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Dispute Settlement Body
31 August 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 31 August 2009

Acting Chairman: Mr. Mario Matus (Chile)

Prior to the adoption of the Agenda, Amb. Mario Matus, the Chairman of the General Council, welcomed delegations and said that he had been asked to chair the present meeting in the absence of Amb. John Gero, the Chairman of the DSB. He noted that this was in accordance with the Rules of Procedure for meetings of the Dispute Settlement Body which provided that if the DSB Chairperson was absent from any meeting or part thereof, the Chairperson of the General Council, or in the latter's absence the Chairperson of the Trade Policy Review Body shall perform the functions of the DSB Chairperson.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.81)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.81)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.56)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.19 – WT/DS293/31/Add.19)

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 by Ecuador: Status report by the European Communities (WT/DS27/96/Add.7)

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DS332/19/Add.5)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34)

1. The Chairman recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue was resolved. He proposed that the seven 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.81)

2. The Chairman drew attention to document WT/DS176/11/Add.81, 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 20 August 2009, in accordance with Article 21.6 of the DSU. As had been noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, which had convened in January 2009. The US administration was working with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, at the present meeting, the United States was presenting its eighty-first status report in this dispute. The EC hoped that the new US authorities would now take steps to finally implement the DSB's ruling and resolve this matter.

5. The representative of Cuba said that, at the 20 July 2009 DSB meeting, the United States, in response to urgent calls by numerous Members to comply with the rulings of the Appellate Body in this case, had argued that the credibility of the dispute settlement system remained intact, as demonstrated by the fact that new cases were being brought to the WTO. However, as long as there were unresolved cases on the Agenda item regarding surveillance of the implementation of the DSB's recommendations, the system would not have fully accomplished its mission. The main objective of the dispute settlement mechanism was to have measures, which were inconsistent with the WTO Agreements eliminated, and this meant all measures, without exception. Cuba had requested the United States to provide information to the DSB, which was responsible for monitoring the implementation of the recommendations, on the concrete steps being taken to comply with the rulings, which had been made more than seven years ago. Unfortunately, the US status reports continued to be vague and repetitive and, contrary to the requirements set out in Article 21.6 of the DSU, did not provide information about progress made. It was evident that it was not possible to give an account of progress that had not been made. In July 2009, Cuba had updated Members on the legislative projects relating to Section 211. No changes had been recorded in 2009, there was no serious discussion on this issue nor was the US administration working with the US Congress to find a legislative measure aimed at repealing the legislation, which had been in force for more than ten years. In 2002, the Appellate Body had found that the legislation in question violated the national and the most-favoured-nation treatment obligations contained in the TRIPS Agreement, which were among the principal pillars of the WTO. Cuba noted that the press had reported on the July meeting between the US Trade Representative and the EU Trade Commissioner, which had been held to discuss pending trade issues between the United States and the EC. However, the Section 211 dispute did not appear on the agenda of issues to be resolved in the coming months. As had previously been stated, both sides must take effective action to end this dispute. The only acceptable way forward was to repeal Section 211. As long as Section 211 remained in force, both parties to the dispute would be promoting the non-observance and violation of intellectual property rights. Both parties were concerned about piracy and counterfeiting of products to the point of detaining generic medicines legally transported from one country to another, but ignored the fact that Barcardi sold alcoholic beverages in Florida using the brand name Havana Club. Finally, Cuba, once again, urged that measures be taken as soon as possible to resolve this long-standing dispute.

6. The representative of Ecuador said that his country thanked the United States for its status report, which regrettably demonstrated little progress towards compliance. Ecuador fully supported the statement made by Cuba on this matter. Once again, Ecuador recalled that Article 21 of the DSU expressly referred to prompt compliance with the DSB's rulings and recommendations, in particular with regard to matters affecting the interests of developing countries. It was the United States that closely monitored compliance by all Members with their WTO obligations and had expressed, in different WTO Councils and Committees, its systemic concerns regarding some of the commitments undertaken and had drafted internal reports about other countries concerning compliance with their obligations in relation to intellectual property rights. Therefore, if the United States wished to promote coherence, it should be setting a good example. Ecuador, once again, urged the US administration and Congress to speed up compliance with the DSB's rulings and recommendations by repealing Section 211.

7. The representative of India said that her country thanked the United States for its status report and its statement. However, it was regrettable that the new US Congress had not begun to consider any implementation action pertinent to this case, despite the endeavours of the US administration and the appeals of WTO Members. As had been mentioned by previous speakers, the situation of non-compliance in this dispute was seriously damaging the credibility of the WTO dispute settlement system. India was confident that the US administration would continue to work with the US Congress in a constructive manner with a view to implementing the DSB's recommendations.

8. The representative of China said that his country thanked the United States for its eighty-first status report and its statement. Regrettably, there was nothing new in the report, and the United States had not indicated when the matter would be resolved after more than seven years since the adoption of the DSB's recommendations and rulings. China, therefore, supported the statements made by the EC and Cuba, since the situation of non-compliance seriously damaged the authority of the TRIPS Agreement and the credibility of the WTO dispute settlement system. China, once again, urged the United States to comply with the DSB's recommendations without further delay.

9. The representative of Brazil said that his country thanked the United States for its status report in this dispute. Brazil joined previous speakers who had expressed serious concerns about the prolonged situation of non-compliance. In this connection, Brazil urged the United States to take all the necessary steps to comply with the DSB's recommendations and rulings as quickly as possible.

10. The representative of the Bolivarian Republic of Venezuela said that his delegation noted the status report presented by the United States pertaining to the Section 211 dispute. His country endorsed the need to end the economic, commercial and financial blockade, which had been imposed by the United States on Cuba. There must be a balance between demands and compliance, and rights must always be accompanied by responsibilities. The United States was one of the countries which made most demands of the WTO, thereby generating an unavoidable responsibility in terms of its own conduct. As stated by Cuba: "doing is the best way of saying". The current economic and financial crisis, which had started in the United States, had, once again, claimed as its direct victims developing countries which, unlike developed countries, did not have millions of dollars at their disposal to revive their economies and tackle the imbalances which, though economic in principle, had social repercussions. Repealing Section 211 would greatly help Cuba, and would be a clear signal from the new US administration that there was a real commitment to a world at peace – which could only be possible when injustice was reduced. Section 211 was unjust, illegitimate and illegal, and called into question the US commitment to comply with the international treaties to which it was signatory. The United States had been pushing back the agreed deadlines for the repeal of Section 211. By so doing, the United States had undermined the credibility of the WTO, but its non-compliance had gone unpunished. However, the harm that this stance caused to the Cuban people was even greater. Postponement was an effective strategy in a world where things were instantly picked up by the media; where "urgent news" consistently received more coverage than important issues, thereby benefiting those who decided to break the rules, since after a while, those cases were not news anymore. But this could not be the way in which a multilateral organization like the WTO operated, where it had been claimed that one of its greatest successes was the credibility of the DSB. His country, therefore, urged the United States to take steps, as a matter of urgency and necessity, to comply with its obligations under the TRIPS Agreement, so that delegations did not have to hear, every month, statements made by the United States about its intention to comply and about the work carried out by the US administration and Congress.

11. The representative of Viet Nam said that his country thanked the United States for its status report. The dispute settlement mechanism was a very important mechanism to ensure the balance between the rights and obligations of WTO Members. Therefore, like other Members, Viet Nam urged the United States to promptly bring its measures into compliance with the DSB's rulings and recommendations in this dispute.

12. The representative of Costa Rica said that his delegation had noted the status report submitted by the United States in relation to this case. Costa Rica stressed the importance of complying with the provisions of Article 21 of the DSU, which referred to the speedy compliance with the DSB's decisions. Costa Rica hoped that the United States would find a prompt solution to enable it to comply with the findings in this case.

13. The representative of Argentina said that his country, once again, wished to join previous speakers who had referred to the prejudicial effect on all WTO Members of the failure to implement the DSB's recommendations. Argentina, therefore, urged the parties to this dispute, and in particular the United States, to take the necessary steps to ensure that this issue could finally be settled.

14. The representative of Chile said that his country had also noted the US status report pertaining to this dispute. As had been stated at past DSB meetings, Chile had a serious systemic concern about the US failure to comply in this long-standing dispute. In Chile's view, the US failure to comply seriously damaged the system. Chile, therefore, urged the United States to take the necessary measures, in a timely fashion, to finally comply with the findings in this dispute.

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, and as indicated at prior DSB meetings, the United States did not believe that those concerns were well-founded. First, the United States reiterated its intention to implement the DSB's recommendations and rulings and had made monthly status reports to this end. This showed a commitment to the dispute settlement system. Second, the record of compliance for WTO Members generally, and for the United States in particular, was good. Third, if the situation in this particular dispute was having systemic consequences, one would expect Members to be demonstrating less interest in bringing disputes to the WTO, but the facts did not bear this out. In fact, since the previous summer, Members had filed 20 consultation requests, which would not seem to reflect a weakening in the confidence that Members had in the dispute settlement system.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.81)

17. The Chairman drew attention to document WT/DS184/15/Add.81, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 20 August 2009, 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 by 23 November 2002, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

19. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan noted the US report that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. Japan hoped that the United States would soon be in a position to report to the DSB a tangible progress for the remaining part of the DSB's recommendations and rulings. 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".[1] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.56)

21. The Chairman drew attention to document WT/DS160/24/Add.56, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

22. The representative of the United States said that his country had provided a status report in this dispute on 20 August 2009, in accordance with Article 21.6 of the DSU. In July 2009, the EC Trade Commissioner and the US Trade Representative had met and had announced that they had exchanged ideas on this dispute. The US administration would continue to confer with the EC, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Communities said that the United States had again reported non-compliance. The EC was aware that the United States was in favour of strong intellectual property protection throughout the world, and thus hoped that the United States would lead by example. Therefore, in the status report, the EC would have preferred to have read that the US administration "was working" with the US Congress, instead of "would work" in an indefinite future. The EC remained ready to work with the US authorities towards the complete resolution of this case, and hoped that the financial loss suffered by the EC industry could be brought to an end soon.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.19 – WT/DS293/31/Add.19)

25. The Chairman drew attention to document WT/DS291/37/Add.19 – WT/DS293/31/Add.19, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

26. The representative of the European Communities said that the EC regulatory procedures on biotech products continued to work as foreseen in the legislation. Twenty-one GMO products had been authorized in the EC since the date of establishment of the WTO Panel. Others were being processed in accordance with applicable law. The authorization of three GM maize events[2] had been submitted to the regulatory Committee in July and were now being transmitted to the Council, and EFSA had delivered positive risk assessments on one GM cotton and four GM maize varieties.[3]

27. The representative of Argentina said that his country, once again, welcomed the EC's status report. Argentina wished to state that it continued to monitor with interest both the approval process and the status of implementation in the EC member States. The positive outcome achieved thus far

[1] Article 3.3 of the DSU.
[2] These GM maize events are the following: MON89034, MON88017 and 59122xNK603.
[3] Cotton GHB614 and Maize MIR 604, MON88017xMON810, 1507x59122 and 59122x1507xNK603.

through dialogue provided sufficient incentive to continue along the same path. Accordingly, Argentina renewed its commitment to continue in a positive way bilateral discussions, which had proved so beneficial for both parties.

28. The representative of the United States said that his country thanked the EC for its statement. Regrettably, the EC had shown little, if any, progress in addressing the problems in the operation of its approval system for biotech products. At past DSB meetings, the United States had already noted the large number of biotech applications backed up in the EC approval system. As a result of this backlog, the EC currently banned the import of maize and other important agricultural products produced in the United States. In fact, the backlog in the EC approval system had grown substantially in the years since the DSB's rulings. The US Panel Report had listed 27 pending biotech applications. That number had more than doubled. Currently, more than 60 biotech applications were pending, and the possibility for meaningful market access for biotech products remained bleak. The United States again urged the EC to take prompt steps to resolve those serious and ongoing problems in the operation of its biotech approval system.

29. The representative of the European Communities said that the GMO regulatory regime was not the subject of the original Panel's findings and neither was its "operation" nor was the status of specific applications not dealt with in the original Panel covered by this Agenda item. In any event, the GMO regulatory regime was working normally. Its functioning should not be rigidly assessed purely quantitatively and in abstract, in terms of number of authorizations per year, since this was dependent on various product and case specific elements, and in particular on the quality of applications and on the time needed by applicants to answer requests from EFSA on additional scientific information. The speedy authorization process of GM soybean MON89788 (Roundup Ready 2), with a decision adopted only four months after EFSA issued its opinion, showed that EC authorization procedures had performed satisfactorily once a complete application was filed.

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

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Communities (WT/DS27/96/Add.7)

31. The Chairman drew attention to document WT/DS27/96/Add.7, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations and rulings in the case concerning the EC's regime for the importation, sale and distribution of bananas.

32. The representative of the European Communities said that, as had been indicated at previous DSB meetings, the EC stood ready to implement the recommendation of the Panel Report by means of modifying its bound duty. The EC still hoped that the rebinding could be made in the context of a comprehensive agreement with Latin American suppliers, an agreement that had been sought since the EC initiated GATT Article XXVIII negotiations back in 2004. The EC was fully committed to finding very soon a final solution to this long-standing "banana saga". As had been indicated in its status report, the EC was fully engaged in negotiations with all Latin American supplying countries with the view of concluding promptly such a comprehensive agreement. The EC hoped that the negotiations could soon lead to a satisfactory agreement for all suppliers.

33. The representative of Ecuador said that his country thanked the EC for its status report and noted that, once again, that report failed to provide any indication of the date by which the EC expected to comply with the DSB's recommendations and rulings in this dispute. The EC had offered to the MFN banana suppliers an agreement, which was subject to a series of conditions that had gone far beyond the Bananas dispute, and made any understanding more complex. Those conditions had

nothing to do with compliance with the DSB's recommendations and rulings in the dispute won by Ecuador and compensation for the EC's enlargement claimed by Ecuador. His country failed to understand the EC's refusal to meet its obligations towards Ecuador, a country which had legal rights to redress the situation, including the retaliation right resulting from past bananas disputes. Nevertheless, Ecuador remained open to reaching a negotiated settlement in the WTO. This matter must be resolved immediately. However, any agreement between the parties would only be acceptable if it maintained the balance achieved in July 2008.

34. The representative of Panama said that his country was deeply disappointed, though not surprised, by the EC's continued lack of compliance in this long-standing dispute, and reiterated that Panama was fully committed to defending its rights. The issue had been on the agenda for 17 years. There had been 13 rulings against the EC and the obligation to comply was already a decade old. Panama did not expect that the EC would make such little progress in the implementation of the DSB's rulings. The EC's non-compliance with the DSB's recommendations undermined the WTO and the rules agreed by all Members. The EC status report demonstrated the main problem faced in the past months. In spite of repeated complaints by a number of Members, the EC was of the erroneous view that Members had to reach "a comprehensive agreement" on numerous elements before it could bring itself into compliance. Panama had understood from the negotiations with the EC that, as a prior condition to compliance, and in a manner unprecedented in the WTO, the EC expected the MFN suppliers to give up their rights in order to secure full compliance with the DSB's decisions in this dispute, and to accept costs not related thereto. Under the DSU, compliance with WTO obligations was not contingent on compliance with "comprehensive" conditions. In Panama's view, the DSU text was clear in demanding that the EC complied promptly and without conditions. He noted that the reasonable period of time for the EC to bring itself into compliance with the DSB's recommendations had expired many years ago. Therefore, any additional delay had, by definition, been unreasonable. The EC's non-compliance record in this dispute had clearly demonstrated that the MFN suppliers had been more than patient in this dispute. Panama and other players in this dispute had enormous, quantifiable tariff interests. Panama believed that the matter had to be resolved promptly and positively, in a way that would safeguard Latin America's substantive and procedural rights. Panama urged the EC to find a solution, without further delay, to Latin American countries' tariff rights and their rights arising from the EC's enlargement.

35. The representative of Colombia said that his country thanked the EC for its status report and noted that the report had reaffirmed, for the seventh time since January 2009, the EC's intention to bring itself into compliance with the DSB's recommendations and rulings by modifying its scheduled tariff commitments on bananas. Colombia had participated in the discussions with the EC with a view to concluding an agreement on bananas that would establish, among other elements, the level of the new EC bound tariff duty. Colombia hoped that those negotiations would result in a fair agreement, which required the full commitment of the EC. Like the EC, Colombia hoped that a satisfactory agreement which would put an end to this long-standing dispute would soon be reached. Colombia hoped that the EC would comply with the DSU obligation to pay particular attention to this matter, which affected the interests of developing countries such as Colombia.

36. The representative of Honduras said that his country had been involved in the Bananas dispute since 1995 and its legal interests had still not been respected. Honduras was a complainant in the Bananas III dispute and hoped that the EC would in fact comply with its obligations. Honduras was a substantial supplier of bananas to the EC market and its interests had still not been recognized by the EC. This persistent failure to comply had destroyed Honduras' position on the EC market. Since the EC's common bananas regime had first been established, his country's exports had fallen by 90 per cent. Thus Honduras' loss had been the ACP countries' gain. The ACP suppliers, many of them with stronger economies than that of Honduras, had experienced growth of 35-40 per cent in their banana exports to the EC over the period in question, and some had grown considerably more. A study recently published by one of the economists, used by the EC on the banana issue, stated that the effects of the EC's failure to comply would become even more far-reaching. The study had

concluded that the preferential tariff of €176 per tonne would almost double exports from the ACP countries in 2016. It had further concluded that by 2016 Latin American suppliers would not maintain their volumes in the EC unless the €176 per tonne was reduced to €60 per tonne. Although the EC itself had now acknowledged that huge distortions existed, there was no evidence that the EC was willing to make an effort to redress this. In its latest status report, the EC stated that it was "engaged in discussions" with Latin American countries, but the reality was in fact that it had been engaged in extracting concessions, not in bringing itself promptly into compliance with the recommendations. Honduras was dissatisfied at the lack of progress in this dispute. Honduras, which had suffered long enough, was entitled to expect prompt compliance by the EC, and on those grounds it reserved all its rights to achieve that end.

37. The representative of Costa Rica said that his country supported the statements made by Ecuador, Panama, Honduras and other MFN suppliers. Costa Rica noted the EC's status report and was, once again, disappointed by the EC's continued failure to comply with the DSB's recommendations and rulings in this case. The conditions imposed by the EC hampered a solution to this dispute and were in contradiction with the statements made by the EC regarding its willingness to comply with the DSB's recommendations and rulings in this dispute. Costa Rica, once again, urged the EC to make all possible efforts to put an end to this long-standing dispute.

38. The representative of the Dominican Republic, speaking also on behalf of the ACP countries, said that since this matter had been on the Agenda of the DSB over the past seven meetings, the ACP countries had underlined their respect for the need to implement the DSB's decisions, notwithstanding their disagreement with certain recommendations reached by the Panel and the Appellate Body in this dispute. They recalled that the recommendations of the Panel and the Appellate Body committed the EC to a TRQ at a tariff of €75/metric tons and an out-of-quota tariff of €680/metric tons. As stated previously, the ACP countries could resign themselves to live with a literal implementation of those recommendations. The EC, however, aimed to achieve compliance and implementation by changing the structure of its tariff commitments through negotiations with the MFN banana suppliers. It appeared that the result of this process may be an overall reduction of applied and bound duty rates. The DSB's recommendations in this dispute did not require such an overall reduction of average tariffs; but either a literal implementation (which would make MFN producers worse off) or a rearrangement. A decision to reduce the EC's average banana tariffs could not be justified by the need to comply with the DSB's recommendations, but could rather be justified in the context of the DDA negotiations. This should be kept in mind when designing and implementing a solution, which should be based on the right reasoning and anchored and balanced out in the right context. The ACP countries remained committed to supporting their partners in finding and implementing an effective final solution to the "banana issue".

39. The representative of Ghana said that his country supported the statements made by the representatives of the ACP countries and the EC. All WTO Members acknowledged that they belonged to one big family. As much as all Members relied on trade to boost their respective economies, all must try as much as possible not to allow trade to drive a wedge among them. In finding a lasting solution to this delicate dispute on bananas, where all the parties had systemic interests, it was important that the dispute be addressed in a holistic manner. In this regard Ghana appealed to all parties to this dispute to exercise more restraint and continue to negotiate in good faith with a view to finding a lasting and amicable solution to this dispute, while taking into consideration the economic and social interest of third parties.

40. The representative of Guatemala said that, once again, his country noted with regret the fact that this matter was still on the DSB's Agenda. Guatemala urged the EC to reflect on its position and to ensure prompt compliance with the recommendations and rulings of the Panel and the Appellate Body. Guatemala also hoped that the EC would provide more detailed reports on the implementation of the recommendations and rulings in this dispute.

41. The representative of the United States said that his country thanked the EC for its status report and its statement. He said that the reasonable period of time for compliance in this dispute had expired more than ten years ago, on 1 January 1999. While taking note of the EC's efforts to reach agreement with interested parties to resolve the dispute, the United States also noted that the commercial impact of the EC's non-compliance over this very long period was undeniably large and damaging to a number of WTO Members. The United States called on the EC to resolve this dispute, and until then, it would renew its request to the EC to provide a status report with respect to the US dispute.

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

(f) Brazil – Measures affecting imports of retreaded tyres: Status report by Brazil (WT/DS332/19/Add.5)

43. The Chairman drew attention to document WT/DS332/19/Add.5, which contained the status report by Brazil on progress in the implementation of the DSB's recommendations and rulings in the case concerning Brazil's measures affecting imports of retreaded tyres.

44. The representative of Brazil said that, on 20 August 2009, his country had provided the DSB with a status report in this dispute, in accordance with Article 21.6 of the DSU. As had been stated in that report, on 24 June 2009, Brazil's Supreme Court had decided that the importation of used tyres into Brazil violated core constitutional precepts relating to the rights to health and to a balanced environment. The Supreme Court had also affirmed the legality of Brazil's import ban on used tyres and had revoked lower court decisions that had allowed some companies to import used tyres into Brazil. This decision by the Supreme Court reinforced Brazil's comprehensive strategy to deal with the risks to the Brazilian population associated with the generation, transportation and accumulation of used tyres. The decision also constituted a fundamental step towards full compliance in this dispute, which Brazil expected to achieve in the very near future.

45. The representative of the European Communities said that the EC noted Brazil's sixth status report. The EC noted again that Brazil had admitted not having achieved compliance to date, and this despite the expiry of the reasonable period of time more than eight months ago. The EC continued to express its understanding and support for Brazil's measures aimed at protecting its citizens against diseases spread by mosquitoes that bred in abandoned waste tyres. For that purpose, however, there were measures available that would actually make a difference, contrary to the selective targeting of certain imported products that contributed marginally, if at all, to the problem. The EC was deeply concerned about Brazil's ongoing lack of compliance and, once again, called upon Brazil to end, without further delay, its arbitrary and discriminatory practices regarding retreaded tyres, and to do so by removing the import ban.

46. 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/DS294/34)

47. The Chairman drew attention to document WT/DS294/34, 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.

48. The representative of the United States said that his country had provided a status report in this dispute on 20 August 2009, 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. With regard to the remaining issues, including those identified in the DSB's recommendations and rulings, the United States was consulting with the EC in order to address those issues.

49. The representative of the European Communities said that it was the first time, at the present meeting, that the US recourse to zeroing appeared on the DSB's Agenda, but unfortunately not the last. The EC noted the first status report in dispute DS294, and the acknowledgement by the United States that it had not yet complied with the DSB's recommendations and rulings. This meant that a large number of EC exporters had been faced with excessive levels of anti-dumping duties, inflated by zeroing, for nearly two and a half years. There was no disagreement about that. The EC also noted that the status report did not refer to involving the US Congress in ending zeroing in administrative reviews. This confirmed the EC's view that the United States could bring itself into compliance by administrative action. The United States had lost many zeroing disputes, with many WTO Members. There was only one way to address the findings contained in the Reports adopted by the DSB and that was for the United States to immediately stop applying the zeroing methodology in administrative reviews and to stop collecting illegally calculated duties.

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

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

(a) Statements by the European Communities and Japan

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

52. The representative of Japan said that, as previously stated, his country recognized that the enactment of the Deficit Reduction Act of 2005 that included provisions to repeal the CDSOA was an important step forward. However, the implementation of the DSB's recommendations and rulings had not been completed by virtue of the transitional clause contained in those provisions.[4] In fact, on 29 May 2009, the US Customs and Border Protection had issued the "Notice of Intent to Distribute Offset for Fiscal Year 2009"[5], pursuant to the CDSOA. As had been explained in that notice, "the distribution process will continue until all entries made before 1 October 2007 are liquidated and anti-dumping and countervailing duties are collected"[6] and "[b]ecause of the statutory constraints in the assessment of anti-dumping and countervailing duties, the distribution process will be continued for an undetermined period".[7] This latest action demonstrated that the CDSOA had been repealed in form, but remained operational and, thus, the United States still failed to fully implement the DSB's recommendations and rulings in this dispute. Under those circumstances, Japan had decided to continue, as from 1 September 2009, its suspension of concessions and related obligations under the GATT 1994 for another one year to induce full compliance by the United States. Details of this determination were provided in Japan's notification to the DSB, dated 14 August 2009 (WT/DS217/56). Japan, once again, called on the United States to stop 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 "until the issue is resolved". In this regard, Japan reserved all its rights under the DSU.

[4] SEC. 7601(b), Deficit Reduction Act of 2005.
[5] 74 Federal Register at 25814 *et seq*. (dated 29 May 2009).
[6] See "Notice of intent to distribute offset for Fiscal Year 2009", 74 Federal Register at 25814 *et seq.*, dated 29 May 2009.
[7] See "Notice of intent to distribute offset for Fiscal Year 2009", 74 Federal Register at 25814 *et seq.*, dated 29 May 2009.

53. The representative of the European Communities said that, as in many previous meetings, the EC wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to its industry, and finally put an end to the condemned measure. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit implementation reports in this dispute.

54. The representative of China said that his country thanked the EC and Japan for, once again, raising this matter at the DSB meeting. China shared the concerns expressed by previous speakers and joined them in urging the United States to comply fully with the DSB's rulings.

55. The representative of Canada said that her country agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

56. The representative of India said that her country thanked the EC and Japan, once again, for raising this matter at the DSB meeting. India shared their concerns. India remained disappointed at the US maintenance of those WTO-inconsistent disbursements. As had been mentioned by previous speakers, the CDSOA remained fully operational. The disbursements made by the United States to its domestic industry under the Byrd Amendment affected the rights of other WTO Members. India, therefore, urged the United States to cease its WTO-inconsistent disbursement and supported the view that continued surveillance by the DSB was needed as long as the United States did not comply with the WTO ruling.

57. The representative of Thailand said that his country thanked the EC and Japan for bringing this matter before the DSB once again. Thailand urged the United States to cease disbursements under the Continued Dumping and Subsidy Offset Act, repeal the Byrd Amendment with immediate practical effect, and resume providing status reports until such actions were taken and this matter was fully resolved.

58. The representative of Brazil said that his country thanked the EC and Japan for keeping this item on the DSB's Agenda. It was clear that, until such time as the United States ceased all disbursements made pursuant to the Byrd Amendment, the situation of non-compliance would persist, and the issue would not be "resolved" within the meaning of Article 21.6 of the DSU. Thus, pursuant to Article 21.6, unless the DSB decided otherwise, the issue of implementation should be placed on the Agenda of the DSB and shall remain there until the issue was resolved.

59. 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 those disputes. The United States further recalled that Members had acknowledged 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, it failed to see what purpose would be served by further submission of status reports repeating, again, that it had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. With respect to Japan's comments regarding its renewed retaliation measures, the United States would be reviewing carefully the measures taken by Japan. As previously observed, the DSB only authorized the suspension of concessions or other obligations as provided in the Award of the Arbitrator.

60. The DSB took note of the statements.

3. Korea – Measures affecting the importation of bovine meat and meat products from Canada

(a) Request for the establishment of a panel by Canada (WT/DS391/3)

61. The Chairman recalled that the DSB had considered this matter at its meeting on 20 July 2009 and had agreed to revert to it. He drew attention to the communication from Canada contained in document WT/DS391/3, and invited the representative of Canada to speak.

62. The representative of Canada said that, at the 20 July 2009 DSB meeting, her country had presented its first request for the establishment of a panel regarding Korea's measures affecting the importation of bovine meat and meat products from Canada. This request had come after more than six years of efforts on the part of Canada to resolve this issue based on science. Over the years, Canada had continuously shown an openness and willingness to reach a mutually satisfactory solution on this matter and was, therefore, surprised by Korea's affirmation at the 20 July 2009 DSB meeting that Canada had prematurely decided to resort to dispute settlement. Canada had, in good faith, engaged in a total of 13 technical discussions with Korea as well as WTO consultations, all with a view to resolving this dispute. Unfortunately, despite repeated assurances from Korea that a mutually satisfactory solution was in close sight, no progress had been made. Canadian beef was still banned from the Korean market, despite clear guidelines from the World Organization for Animal Health (OIE), allowing for the safe trade in beef under conditions that Canada had met. The panel request was a last resort. Canada had already set out its reasons for proceeding with this case in its request for the establishment of a panel and would, therefore, not repeat them at the present meeting. Pursuant to its request of 9 July 2009, Canada, therefore, asked, once again, that the DSB establish a panel in this case, with standard terms of reference.

63. The representative of Korea said that his country regretted that Canada had chosen to request the establishment of a panel for the second time, despite Korea's efforts to resolve this dispute in a mutually satisfactory manner, as indicated in its previous statement at the 20 July 2009 DSB meeting. Korea understood that such a panel would be established at the present meeting, in accordance with Article 6.1 of the DSU. Once again, Korea wished to reiterate that Members had the right to take sanitary and phytosanitary measures necessary for the protection of human and animal life or health, in accordance with the SPS Agreement. The dispute at hand was related to Bovine Spongiform Encephalopathy (BSE), which was a deadly disease, infectious to both human and cattle and for which no effective treatment had yet been developed. Sixteen BSE outbreaks had been reported in Canada, including two recently, in November 2008 and May 2009. Under these circumstances, the SPS measures taken by Korea in this regard were indispensable to prevent the introduction of BSE agents into Korea, where BSE had never occurred, and to protect life and health of its people and animals. Korea believed that its SPS measures were fully consistent with its relevant WTO obligations and was ready to defend them before the panel.

64. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

65. The representatives of Brazil, Japan, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

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

(a) Request for the establishment of a panel by Brazil (WT/DS382/4)

66. The Chairman drew attention to the communication from Brazil contained in document WT/DS382/4, and invited the representative of Brazil to speak.

67. The representative of Brazil said that, on 20 August 2009, his country had requested the DSB to establish a panel to examine anti-dumping measures adopted by the United States on imports of Brazilian orange juice. The request specifically challenged the use of zeroing when calculating the margin of dumping for exporters of orange juice from Brazil, a practice well-known to WTO Members, given the number of times it had already been raised in the DSB. Indeed, the issue of zeroing was obviously not a new one. Almost a decade had passed since zeroing was first condemned in "EC - Bed Linen". From 2000 to the present date, such a practice had been challenged and condemned several times. The list of cases was long: "US - Hot Rolled Steel"; "US - Corrosion Resistant Steel Sunset Review"; "US - Softwood Lumber V"; "US - Zeroing (EC)"; "US - Zeroing (Japan)"; "US - Stainless Steel (Mexico)" and, more recently, "US - Continued Application (EC)", just to mention some of them. The result of this intense litigation had been a consistent and coherent line of decisions, finding zeroing to be "as such" and "as applied", in original investigations or in reviews, in any of the three methods of comparison, inconsistent with the GATT 1994 and the Anti-Dumping Agreement. Despite the thousands of pages written on the subject and the sharp rebukes by the Appellate Body, the United States refused to abandon zeroing. Except for a change in policy regarding the weighted-average-to-weighted-average comparison method in original investigations, the United States had not yet changed its internal procedures and continued to apply zeroing in the calculation of dumping margins in other anti-dumping procedures. Brazil regretted having the obligation again to bring the issue of zeroing before the WTO Members. Had the United States complied with its WTO obligations, this request would not have been necessary. However, given the circumstances, Brazil had no choice but to request the establishment of a panel to consider this issue once again. Brazil hoped that, besides bringing relief to Brazilian orange juice exporters subjected to an unfair and illegal practice, this dispute may contribute to persuade the United States to abandon the practice of zeroing and avoid any further burden on other WTO Members to re-litigate an issue in relation to which the debate should be over.

68. The representative of the United States said that his country was disappointed that Brazil had chosen to move forward with a panel request at the present meeting. The United States also had concerns with the way in which Brazil had framed its panel request. For example, the request included measures that were not in existence at the time of consultations and consequently could not have been, and had not been, consulted upon. The United States was not in a position to agree to the establishment of a panel at the present meeting.

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

5. United States – Measures relating to zeroing and sunset reviews: Recourse to Article 21.5 of the DSU by Japan

(a) Report of the Appellate Body (WT/DS322/AB/RW) and Report of the Panel (WT/DS322/RW)

70. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS322/34 transmitting the Appellate Body Report on: "United States – Measures Relating to Zeroing and Sunset Reviews: Recourse to Article 21.5 of the DSU by Japan", which had been circulated on 18 August 2009 in document WT/DS322/AB/RW, in accordance with Article 17.5 of the DSU. He reminded Members that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

71. The representative of Japan said that his country appreciated the time and persistent efforts devoted to the proceedings of the Panel and the Appellate Body and the respective Secretariats. The

sheer volume of the submissions and evidential documents filed by the parties suggested that the tasks before them in those compliance proceedings were challenging, but the Panel and the Appellate Body had discharged their responsibilities in a faithful and professional manner. Japan welcomed the findings and conclusions of the Panel and the Appellate Body as well as the analysis and reasoning behind them. The Panel and the Appellate Body had examined the matters before them rigorously and thoroughly, and had decided this case based on the specific facts and circumstances of the case pertaining to the implementation of the DSB's recommendations and rulings concerning zeroing. Ever since the DSB had adopted the Reports of the Appellate Body and the Panel in the original proceedings, on 23 January 2007, Japan had continuously urged the United States to cease the WTO-inconsistent zeroing procedures both as such and as applied. However, even after the expiration of the reasonable period of time, on 24 December 2007, the implementation by the United States was limited to a part of the DSB's recommendations and rulings. The issues presented in the DSU Article 21.5 proceedings which might have appeared to be complicated and technical were in fact straightforward. As the Panel and the Appellate Body had rightly found, there were no measures taken to fully comply with the recommendations and rulings and, where the measures taken to comply did exist, they were inconsistent with covered agreements. In other words, the United States had not ceased the zeroing procedures as such and as applied except for in the context of weighted average-to-weighted average comparisons in original investigations. At the present meeting, Japan would neither repeat the discussions which had taken place during the proceedings nor summarize the findings and conclusions of the Reports of the Panel and the Appellate Body. The findings and conclusions by the Panel and the Appellate Body were clear. Nor was there need to refer to the relevant provisions of the DSU; the Reports to be adopted at the present meeting of the DSB should be unconditionally accepted by the parties. What was required was a concrete action by the United States to fully implement the DSB's recommendations and rulings. A time had come for the United States to take immediate and concrete action to fully implement the DSB's recommendations and rulings in order to resolve this dispute once and for all.

72. The representative of the United States said that his country thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding. As an initial matter, with respect to the issue of zeroing, the United States recognized that the Appellate Body had addressed the consistency of zeroing in anti-dumping proceedings in a number of disputes. The United States continued to take a different view of the commitments that Members negotiated, and did not negotiate, concerning the use of zeroing. Nonetheless, the United States had publicly stated its intention to comply with the DSB's recommendations and rulings in all of these disputes. The United States wanted Members to understand that it was working actively to implement these recommendations and rulings, including those made in other disputes for which the reasonable period of time was still ongoing. However, as the United States had explained to the Appellate Body, this appeal was not about zeroing, but rather concerned what a Member with a retrospective anti-dumping system must do to come into compliance with the DSB's recommendations and rulings with respect to individual administrative reviews. This dispute also raised important procedural issues as to the scope of dispute settlement proceedings. On both of those questions, the Appellate Body and the compliance Panel had misconstrued US obligations and had read requirements into the DSU that had not been agreed by Members.

73. The United States was very concerned that the Appellate Body had, once again, rejected the argument that implementation of the DSB's recommendations and rulings with respect to administrative reviews should be determined by reference to the date of entry. In doing so, the Appellate Body had ignored the well-established principle that the Appellate Body itself had recognized in prior disputes – implementation in the WTO dispute settlement system was prospective in nature. The Appellate Body's interpretation of compliance would have the United States reach back in time to redo determinations that had been made with respect to entries that had occurred many years before the end of the reasonable period of time, in some cases as long ago as six to seven years before the deadline for compliance. And yet somehow the Appellate Body had not found this to be retroactive or otherwise contrary to the prospective nature of compliance. The United States asked

Members to reflect on the implications of the Appellate Body's finding. Members should be concerned with the systemic consequences that could flow from those findings. For example, in future compliance proceedings, a similar approach could be taken with respect to border measures, such as ordinary tariffs, special agricultural safeguards, tariff preferences and customs valuation. Members had never agreed to a dispute settlement system in which implementation was retrospective in nature and in which they could be required to take actions after the end of the reasonable period of time with respect to past entries of merchandise. Only in subsequent disputes would all Members know more fully what consequences would follow from the Appellate Body's reasoning, but in the meantime Members would be left with questions and uncertainty. In addition, the United States referred to the Appellate Body's analysis in US - Zeroing I (EC) (Article 21.5) ("EC I"). There, the Appellate Body had made a distinction between those measures that derived "mechanically" from the assessment of duties and those that did not. The Appellate Body had explicitly left open the question of whether liquidations that had occurred after the reasonable period of time, because they had been delayed by judicial review, could constitute a failure to comply. Moreover, for three of the reviews at issue in this proceeding – identified as Reviews 4, 5 and 6 – there were no post reasonable period of time effects whatsoever that could have served as the basis for a finding of inconsistency. The United States was troubled that the Appellate Body had rejected its argument concerning post reasonable period of time liquidations. The Appellate Body's findings rejected the distinction the Appellate Body itself drew between mechanically and non-mechanically derived measures.

74. The Appellate Body's findings with respect to Reviews 4, 5 and 6 were also cause for concern and were at odds with the Appellate Body's recent approach in the "EC I" dispute. It was difficult to understand how a measure that had not been applied after the expiration of the reasonable period of time could form the basis for a finding that the measures were inconsistent as applied. Lastly, the United States turned to a troublesome procedural finding by the Appellate Body, which had potential implications far beyond anti-dumping disputes. The Appellate Body had affirmed the compliance panel's finding that a particular administrative review, Review 9, which had not been in existence at the time of Japan's panel request, was properly within the scope of the compliance proceeding. The DSU, however, was clear – a measure not in existence at the time of a panel request could not fall within the scope of a dispute settlement proceeding. The Appellate Body had viewed the fact that "we are dealing here with Article 21.5 proceedings" as a reason to depart from the text of the DSU. It had reached this conclusion without ever addressing US arguments based on the language of Article 21.5 itself; in fact, those US arguments did not even appear in the report. For example, Article 21.5 only provided jurisdiction for a panel where there was a "disagreement" over a "measure taken to comply". The United States was at a loss to understand how a non-existent measure could be a measure "taken" to comply, or how a measure not in existence could serve as the basis for finding that there was a "disagreement" at the time of a panel request over the existence or consistency of that non-existent measure. The Appellate Body had also viewed the "prompt settlement" of disputes, in the sense of Article 3.3 of the DSU, as justifying the inclusion of Review 9. "Prompt settlement", however laudable a goal, did not provide a basis for departing from the requirements of the DSU. And the text of Article 3.3 actually supported the exclusion of future measures, since such non-existent measures could not possibly be "impairing" any benefits at the time of a panel request. The Appellate Body had made much of the fact that Review 9 was initiated and underway at the time of Japan's panel request and that it was the most recent administrative review in a series of reviews. The United States failed to see how this reasoning squared with recent Appellate Body findings where challenges to on-going proceedings at the time of a panel request were considered premature. Nor did the United States understand how the Appellate Body was so confident that at the time of the panel request, the final results of Review 9 were so predictable that they should have been included within the scope of the proceeding. In fact, Japan had no way of knowing the final results of the review, as any number of circumstances could have affected that outcome.

75. The United States considered that all Members should share those concerns. The Appellate Body was not empowered to fashion exceptions to the text of the DSU. In the past, the Appellate Body had recognized the rule that "the measures included in a panel's terms of reference must be

measures that are in existence at the time of the establishment of the panel". Only where a subsequent measure was in essence the same measure as the one identified in the panel request had it been included in the scope of the panel proceeding. That was not the case with separate and distinct administrative reviews. The Appellate Body, apparently influenced by the circumstances surrounding this dispute, had relied on an "objective" of the DSU to contradict its express terms. This was not an appropriate approach to treaty interpretation, could raise serious concerns in any further negotiations, and should be of concern to all Members.

76. The representative of the European Communities said that the EC welcomed the Appellate Body Report, although it was rather disappointing to have had to intervene with regard to yet another failure by the United States to implement correctly in a zeroing case. There was a lot of mystification on this issue but what the Appellate Body had found was in essence quite simple – WTO Members could not use zeroing and they could not collect zeroed duties after the end of the implementation period. Whatever the United States may say, this was hardly revolutionary. The Appellate Body had confirmed that, and had explained why, the US claim of discrimination between retrospective and prospective anti-dumping systems was not valid at all. The Appellate Body had further confirmed that, and had explained why, the United States could not hide itself behind domestic litigation to escape its clear and unambiguous obligation to stop collecting illegal anti-dumping duties after the end of the reasonable period of time. Brazil's request in the previous Agenda item showed that this issue would not go away. The only way for the United States to solve the problem of those escalating disputes was to show leadership, stop zeroing and implement the findings correctly.

77. The representative of Korea said that, as a third party to this dispute, his country welcomed the findings of the Reports provided in this dispute. Korea noted that the Panel and the Appellate Body had properly addressed the issues raised in this compliance dispute. Korea hoped that this ruling would contribute to further clarifying the implementation scope and obligation, especially with regard to zeroing in the context of the US anti-dumping proceedings. However, Korea remained concerned about the ongoing zeroing practice by the United States, which had been repeatedly found to be inconsistent with the Anti-Dumping Agreement as well as other covered agreements. This situation could lead Members to a continuous circle of disputes, undermining the Members' expectation of security and predictability of the multilateral trading system. Korea expected the United States to take prompt measures to fully implement the DSB's rulings and recommendations without delay. Korea would continue to remain vigilant in monitoring the situation in the future.

78. The representative of Norway said that, as a third party, her country thanked the Appellate Body, the Panel and the Secretariat for their work in this long-standing dispute and welcomed the adoption of the Panel and the Appellate Body Reports at the present meeting. Norway noted that the Appellate Body had, once again, confirmed the illegality of the zeroing methodology and clarified important implementation related issues. The ongoing zeroing practiced by the United States had repeatedly been found to be inconsistent with the Anti-Dumping Agreement and the GATT 1994. Norway urged the United States to change its practice and bring itself into conformity with its obligations by discontinuing the use of zeroing. Norway hoped that this issue was now finally settled and that implementation would occur without delay.

79. The representative of Japan said that his country wanted to briefly respond to some of the points made by the United States in its statement. First, the United States had stated that the findings of the Panel and the Appellate Body would allow the retroactive remedy, contrary to what the Appellate Body had recognized previously. This was the argument that the United States had put forward during the compliance proceedings and was squarely rejected. The remedy Japan sought, which had been upheld by the Panel and the Appellate Body, was not "retroactive" at all. What Japan claimed was that as long as the measures at issue had legal effect after the end of the reasonable period of time, those measures must be brought into conformity with the covered agreement. As the Panel and the Appellate Body had rightly found, a responding Member failed to comply with the DSB's recommendations if the measure found to be WTO-inconsistent "continued to have legal effect

after the end of the reasonable period of time", in this specific case, if "they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries" after the reasonable period of time.[8]

80. Second, the United States claimed that Reviews 4, 5 and 6 could not have provided a basis for a finding of inconsistency because they had no post reasonable period of time effect. Again, this was the argument made by the United States during the Appellate Body's proceedings and had squarely been rejected by the Appellate Body. As approvingly referred to by the Appellate Body in para. 193 of its Report, the Panel had found that "'the export-specific margins of dumping and import-specific assessment rates in Reviews 4, 5, [and] 6 … were affected (in the sense of being inflated) by zeroing', 'Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings', and some of the import entries covered by Reviews 4, 5, and 6 had not been liquidated when the reasonable period of time expired".[9] Those findings had not been appealed by the United States and Japan failed to see how the United States could argue that Reviews 4, 5, and 6 could not be found WTO-inconsistent because they had no post-reasonable period of time effects.

81. Third, the United States appeared to argue that the finding by the Panel and the Appellate Body to include Review 9 within the scope of the Panel's terms of reference would have a broader implication for the operation of the DSU. On this jurisdictional issue concerning Review 9, two questions had been presented; (i) whether Japan's panel request identified Review 9 as "the specific measure at issue", and (ii) whether that Review which had been initiated at the time of the panel request and was due to be completed during the Panel proceedings could be included in the panel's terms of reference. In disposing of both questions, the Panel and the Appellate Body had focused on the particular facts and circumstances of this case. Specifically, the Panel's findings on those two questions, which had been upheld by the Appellate Body, were based on the facts or its factual findings that: (i) Review 9 had been already initiated at the time of the panel request[10]; (ii) "there is a high degree of predictability regarding the future occurrence of subsequent administrative reviews" under the US retrospective anti-dumping duty assessment system in which the subsequent review supersedes the preceding one[11]; and (iii) administrative reviews formed part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed under the 1989 Anti-Dumping Order" on ball-bearing from Japan and "a chain of measures or a continuum existed" at the time of the panel request and Review 9 had been a latest part of this chain[12] "in which zeroing was used".[13] Japan did not think that the case specific findings by the Panel and the Appellate Body would have such a broader implication for the operation of the DSU, as had been claimed by the United States.

82. The United States had claimed that since Review 9 was still ongoing at the time of the panel request, Japan's claim on Review 9 was premature and Japan had no way of knowing the final outcome of Review 9. As the Panel had found, there was "a high degree of predictability"[14] regarding the future review under the US system, and Review 9 was a latest part of a "chain of measures or a continuum that existed at the time of the panel request".[15] It must also be recalled that the zeroing procedures in reviews had been found to be WTO-inconsistent as such and the Panel had found that the United States had failed to comply regarding those as such measures. This Panel's finding was not appealed by the United States. Thus the zeroing procedures were still out there for use in reviews.

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[8] Panel Report, para. 7.149. See also Panel Report, para. 7.148, approvingly quoted in the Appellate Body Report, para. 161; Appellate Body Report, paras. 160 and 168.

[9] Appellate Body Report, para. 193 (footnote omitted).

[10] See e.g. Panel Report, paras. 7.110 and 7.116; AB Report, paras. 118, 122, 124, and 127.

[11] See e.g. Panel Report, paras. 7.102, 7.106, and 7.111.

[12] See e.g. Panel Report, paras. 7.110 and 7.116; AB Report, paras. 113 and 127.

[13] AB Report, para. 127.

[14] Panel Report, paras. 7.102 and 7.111.

[15] Panel Report, para. 7.116; see also AB Report, paras. 113 and 127.

Under those circumstances, Japan failed to see how its claim on Review 9 could be speculative.[16] The United States appeared to criticize the Appellate Body's consideration of Article 21.5 as a context in interpreting the requirement in Article 6.2. However, those were the compliance proceedings referred to pursuant to Article 21.5 of the DSU. There was nothing wrong with considering Article 21.5 of the DSU in interpreting the requirement under Article 6.2 in these compliance proceedings. Under the Vienna Convention, such consideration as a context was even required. As the Appellate Body had rightly observed, "the text of Article 6.2 of the DSU does not require that a measure be referred to individually in order to be properly identified for purpose of that Article"[17], and "Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request".[18] Thus "the requirement of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings".[19] In any event, the findings of the Panel and the Appellate Body were founded on the specific facts and circumstances of this case. As the Appellate Body had found, in the specific circumstances of this case, "an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings"[20] that is to fully resolve the disagreement contemplated under Article 21.5[21] and as "an aggrieved Member"[22] "Japan had a basis to consider that Review 9, as part of a 'chain of measure or a continuum' in which zeroing was used, could lead to the impairment of benefits accruing to it under the Anti-Dumping Agreement and the GATT 1994".[23]

83. The representative of Thailand said that his country had participated as a third party in this dispute due to its systemic and substantive interest in the elimination of zeroing in all forms, as such and as applied. Thailand thanked the Members of the Appellate Body and the Secretariat for their excellent work in this dispute. Thailand welcomed the decisions of the Appellate Body upholding that of the Panel, and looked forward to prompt implementation by the United States. Prompt implementation would particularly benefit developing countries such as Thailand that did not have sufficient resources to fully participate in multiple continuous litigation cycles. Finally, as mentioned by Thailand in its statements made previously in the DSB regarding other zeroing disputes, Thailand sincerely regretted the controversy those cases had caused.

84. The representative of India said that her country welcomed the Appellate Body Report in these proceedings, and the clarifications given by the Appellate Body on the issue of WTO-consistency of the zeroing practices. India was not a third party in those proceedings but its strong systemic interest in the issue of prohibition of zeroing was well known to all. Members were aware that the correct legal interpretation of the GATT 1994 and the Anti-Dumping Agreement, with respect to this matter, had been repeatedly confirmed by the Appellate Body Reports on several occasions, and the present Report was consistent and coherent to the earlier decisions on this issue. In India's view, zeroing in any form, whether investigations or reviews such as changed circumstances, sunset reviews or administrative reviews was WTO-inconsistent. However, it was regrettable that Members were repeatedly coming to the DSB on this subject matter. India also wished to express its concern over the Appellate Body's decision to open these proceedings to the public and the reasoning given by the Appellate Body and the confidentiality rules of the DSU. India was not against enhancing transparency in the dispute settlement mechanism. However, in India's view, the confidentiality the government provided under the DSU was a matter of substantive issue. Any bilateral arrangement by the parties in this regard may lead to systemic concerns.

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[16] See also AB Report, para. 114.
[17] AB Report, para. 116.
[18] AB Report, para.121.
[19] AB Report, para. 125; see also *id*, paras. 109 and 122.
[20] AB Report, para. 122.
[21] See e.g. AB Report, paras. 122, 155, and 158.
[22] AB Report, para. 127.
[23] Appellate Body Report, para. 127.

85. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS322/AB/RW and the Panel Report contained in WT/DS322/RW, as upheld by the Appellate Body Report.

6. China – Measures affecting imports of automobile parts

(a) Statement by Canada, also on behalf of the EC and the United States

86. The representative of Canada, speaking under "Other Business", said that her delegation wished to make a statement also on behalf of the EC and the United States and believed that both the EC and the United States would wish to make their individual statements thereafter. She recalled that on 12 January 2009, the DSB had adopted the Panel and the Appellate Body Reports in "China – Autos" (DS342). The parties in this case, and the related cases with the United States and the EC, (DS339 and 340), had adopted a reasonable period of time for implementation on 27 February 2009. This reasonable period of time would expire the following day. Under the DSU, China had an obligation to report on its implementation, six months following the establishment of a reasonable period of time for implementation – namely as of 27 August 2009. China should have used the present meeting to inform the DSB on how it would implement the recommendations and rulings in the case "China - Auto Parts", as required under Article 21.6 of the DSU. It was regrettable that China had not placed the matter on the Agenda and had not circulated a status report as required by the DSU. China's failure to respect its reporting obligations was extremely worrying, particularly because the reasonable period of time for implementation would expire the following day. Canada called upon China to make every effort to comply with its obligations under the DSU.

87. The representative of the European Communities said that under Article 21.6 of the DSU, China should have informed the DSB, at the present meeting, on how it would implement the recommendations and rulings in the "China - Autos Parts" dispute. Yet regrettably, it had failed to do so. This was extremely worrying, as it was China's first recommendations and rulings to implement. The EC hoped that China was not creating a precedent in its refusal to be transparent. Furthermore, this secrecy was all the more worrying, because the reasonable period of time would expire the following day. The EC, therefore, urged China to comply with all its obligations under the DSU.

88. The representative of the United States said that his country also wished to make a brief comment concerning the dispute: "China – Measures Affecting Imports of Automobile Parts". China's reasonable period of time for compliance in this dispute had been established over six months ago – on 27 February 2009, and, as mentioned, would expire the following day, 1 September 2009. In those circumstances, it would have been very helpful to the United States, to its co-complainants the EC and Canada, and to the DSB as a whole if China had provided a written status report on its implementation in advance of the present meeting. The United States, therefore, joined Canada and the EC in expressing regret that China had chosen not to do so. The United States understood that China had very recently announced that its implementation of the DSB's recommendations and rulings in those disputes would be effective by 1 September 2009 and the United States looked forward to reviewing China's measures taken to comply.

89. The representative of China said that his country wished to first respond briefly to the statements made by the United States, the EC and Canada, which China believed were not well-founded. With respect to the issue of status reports, he said that Article 21.6 of the DSU stipulated that: "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 pursuant to Article 21.3 unless the DSB decides otherwise". In the "China - Auto Parts" case, the date of the establishment of the reasonable period of time was 27 February 2009. Therefore, the first day after the six-month period for submitting status reports was 27 August 2009. Since the closing date for inscribing items on the Agenda of the present DSB meeting was 20 August 2009, seven days before expiration of the reasonable period of time, China had difficulty in understanding how it

should have the obligation, as alleged by the United States, the EC and Canada, to submit a status report at the present meeting, pursuant to Article 21.6 of the DSU.

90. China recalled that at its meeting on 12 January 2009, the DSB had adopted the recommendations and rulings pertaining to this dispute. On 27 February 2009, China, the United States, the EC and Canada had agreed and had notified the DSB that the reasonable period of time for implementation was seven months and 20 days and would expire on 1 September 2009. Since then, China had made great efforts to implement the DSB's decisions. On 15 August 2009, the Ministry of Industry and Information Technology and National Development and Reform Commission had issued a joint decree to stop the implementation of relevant provisions concerning importation of auto parts in Automobile Industry Development Policy. On 28 August 2009, the General Administration on Customs and relevant agencies had promulgated a joint decree to repeal Decree 125. All those new decrees would come into effect on 1 September 2009. Therefore, China was glad to declare that it had brought its measures into conformity with the DSB's recommendations and rulings. Before concluding, China wished to point out that it had taken actions to implement the DSB's ruling and recommendations with a view to upholding the multilateral trading system. China, therefore, hoped that Members with poor record of implementing the WTO rulings could also take concrete actions to respect their international obligations.

91. The DSB took note of the statements.