nam said that his country thanked the United States for its status report and supported the statement made by Cuba. Like previous speakers, Viet Nam urged the United States to bring its measures into compliance with the DSB's rulings and recommendations as soon as possible.

11. The representative of Ecuador said that his country noted the US status report and supported the statement made by Cuba. Once again, Ecuador emphasized that Article 21 of the DSU referred expressly to prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing-country Members. Ecuador noted that the United States closely monitored compliance by other Members with their obligations and, in various WTO Councils and Committees, it had expressed its trade and systemic concerns with respect of certain commitments undertaken by other Members. The United States also prepared internal reports on other countries' alleged non-compliance with their obligations in the area of intellectual property rights. In light of this, Ecuador hoped that the United States would set a good example. Ecuador, once again, urged the US administration and Congress to continue their efforts to ensure prompt compliance with the DSB's recommendations and rulings by repealing Section 211. Finally, Ecuador, once again, wished to stress the need for more detailed information from the EU on the steps being taken to resolve this dispute.

12. The representative of Chile said that his country thanked the United States for its status report. Once again, Chile wished to express its systemic concern about the lack of implementation in this dispute. In Chile's view, in order to preserve the multilateral trading system, and in particular the dispute settlement system, Members must implement the DSB's decisions. This was especially relevant with regard to long-standing disputes such as the Section 211 dispute. Once again, Chile urged the parties to this dispute to take all the necessary steps and measures in order to comply in this dispute.

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. Brazil urged the United States to expedite its efforts and bring its measures into conformity with its multilateral obligations.

14. The representative of Mexico said that his country supported a solution to this dispute either through compliance or via some other legal remedies provided for in the DSU. Mexico noted that, if a Member considered that an outcome in a particular dispute was not satisfactory, it could initiate a fresh dispute on the same matter. Mexico pointed out that, in the week of 21 June 2010, the issue of "effective compliance" was being discussed in the DSU negotiations. Thus, Mexico believed that the information regarding the disputes considered under item 1 of the Agenda of regular DSB meetings could be useful with regard to the assessment on effective compliance in the context of the DSU negotiations. For example, the defendant in the Section 211 dispute had reported 90 times, once a month since 2002, on its steps to implement the DSB's recommendations and rulings.

15. The representative of the United States said that, in response to the statements made by some Members that this dispute raised concerns for the dispute settlement system, as the United States had noted at several previous DSB meetings, it did not believe that those concerns were well-founded. In addition, as the United States had noted, in March 2010 the Committee on the Judiciary of the US House of Representatives had held a hearing on certain proposals to implement the DSB's recommendations and rulings in this dispute.

16. The representative of Cuba said that, once again, Cuba wished to thank those delegations who had urged the parties to settle this dispute and had called for Cuba's rights to be respected. Cuba noted the statement that had just been made by the United States. While Cuba recognized that delegations had the right of reply, it considered that there was no point in doing so unless there was a chance that those who listened to those statements believed what they heard. Cuba noted that, from a technical or legislative point of view, this dispute was not as complex to settle like the other disputes that had already been settled, and yet it had dragged on for so long. In addition, what the United States had stated was devoid of merit, unless it would decide one day to announce that it had complied with the DSB's rulings.

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.91)

18. The Chairman drew attention to document WT/DS184/15/Add.91, 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 10 June 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 hoped that the United States would soon be in a position to report to the DSB tangible progress. A 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.

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.66)

22. The Chairman drew attention to document WT/DS160/24/Add.66, 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 10 June 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 the United States had again reported non-compliance. The EU was again disappointed and remained ready to work with the US authorities towards the complete resolution of this case.

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.29)

26. The Chairman drew attention to document WT/DS291/37/Add.29, 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 more, her delegation noted that EU regulatory procedures on biotech products continued to work as foreseen in the legislation. The five authorizations decisions on GMOs, issued on 2 March 2010, including one for cultivation, had raised the number of GMOs authorized since the date of establishment of the Panel to twenty-nine. Progress had also been made on other applications for authorization and the Agriculture Council would, on 29 June 2010, vote on six new authorizations (GM maize events: (i) MON89034xNK603; (ii) Bt11xGA21; (iii) MON88017xMON810; (iv) 59122x1507xNK603; (v) 1507x59122 and (vi) renewal of the authorization for Bt11 maize). The EU, once again, thanked both Argentina and Canada for their constructive approach on this matter and reiterated its invitation to the United States to re-engage in dialogue. The EU noted that there had recently been some positive signals in that respect, which the EU hoped would soon be confirmed.

28. The representative of the United States said that his country thanked the EU for its status report and its statement. As the United States had noted at the May DSB meeting, the EU had been

[2] Article 3.3 of the DSU.

considering substantial modifications to its biotech approval procedures. The United States understood that the modifications were intended to address problems that were linked both to delays in the approval of biotech applications, and to the adoption by EU member States of bans on products approved at the EU level. The United States further understood that earlier this month, the EU had begun discussing a concrete proposal with stakeholders. The United States had been working with the EU to schedule discussions to address these developments and other matters relating to trade in biotech products. The United States looked forward to holding constructive discussions with the EU regarding these matters.

29. The representative of the European Union said that her delegation wished to note that this issue was unrelated to the Panel's findings and recommendations in this dispute. Nevertheless, the EU was ready to reply to the question as a matter of transparency. As announced by both President Barroso and Commissioner Dalli, the Commission was currently reflecting on the most effective approach to the issue of cultivation of GM crops within the current EU legislative framework. Such legislative framework provided for an EU system of authorization that was science-based. However, the EU regime, as much as the WTO Agreements, acknowledged that there were other relevant factors that may have to be taken into consideration. Some EU member States had expressed for some time certain concerns regarding the issue of cultivation of GM crops in their territory. For the EU authorization system to be effective, those concerns needed to be addressed adequately. The Commission expected to announce the outcome of its reflection in July 2010.

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

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.9)

31. The Chairman drew attention to document WT/DS322/36/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 US measures relating to zeroing and sunset reviews.

32. The representative of the United States said that his country had provided a status report in this dispute on 10 June 2010, in accordance with Article 21.6 of the DSU. As noted in the 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.

33. 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 report 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.

34. The representative of the European Union said that her 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, and recalled that immediate compliance with the DSB's recommendations and rulings was not an option, but an obligation under the DSU.

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

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.6)

36. The Chairman drew attention to document WT/DS350/18/Add.6, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

37. The representative of the United States said that his country had provided a status report in this dispute on 10 June 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.

38. The representative of the European Union said that EU's concerns about the lack of implementation by the United States in this dispute were well-known and were recorded in the minutes of past DSB meetings. Despite encouraging political statements, the final determination in the Section 129 proceeding (12 March 2010) left the EU perplexed as to the US intentions on compliance with the ruling in this dispute. The EU, therefore, urged the United States to reconsider its Section 129 determination immediately and to implement.

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

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

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

41. The representative of the United States said that his country had provided a status report in this dispute on 10 June 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, and it would continue to consult with interested parties with regard to the remaining issues. Finally, 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.

42. The representative of the European Union said that her delegation thanked the United States for its status report. At the same time, as the EU had already stated, it wished to express 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.

43. 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

44. 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.

45. The representative of Japan said that, according to the CDSOA 2009 Annual Reports issued on 10 December 2009, some US$248 million had been distributed for FY2009.[3] Those latest annual distributions showed that the CDSOA remained operational. In fact, as US Customs and Border Protection had explained, "the distribution process will continue for an undetermined period".[4] Japan urged the United States to stop 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 in this dispute.

46. The representative of the European Union said that, as Members were aware, as of 1 May 2010, the EU had brought up to US$95.38 million the level of retaliatory measures applied in this dispute. This reflected the proportionate increase of the amount disbursed to US companies from anti-dumping and countervailing duties collected on EU products, as published in the latest distribution of October 2009. This showed that duties continued to be distributed to the US industry. Once again, the EU wished to ask the United States when it would effectively stop the transfer of those 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 on implementation in this dispute.

47. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. As had been stated at previous DSB meetings, Brazil was of the view that non-compliance in this dispute would continue until the United States ceased all disbursements made pursuant to the Byrd Amendment. Before that, the issue would not be "resolved" within the meaning of Article 21.6 of the DSU and the submission of status reports would continue to be required.

48. The representative of India said that his country thanked the EU and Japan for, once again, bringing this issue before the DSB's Agenda. India shared their concerns and remained disappointed at the US maintenance of those WTO-inconsistent disbursements. As mentioned by previous speakers, the CDSOA remained fully operational and allowed for disbursements by the US administration to its domestic industry. This fact continued to raise concerns to WTO Members. As reiterated in the past, India was concerned that non-compliance by Members would lead to the erosion of credibility of the WTO dispute settlement system.

49. The representative of China thanked the EU and Japan for, once again, raising this item on the Agenda of 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.

[3] See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority trade/add cvd/cont dump/cdsoa 09/report/fy 09 annual report.xml

[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

50. The representative of Thailand said that his country thanked Japan and the EU for bringing this issue 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 providing the status reports until such actions were taken and this matter was completely resolved.

51. The representative of Canada said that her country thanked the EU and Japan for raising this issue in the DSB and agreed with them that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

52. The representative of the United States said that, as his country had explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Furthermore, the United States recalled that Members had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, 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 explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

53. The DSB took note of the statements.

3. European Communities – Export subsidies on sugar

(a) Statements by Australia, Brazil and Thailand

54. The Chairman said that the item was on the Agenda of the present meeting at the request of Australia, Brazil and Thailand. He then invited the respective representatives to speak.

55. The representative of Australia, speaking also on behalf of Brazil and Thailand, said that Australia, Brazil and Thailand recalled their statements made at the previous four meetings of the DSB, and at the meeting of the Committee on Agriculture held on 10 March 2010, expressing their concern at the January 2010 decision of the EU to export out-of-quota sugar in excess of its annual scheduled quantity commitment level of 1.2735 million tonnes. Australia, Brazil and Thailand continued to be concerned by the EU's action and urged the EU to provide the necessary technical information underpinning its decision to export additional sugar and to justify the WTO-consistency of its decision to export additional sugar. Australia, Brazil and Thailand remained ready to engage in a dialogue.

56. The representative of the European Union said that this was the fifth time that her delegation highlighted that the EU's decision to export 0.5 million tonnes of sugar was a temporary measure, which had been adopted in view of the exceptional market conditions at both the EU and world level; i.e. world prices being at a record high level creating a shortage of sugar, which affected importing developing countries. The EU did not expect those market conditions to last beyond the season 2009-2010. The export of 0.5 million tonnes was now exhausted and the EU had not renewed that temporary decision. The decision fully respected the EU's international obligations. The quantities on sale were not subsidized and happened at a time when world sugar prices were higher than EU production costs and EU producers had become much more competitive following the drastic overhaul of the EU Common Market Organisation for sugar. Once again, the EU continued to respect its WTO commitments and reiterated its insistence on its right to engage in international trade, even if

competing exporters of other WTO Members would have, for rather obvious reasons of commercial interest, preferred otherwise. The EU continued to offer its readiness to continue a dialogue regarding the background underpinning its temporary decision to export sugar.

57. The DSB took note of the statements.

4. Korea – Anti-dumping duties on imports of certain paper from Indonesia

(a) Statement by Indonesia

58. The Chairman said that the item was on the Agenda of the present meeting at the request of Indonesia and invited the representative of Indonesia to speak.

59. The representative of Indonesia said that her country was very disappointed with Korea's statement on this matter, made at the 18 May 2010 DSB meeting, and regretted Korea's continued lack of cooperation in this dispute. Korea claimed that it had taken steps to correct the violations identified by the Article 21.5 Panel on "Korea - Paper" (DS312). Korea had attempted to classify those violations as "procedural" rather than "substantive" ones and had suggested that it had corrected those faults. Indonesia was not aware of any formal distinction between "substantive" and "procedural" obligations under the Anti-Dumping Agreement. In fact, the main issue in this dispute involved Korea's failure to comply with the requirements of the Anti-Dumping Agreement in selecting the information to be used to calculate the dumping margin for the Indonesian exporters. This was a very substantive issue. Had Korea complied with its obligations, it would have calculated *de minimis* margins for the Indonesian exporter. Moreover, nothing in the DSU granted a Member, which had been found by an Article 21.5 Panel not to have properly implemented the DSB's recommendations and rulings, unlimited opportunities to attempt compliance solely because it characterized its violations as "procedural".

60. In this case, Korea's position appeared to be that Korea could repeatedly make cosmetic changes to the wording of its determination, without ever addressing the substance of the problem. This was very different from Korea's standard towards other WTO Members, even with respect to the so-called "procedural" violations. For example, in its third-party submission in the dispute: "US – Oil Country Tubular Goods Sunset Reviews" (Article 21.5 - Argentina), Korea had described Article 6 of the Anti-Dumping Agreement – the same provision it had been found to have violated in the "Korea - Paper" Article 21.5 proceeding – as involving "fundamental due process rights that must be ensured at all times" and that if a defending Member failed to implement the DSB's recommendations and rulings with respect to Article 6 rights, "the only way to bring the measure into conformity with the relevant provisions of the covered agreements is to revoke it". Indonesia saw no reason why Korea should itself be subject to a different standard than the standard that Korea applied to other WTO Members. Korea's failure to implement the DSB's recommendations and rulings was now relevant because Korea had recently initiated a sunset review that may lead to the continuation of this WTO-inconsistent measure for several more years. Indonesia regretted that despite the findings of the two Panels in this dispute, and repeated requests from Indonesia to resolve this dispute in a cooperative manner, Korea seemed to maintain this WTO-inconsistent measure no matter what. Indonesia, once again, requested Korea to make serious efforts to resolve this dispute. Meanwhile, Indonesia preserved its rights under the DSU deriving from the Article 21.5 Panel Report.

61. The representative of Korea said that his country wished to express its deep disappointment with Indonesia's statement made at the present meeting reiterating its assertions, which had already been made at the 18 May 2010 DSB meeting. At that meeting, Korea had confirmed its implementation of the October 2007 DSB decision. Korea wished to confirm again that it had fully implemented the recommendation of the compliance Panel and had duly delivered its implementation

results to Indonesia. With respect to the sunset review mentioned by Indonesia, the review process was ongoing in a manner consistent with both the WTO Agreements and Korean laws.

62. The DSB took note of the statements.

5. United States – Measures affecting the production and sale of clove cigarettes

(a) Request for the establishment of a panel by Indonesia (WT/DS406/2)

63. The Chairman drew attention to the communication from Indonesia contained in document WT/DS406/2, and invited the representative of Indonesia to speak.

64. The representative of Indonesia said that she was pleased to present her country's concerns regarding the dispute: "US – Measures Affecting the Production and Sales of Clove Cigarettes". She recalled that, on 7 April 2010, Indonesia had requested consultations with the United States pursuant to Articles 1 and 4 of the DSU; Article XXII of GATT 1994; Article 11 of the SPS Agreement; and Article 14 of the TBT Agreement with respect to the measure adopted by the United States banning flavoured cigarettes, including clove cigarettes. Indonesia had held those consultations with the United States on 13 May 2010. Unfortunately, those consultations had not resolved the dispute. The subject of the consultations and the panel request concerned the prohibition on the production or sale of so-called "clove cigarettes" in the United States, pursuant to Section 907(a)(1) of the Family Smoking Prevention and Tobacco Control Act of 2009. This law had taken effect on 22 September 2009. Pursuant to the Act, clove cigarettes produced in Indonesia may no longer be imported into the United States.

65. Indonesia was a developing country with a relatively large population. It struggled to keep its people employed, fed, and educated. In many parts of Indonesia, the main source of income and employment was the production of tobacco, clove, and cigarettes. Indeed, well over 6 million Indonesians[5] depended directly or indirectly on clove cigarette production to put food on the table, clothes on their children's backs, and a day's wages in their pocket. Prior to the Act, Indonesia had produced 99 per cent of the clove cigarettes sold in the United States. Now, those sales were down to zero. No one, least of all Indonesia, questioned the serious health risks associated with the use of tobacco products. In this regard, Indonesia was particularly mindful of the need in many countries to adopt reasonable measures aimed at restricting the sale, use, and marketing of cigarettes to underage smokers. At the same time, Indonesia did not understand the rationale and justification for the complete ban on clove cigarettes resulting from Section 907(a)(1) of the Act, while menthol cigarettes were excluded from the ban. The Act stated that its primary purpose was to reduce the incidence of youth smoking. It sought to accomplish this purpose by prohibiting the production or sale in the United States of any cigarette that contained a natural or artificial flavour, herb or spice that was a "characterizing flavour" of the tobacco product or smoke, including strawberry, grape, orange, cinnamon, pineapple, vanilla, coconut, liquorice, cocoa, chocolate, cherry, coffee, and last, but not least, clove. However, not all flavours, herbs, and spices were covered by the Act. Specifically excluded from Section 907 was menthol. Menthol was an artificial flavour derived from mint, which was a herb or spice. The menthol flavour was added to the cigarette in order to hide or "mask" the otherwise harsh taste of the tobacco. Not surprisingly, this fact made menthol cigarettes particularly appealing to first-time smokers, including under-aged ones. Almost all of the menthol cigarettes sold in the United States were produced domestically.

66. According to surveys and studies conducted by the US Government, menthol cigarettes accounted for approximately 44 per cent of the cigarettes consumed by youth smokers and approximately 28 per cent of the cigarettes consumed in the United States. By contrast, clove

[5] NSDUH – National Survey on Drug Use and Health (for the year 2007).

cigarettes, before the ban, were believed to account for less than 0.05 per cent of the cigarettes consumed by youth smokers in the United States and just 0.09 per cent of the cigarettes consumed in the United States. Given those facts, Indonesia could not understand why menthol cigarettes could continue to be sold while clove cigarettes were banned. Indonesia was not aware of any science, "sound" or otherwise, that showed clove cigarettes to be more harmful than regular cigarettes and certainly none that distinguished clove from menthol cigarettes in this respect. Indonesia also did not know any science that would support the conclusion that clove cigarettes were more appealing to youth smokers than menthol cigarettes. In fact, quite the opposite was true. On many occasions, including most recently during the consultations, Indonesia had asked the United States to share any surveys or studies that demonstrated why clove cigarettes should be banned but not menthol. Indonesia still had not received any written response from the United States, which had been agreed to be delivered by 10 June 2010. Indonesia believed that Section 907(a)(1) of the Act and its implementation by the United States was inconsistent with various rules and principles of the WTO, including, but not limited to, the GATT 1994 and the TBT Agreement. The specific legal claims were outlined in Indonesia's written request for a panel. In conclusion, Indonesia had been trying to avoid the present situation since 2004. Indonesia had written letters, spoken to Members of the US Congress and their staff, and had repeatedly met with US administration officials. Indonesia had even held informal, bilateral consultations with the United States in Geneva in August 2009, all in an effort to avoid formal, WTO dispute settlement proceedings. Unfortunately, however, no resolution had proven possible. Therefore, Indonesia respectfully requested that, pursuant to Article 6 of the DSU, the DSB establish a panel to examine the matter, with standard terms of reference, as set out in Article 7.1 of the DSU.

67. The representative of the United States said that his country was disappointed that Indonesia had chosen to move forward with its request for panel establishment. The Family Smoking Prevention and Tobacco Control Act did not target Indonesian clove cigarettes. Indeed, the law did not single out any country. The United States was confident that the Act was fully consistent with its WTO obligations, and it intended to defend its position vigorously. In addition, the Food and Drug Administration's Tobacco Products Scientific Advisory Committee, which had been established by the Family Smoking Prevention and Tobacco Control Act, was currently meeting and carrying out the tasks assigned to it by Congress. As required under the Act, the Committee would report its findings to the FDA by 18 March 2011. In light of the fact that the required report of the Tobacco Products Scientific Advisory Committee was pending, Indonesia's request for a panel was, in the US view, premature, and the United States would encourage Indonesia to reconsider its request. For those reasons, the United States was not in a position to agree to the establishment of a panel at the present meeting.

68. The DSB took note of the statements and agreed to revert to this matter.

6. Proposed nominations for the indicative list of governmental and non-governmental panellists (WT/DSB/W/427)

69. The Chairman draw attention to document WT/DSB/W/427, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/427.

70. The DSB so agreed.

7. Proposed amendments to the Working Procedures for Appellate Review

(a) Statement by the Chairman

71. The Chairman, speaking under "Other Business", said that, as he had announced at the beginning of the meeting, he wished to make a statement concerning the amendments proposed by the Appellate Body to the Working Procedures for Appellate Review, which had been circulated in document WT/AB/WP/W/10. He informed delegations that, on 27 May 2010, in accordance with the Decision of the DSB of 19 December 2002, he had conveyed to the Appellate Body the views expressed by Members at the 18 May DSB meeting on the proposed amendments, by forwarding to them the record of that meeting. In addition, as had been agreed by the DSB regarding the submission of written comments sent by the deadline of 26 May, he had also conveyed to the Appellate Body written comments submitted by Australia, Chile, China, Guatemala, Japan, Korea, Mexico, New Zealand, Singapore, Chinese Taipei, Thailand, Turkey and the United States. In this regard, he wished to confirm that, as had been agreed, these written comments would be annexed to the minutes of the 18 May DSB meeting. Finally, in accordance with paragraph 4 of the 2002 DSB Decision, he had requested that Members' views and written comments be taken into account by the Appellate Body. It was his understanding that the Appellate Body was currently in the process of reviewing the views and comments received from Members.

72. The DSB took note of the statement.