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Dispute Settlement Body
20 January 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 January 2012

Chairperson: Mrs. Elin Østebø Johansen (Norway)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the case on: "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" (DS381) was removed from the proposed Agenda following the US decision to appeal the Report.

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.110)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.110)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.85)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.48)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.28)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.25)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.19)

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.12)

(i) United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil: Status report by the United States (WT/DS382/10/Add.1)

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

1. The Chairperson recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue was resolved. She proposed that the ten sub-items under Agenda item 1 be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.110)

2. The Chairperson drew attention to document WT/DS176/11/Add.110, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 9 January 2012, in accordance with Article 21.6 of the DSU. Legislative proposals had been introduced in the current 112th Congress that would implement the recommendations and rulings of the DSB. The US Administration would continue to work on solutions to implement the DSB's recommendations and rulings.

4. The representative of the European Union said that the EU thanked the United States for its status report. The EU hoped that the US authorities would very soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba said that the first DSB meeting in 2012 demonstrated that there were still many disputes where the DSB's recommendations and rulings had not been implemented. This fact was also reflected in the Annual Report of the DSB (WT/DSB/54), which had been circulated on 17 November 2011. In particular, by the end of 2011 the United States was out of compliance with its obligations in six disputes. For example, since February 2002 the United States had not repealed Section 211. For almost ten years, the repetitive US status reports (110) regarding the Section 211 dispute had reflected the US failure to make any progress towards adopting the legislative measures necessary to repeal Section 211. Paradoxically, in an interview published by the Washington Trade Daily on 21 December 2011, the US Trade Representative, Mr Ron Kirk, had stated that the dispute settlement system was an essential component for maintaining the integrity of the multilateral trading system, and had cautioned that the integrity of the system would be undermined if Members acted in an unfair and punitive manner. The United States was no stranger to double standards, and the Washington Trade Daily had also reported that, in November 2011, the Office of the US Trade Representative had submitted a list of more than 30 WTO Members that violated or might violate intellectual property rights. The United States had applied corrective measures to some of them, while others would remain under investigation. The United States, which consistently failed to comply with its DSB obligations and blatantly violated intellectual property rights, unilaterally assumed the right to judge other Members and even imposed sanctions on them.

6. Section 211 was found to be inconsistent with WTO rules and the DSB had recommended that the United States comply with the provisions of the TRIPS Agreement. Section 211 undermined the legitimate rights of Cuban trademark holders. The US authorities had disregarded intellectual property rights so as to enable the Bacardi Company to engage in the fraudulent and illegal sale of products that were not produced in Cuba, using the Havana Club trademark, which manifestly indicated Cuban origin. In this case and in others, the inability to ensure compliance with the DSB's rulings encouraged the proliferation of commercial crime. This confirmed the need to establish more effective mechanisms, especially when the non-complying parties were those Members who, due to their economic hegemony, ignored their legal responsibilities and the rules of international law. Cuba would continue to demand that the United States comply with the DSB's recommendations and rulings, and in particular, that it repeal Section 211, which had been denounced as part of the measures and legal provisions underlying the unjust and illegal US embargo against Cuba. That US

embargo was overwhelmingly rejected by the international community. Cuba refused to accept that one Member should continue to disregard the claims and rights of other Members, or unilaterally decide to introduce WTO-inconsistent practices. Cuba urged the United States to repeal Section 211, as this was the only way to end this dispute.

7. The representative of Ecuador said that his country supported the statement made by Cuba and, once again, wished to underline that Article 21 of the DSU referred specifically to prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing-country Members. Ecuador hoped that the United States would step up its efforts to ensure prompt compliance with the DSB's recommendations and rulings by repealing Section 211. This dispute, which had lasted for more than eight years, demonstrated the main shortcoming of the dispute settlement system.

8. The representative of Brazil said that his country thanked the United States for its status report pertaining to this dispute. Once again, Brazil noted that the United States reported lack of progress. Brazil remained concerned about the non-compliance with the DSB's recommendations and urged the United States to bring its measures into conformity with WTO disciplines.

9. The representative of the Plurinational State of Bolivia said that her country noted the US status report on non-compliance with the DSB's recommendations, and that the United States made no progress towards finding a solution to this dispute. Once again, Bolivia wished to express its concern about this situation of non-compliance, which affected the integrity of the international trading system and caused harm to a developing-country Member. Once again, Bolivia urged the United States to comply with the DSB's recommendations and to remove the restrictions imposed under Section 211. Bolivia supported the statement made by Cuba regarding this matter.

10. The representative of China said that her country thanked the United States for its status report and regretted that the United States had, once again, reported non-compliance. This prolonged situation of non-compliance was highly incompatible with the prompt and effective implementation as required under the DSU provisions, in particular when the interests of a developing-country Member were affected. China urged the United States to implement the DSB's rulings and recommendations without further delay.

11. The representative of Zimbabwe said that her country thanked the United States for its status report. Zimbabwe continued to note with concern the seemingly unending delay by the United States to comply with the DSB's recommendations and rulings. The restrictions being imposed on Cuba by the United States under Section 211 caused prejudice and harm to Cuba. Zimbabwe was disappointed that not enough effort had been made by the United States to address this matter, which had been pending for almost a decade. In that regard, Zimbabwe fully supported Cuba's statement and urged the United States to implement the DSB's recommendations without further delay.

12. The representative of Paraguay said that his country shared the concern expressed by Cuba and other delegations regarding the constant delays in implementing the DSB's recommendations in this dispute. This was not only a trade concern but also a systemic one, since Members' compliance with the DSB's recommendations was essential to the effective functioning of the dispute settlement system. Paraguay believed that this matter could be taken up in the DSU negotiations in the context of discussions on the issue of effective compliance. Paraguay urged the United States to comply with the DSB's recommendations and rulings pertaining to Section 211.

13. The representative of the Bolivarian Republic of Venezuela said that her country regretted that this item was again on the DSB's Agenda and that no implementing action had been taken by the United States. Venezuela was concerned that this undermined the credibility of the DSB and caused harm to Cuba and its people. Venezuela reiterated its support for Cuba and, once again, urged the United States to comply with the DSB's rulings and to lift the embargo.

14. The representative of Chile said that his country wished to express its concern about the lack of compliance in this dispute, which significantly weakened the credibility of the dispute settlement system. Chile wished to reiterate that Members' compliance with their WTO obligations was of paramount importance.

15. The representative of Uruguay said that his country shared the concerns expressed by previous speakers. He said that the WTO was undergoing one of its most critical periods and Members had an obligation to protect the multilateral trading system as well as its dispute settlement system. It was, therefore, important to ensure that DSB decisions were respected. This would help to maintain the credibility of the dispute settlement system, which was an important element of the multilateral trading system. Uruguay reiterated its concern about the non-compliance and urged all parties to resolve this dispute.

16. The representative of Mexico said that his country thanked the United States for its status report. As it had done at previous meetings, Mexico urged the parties to resolve this dispute through the legal remedies provided under the DSU provisions. Mexico noted that the dispute settlement system enabled a Member to initiate its own dispute if it considered that its rights had been impaired or nullified by the lack of compliance with the DSB's decision. Furthermore, Mexico noted that the discussion under this Agenda item could be useful in the context of the DSU negotiations, in particular with regard to the issue of effective compliance.

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.110)

18. The Chairperson drew attention to document WT/DS184/15/Add.110, 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 9 January 2012, in accordance with Article 21.6 of the DSU. As of November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. With respect to the recommendations and rulings of the DSB 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. Japan hoped that the United States would soon be in a position to report to the DSB a tangible progress with respect to the implementation of the remaining part of the DSB's recommendations. Full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[1] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

[1] Article 3.3 of the DSU.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.85)

22. The Chairperson drew attention to document WT/DS160/24/Add.85, 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 9 January 2012, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

24. The representative of the European Union said that the EU thanked the United States for its status report. The EU took note of the US status report and remained keen to resolve this dispute.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.48)

26. The Chairperson drew attention to document WT/DS291/37/Add.48, 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 his delegation hoped that the EU and the United States would continue on the constructive path of dialogue. The last technical meeting held on 27 September 2011 had given the parties another opportunity to discuss directly issues of concern on both sides and to follow up closely on developments in the biotech field. As mentioned at the last regular DSB meeting, four authorizations decisions had been voted in the Standing Committee on 14 November[2] and on 12 December 2011.[3] Since no qualified majority in favour was reached, these four drafts decisions had been submitted to the Appeal Committee on 17 January 2012. Regarding the concerns expressed by the United States on the backlog of approvals, the EU once again recalled that the EU approval system had not been considered by the Panel. In 2011, the Commission had adopted six authorizations decisions[4], not two as previously mentioned by the United States, and had also approved the renewal of the authorization of maize 1507.

28. The representative of the United States said that his country thanked the EU for its status report and its statement made at the present meeting. Between the present day's meeting and the last regularly-scheduled meeting in 2011, the EU had approved four long-pending product applications, including three varieties of biotech maize. Although the United States welcomed any movement in the EU system, those approvals hardly put a dent in the backlog of approximately 70 pending applications. Further, the slow progress of the three maize applications illustrated US concerns with the EU's approval system. The EU's scientific authority had issued positive safety assessments for the three varieties in May 2010, over one year and eight months ago. Under the EU's legislation, these products should have been submitted to the EU's regulatory committee within three months of May 2010. The regulatory committee, which consisted of EU member State representatives, should have proceeded to vote in accordance with the scientific assessments and approve the applications.

[2] A5547-12 soybean and the renewal of 40-3-2 soybean.
[3] MON87701 maize and 356043 soybean.
[4] Maize MON89034xMON88017, cotton GHB614. MIR604×GA21 maize, BT11×MIR604 maize, Bt11×MIR604×GA21 maize, 281-24-236/3006-210-23 cotton.

This, however, did not occur. Instead, the applications had been held up for well over a year in the EU's approval process. In all, the time taken after the scientific assessment, that is, from May 2010 until December 2011, was five or six times longer than had been contemplated in the EU's own law. The delays for these products were unfortunately typical and as a result of such delays, US maize products remained shut out of the EU market. The United States hoped that the EU would address these issues in the coming year.

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

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.28)

30. The Chairperson drew attention to document WT/DS322/36/Add.28, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

31. The representative of the United States said that his country had provided a status report in this dispute on 9 January 2012, in accordance with Article 21.6 of the DSU. In December 2010, the Arbitrator in the proceeding under Article 22.6 of the DSU in this dispute had issued a communication stating that it had accepted a joint request by the parties to the dispute to suspend its work. On 9 January 2012, in response to a joint request of the United States and Japan, the Arbitrator had issued a communication stating that it had decided to continue further the suspension. The communication of the Arbitrator had been circulated to the DSB in document WT/DS322/42. As the United States had explained in its status report, in December 2010, the US Department of Commerce announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. Currently, the US Department of Commerce was continuing with its ongoing work on the proposal.

32. 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 report that "the United States is continuing its ongoing work on the proposal" that had been announced on 28 December 2010 by the US Department of Commerce. As stated in previous meetings, Japan took the US implementation effort as a positive step forward and urged the United States to complete its work on the proposal without any further delay. Japan, however, continued to seek prompt and full compliance by the United States with respect to all of the measures at issue that were subject to the DSB's recommendations in this dispute. As the United States had stated, upon request by the parties, the Article 22.6 arbitrator "has decided to continue the suspension of its work" until 31 January 2012.[5] Japan called on the United States to fully comply by then. Japan hoped that its continued dialogue with the United States and the US implementation efforts would lead to a final resolution of this dispute that would address all aspects of the DSB's recommendations. Japan reserved its rights under the DSU to take appropriate action.

33. The representative of China said that her country thanked the United States for its status report and statement made at the present meeting. China welcomed the steps taken by the United States towards the implementation of the DSB's rulings and recommendations on zeroing matters. However, China remained very concerned about how the United States would implement the DSB's decision on zeroing matters. China would monitor the US implementation steps and urged the United States to fully comply with the DSB's rulings and recommendations without further delay.

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

[5] WT/DS322/42.

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.25)

35. The Chairperson drew attention to document WT/DS350/18/Add.25, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

36. The representative of the United States said that his country had addressed the issue of compliance with the recommendations in this dispute in the status report provided on 9 January 2012, and earlier in the present meeting's discussion of Agenda item 1(e). The United States referred Members to that report and statement for further details.

37. The representative of the European Union said that the EU thanked the United States for its most recent status report. The EU had been working with the United States to find a solution to this dispute, and hoped that such a solution could be found soon.

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

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.19)

39. The Chairperson drew attention to document WT/DS294/38/Add.19, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

40. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 9 January 2012, and earlier in the discussion of Agenda item 1(e) of the present meeting. The United States referred Members to that report and statement for further details. In addition, the United States noted that in September 2010, the Arbitrator in the proceeding under Article 22.6 of the DSU in this dispute had issued a communication stating that it had accepted a joint request by the parties to the dispute to suspend its work. On 16 January 2012, in response to a joint request of the parties, the Arbitrator had issued a communication stating that it had decided to continue the suspension. The communication of the Arbitrator had been circulated to the DSB in document WT/DS294/42.

41. The representative of the European Union said that the EU thanked the United States for its status report and referred Members to its statement under Agenda item 1(f) of the present meeting.

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

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.12)

43. The Chairperson drew attention to document WT/DS363/17/Add.12, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning China's measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products.

44. The representative of China said that her country had provided a status report in this dispute on 9 January 2012, in accordance with Article 21.6 of the DSU. China had made tremendous efforts to implement the DSB's rulings and recommendations and had, thus far, completed amendments to most measures at issue. On 24 December 2011, China had issued the amended Catalogue of

Industries for Guiding Foreign Investment, which would come into effect on 30 January 2012. China was discussing with the United States and believed that this matter would be properly resolved through joint efforts and mutual cooperation by relevant parties.

45. The representative of the United States said that his country thanked China for its status report and its statement made at the present meeting. As it had previously noted, the United States remained concerned about China's lack of progress in bringing its measures relating to films for theatrical release into compliance with the DSB's recommendations and rulings. The United States also had significant concerns about the incomplete progress relative to China's measures relating to audiovisual home entertainment products, reading materials, and sound recordings. The United States was conferring with China on these matters and hoped that China would take steps to resolve this matter soon.

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

(i) United States – Anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil: Status report by the United States (WT/DS382/10/Add.1)

47. The Chairperson drew attention to document WT/DS382/10/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping administrative reviews and other measures related to imports of certain orange juice from Brazil.

48. The representative of the United States said that his country had provided a status report in this dispute on 9 January 2012, in accordance with Article 21.6 of the DSU. As noted in the status report, the United States had informed the DSB, on 17 June 2011, of its intention to implement the DSB's recommendations and rulings in this dispute. Brazil and the United States had agreed that the reasonable period of time to implement would expire on 17 March 2012. As the United States had explained in its status report, in December 2010, the US Department of Commerce had announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. At the present time, the US Department of Commerce was continuing with its ongoing work on the proposal.

49. The representative of Brazil said that his country thanked the United States for its status report on this dispute. As the United States did not report any new progress concerning implementation with regard to this dispute, Brazil referred Members to its statement made in December 2011. Brazil still expected, despite the short time remaining, that the United States would adjust its internal rules and practices so as to fully comply with the DSB's recommendations and rulings by the end of the agreed reasonable period of time, which would end on 17 March 2012.

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

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

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

52. The representative of the United States said that his country had provided a status report in this dispute on 9 January 2012, in accordance with Article 21.6 of the DSU. Earlier that week, on 17 January 2012, the United States and China had notified the DSB that they had agreed to modify the

reasonable period of time for implementation of the recommendations and rulings of the DSB which had originally been established pursuant to Article 21.3(b) of the DSU, so as to expire on 25 April 2012. The notification had been circulated to the DSB in document WT/DS379/13. The United States would continue to work on solutions to implement the DSB's recommendations and rulings.

53. The representative of China said that her country thanked the United States for its status report and statement made at the present meeting. China welcomed the steps that had been taken by the United States towards the implementation of the DSB's rulings and recommendations. Considering the complexity of the questionnaires that had been issued by the US Department of Commerce, Chinese respondents had requested additional time for the submission of responses to the questionnaires. China and the United States had also agreed to modify the reasonable period of time in this dispute which would expire on 25 April 2012. As almost ten months had lapsed since the adoption of the Appellate Body Report and the Panel Report in this dispute, China urged the United States to expedite its work and fully implement the DSB's rulings and recommendations by the end of the reasonable period of time that both parties had agreed to.

54. 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

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

56. The representative of Japan said that the latest distributions for FY 2011 announced last December[6] showed that the CDSOA remained operational. As US Customs and Border Protection explained, "the distribution process will continue for an undetermined period".[7] Japan urged the United States to stop the illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute.

57. The representative of the European Union said that, as it had done many times before, the EU wished to ask the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU, once again, renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

58. 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 meetings, Brazil was of the view that the United States was under an obligation to submit status reports pertaining to this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then the issue would be "resolved" within the meaning of the DSU and the United States would be released from its obligation to provide status reports pertaining to this dispute.

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

[7] 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

59. The representative of Canada said that his country thanked the EU and Japan for keeping this item on the DSB's Agenda. Canada agreed with the EU and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

60. The representative of India said that his country thanked the EU and Japan for their statements and shared their concerns. India urged the United States to report full compliance in this dispute without any further delay. India agreed with the previous speakers that, until such time full compliance was achieved, this matter should continue to remain under the surveillance of the DSB.

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

62. The representative of the United States said that, as his country had explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that Members had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. With respect to comments regarding further status reports in this matter, as it had 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 in these disputes.

63. The DSB took note of the statements.

3. European Communities – Export subsidies on sugar

(a) Statements by Australia, Brazil and Thailand

64. The Chairperson said that this item was on the Agenda of the present meeting at the request of Australia, Brazil and Thailand. She then invited the respective representatives to speak.

65. The representative of Australia said that, together with Brazil and Thailand, her country had, once again, put this item on the DSB's Agenda due to concerns over EU action with regard to out-of-quota sugar exports. Australia understood that out-of-quota sugar that had been authorized for export by the EU in the 2010-2011 marketing year, may have been physically exported in the 2011-2012 marketing year. These exports, together with those authorized for export in the 2011-2012 marketing year, could result in the EU exceeding its WTO scheduled export subsidy commitment levels for sugar. Australia would welcome data from the EU which demonstrated when the out-of-quota sugar authorized for export in the 2010-2011 marketing year had been physically exported. Australia would continue to monitor the action taken by the EU and requested that the EU respect its WTO export subsidy commitments.

66. The representative of Brazil said that, together with Australia and Thailand, his country had, once again, inscribed this item on the DSB's Agenda because it remained concerned that the EU may have exceeded its WTO export subsidy commitments for sugar in the marketing year 2011-2012. As expressed in Brazil's statement of December 2011, the EU had authorized exports of two million and fifty thousand (2,050,000) tons of out-of-quota sugar for marketing year 2011-2012. Despite the fact that the period of reference for 700,000 tons of this sugar was marketing year 2010-2011, the large majority of those exports would take place during marketing year 2011-2012. At the previous regular DSB meeting, the EU had indicated that it could provide technical information on these exports, if

necessary. Brazil would welcome further information from the EU clarifying when the 700,000 tons of out-of-quota sugar authorized for export in marketing year 2010-2011 had indeed been exported. Brazil would closely monitor the situation and trusted that the EU would abide by its WTO export subsidy commitments.

67. The representative of Thailand said that his country wished to reiterate its concerns about the EU's authorization of out-of-quota sugar exports for the marketing year 2011/12 which, when combined with the previous authorization of the period from 1 September to 31 December 2011, would likely breach the EU's export subsidy commitments on sugar because the actual exports of sugar of such authorization may occur in the MY 2011/12. In Thailand's view, the EU's action with respect to this sugar export ran the risk of being in excess of the EU's commitments, in light of the DSB's rulings and recommendations in the "EC-Sugar" dispute. Thailand recognized that, on 11 January 2012, the EU had issued the Commission Implementing Regulation to fix an acceptance percentage for the issuance of export licenses from 2 to 6 January 2012 and to reject and suspend the license applications submitted during a specific time period. However, Thailand was still monitoring this situation closely and welcomed the data of the physical exportation of out-of-quota sugar in the MY 2011/12. Along with Australia and Brazil, Thailand would continue to monitor the EU's actions and urged the EU to respect its WTO export subsidy commitments for sugar.

68. The representative of the European Union said that, at the regular DSB meeting on 19 December 2011, the EU had informed Members that it abided by its international commitments on export subsidies for sugar. The EU's recent decision led to an increase of 650,000 tonnes up to 1,350,000 tonnes of export limit fixed for out-of-quota exports during the marketing year 2011/12. The quantity of 1,350,000 tonnes remained well within the EU's WTO quantitative commitment on export subsidies (i.e. 1,374,000 tonnes). The EU was ready to continue the dialogue and to hold technical meetings with a view to dispelling any doubts about the WTO compliance of the EU sugar exports.

69. The DSB took note of the statements.

4. China – Definitive anti-dumping duties on x-ray security inspection equipment from the European Union

(a) Request for the establishment of a panel by the European Union (WT/DS425/2)

70. The Chairperson recalled that the DSB had considered this matter at its meeting on 19 December 2011 and had agreed to revert to it. She drew attention to the communication from the European Union contained in document WT/DS425/2, and invited the representative of the European Union to speak.

71. The representative of the European Union said that the EU referred to its statement made at the previous regular DSB meeting and its continuing concerns concerning these measures. The EU, therefore, maintained its request for the establishment of a panel.

72. The representative of China said that her country was disappointed that the EU had decided to make a second request for the establishment of a panel in this dispute at the present meeting. As stated at the previous regular DSB meeting, China believed that the relevant measures at issue were fully consistent with the Anti-Dumping Agreement. In carrying out the anti-dumping investigation and adopting remedy measures, the Ministry of Commerce of China had aimed to offset the adverse effect produced by dumping imports to domestic industry and restore a fair trading environment. Both the investigation and the measure were fully based on solid facts and evidence. China understood that the DSB would establish a panel at the present meeting, and would work together with the panel and the EU to resolve the dispute in accordance with WTO rules.

73. 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.

74. The representatives of India, Japan, Norway, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

5. China – Anti-dumping and countervailing duty measures on broiler products from the United States

(a) Request for the establishment of a panel by the United States (WT/DS427/2)

75. The Chairperson recalled that the DSB had considered this matter at its meeting on 19 December 2011 and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS427/2, and invited the representative of the United States to speak.

76. The representative of the United States said that China had imposed anti-dumping and countervailing duties on chicken broiler products from the United States. As the United States had explained at the 19 December 2011 DSB meeting, China's dumping and subsidy determinations appeared to be inconsistent with China's obligations under the GATT 1994, the Anti-Dumping Agreement, and the Subsidies Agreement. The apparent inconsistencies were set out in detail in the US request for the establishment of a panel and the US concerns related to every phase of China's investigation. In short, the United States believed that there were significant procedural and substantive deficiencies in the investigation, and that these determinations were, therefore, unsustainable under WTO rules. Accordingly, the United States requested that the DSB establish a panel to examine the matter set forth in the US panel request, with standard terms of reference.

77. The representative of China said that her country was disappointed that the United States had decided to make a second request for the establishment of a panel in this dispute at the present meeting. As stated at the previous regular DSB meeting, China believed that the anti-dumping and the countervailing measures at issue were consistent with the WTO rules, and China would use solid facts and evidence to prove this in the following proceedings. China wished to point out that the US request for the establishment of a panel contained claims which had not been listed in the request for consultations. China understood that the DSB would establish a panel at the present meeting and China would work together with the panel and the United States to resolve the dispute in accordance with WTO rules.

78. The representative of the European Union said that the EU noted that the concerns expressed by the United States in this case were similar to those which led the EU to request the establishment of a panel under the previous Agenda item. The EU would, therefore, follow this proceeding very closely as a third party once the panel was established.

79. The representative of the United States said that his country had noted that China had asserted that the United States was bringing claims that it had not raised in its consultation request. The United States was confident that all the claims included in this panel request were properly included and looked forward to establishing as much before the panel.

80. 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.

81. The representatives of the European Union, Japan, Norway, Saudi Arabia and Thailand reserved their third-party rights to participate in the Panel's proceedings.

6. Canada – Measures relating to the feed-in tariff program

(a) Request for the establishment of a panel by the European Union (WT/DS426/5)

82. The Chairperson drew attention to the communication from the European Union contained in document WT/DS426/5, and invited the representative of the European Union to speak.

83. The representative of the European Union said that the EU wished to request the establishment of a panel to determine whether certain features of the feed-in tariff program of the Canadian Province of Ontario, in particular local content requirements, were consistent with Canada's obligations under the SCM Agreement, the GATT 1994 and the TRIMs Agreement. The EU had requested consultations on this matter by means of a request sent on 11 August 2011. While the consultations had been useful to set out and explain both parties' interests and concerns, they had failed to result in a satisfactory resolution of the matter. The EU was seriously concerned about the measures at stake in this dispute, considering the significant commercial interest of the EU in the area of renewable energy technologies, including on the Canadian market, and the negative effects that these kinds of measures had on the world-wide deployment of low-carbon technologies for the generation of electricity. Feed-in tariff programs were important instruments to incentivize the development of sustainable sources of energy, as an alternative to fossil fuels, but they should be designed and implemented in a way that did not discriminate against foreign goods. The EU recalled that it was also a third party in the DS412 dispute, which was examining the same measures that were the subject of the EU's request for the establishment of a panel. The EU trusted that its request would lead to the removal of the WTO-inconsistent aspects of the feed-in tariff program of the Canadian Province of Ontario, in order to guarantee a fair treatment of EU goods on the Canadian market.

84. The representative of Canada said that his country wished to express its disappointment that the EU had decided to request the establishment of a panel at the present meeting, with respect to the feed-in tariff (FIT) program established by the province of Ontario. On 7 September 2011, Canada had held consultations with the EU concerning the FIT program. On that occasion, Canada had provided information on the operation of the program. While those consultations had been helpful, unfortunately they did not seem to have been sufficient to satisfy the concerns of the EU. The Ontario FIT program had been established to increase the supply of renewable energy in that province and it supported Ontario's committed transition away from coal-fired electricity generation, an ambitious energy plan that had been taken in concert with industry and the public. Canada was confident that the FIT program was consistent with its obligations under the WTO Agreement. At Japan's request, the DSB had recently established a panel in DS412 to consider the same measures now challenged by the EU. Over the last week, Canada had held consultations with the EU, Japan and the existing Panel in that other dispute to determine whether harmonization of the time-tables would be feasible. As a result of those consultations, in order to allow the proceedings in the two disputes to be promptly harmonized, Canada could agree to the establishment of a panel in DS426 at the present meeting. Canada would move quickly with the EU to compose the same Panel, and would work with both complainants to harmonize the time-tables. Canada hoped that this would reduce the burden on the Panel, the Secretariat and the parties.

85. The representative of Japan said that Canada's measures at issue in this dispute were the same as what Japan was challenging in its own dispute with Canada (DS412) and the Panel proceedings in that dispute were well underway and were at the fairly advanced stage. Japan would not repeat its position on the issue presented in its dispute and also in the present dispute initiated by the EU. This was a clear case of domestic content requirements which no doubt violated several provisions of the WTO Agreements as an origin-based discrimination. The sheer number of third parties in DS412, which amounted to thirteen and the EU's decision in the present dispute to proceed to request the panel establishment should signify growing concerns amongst Members about the WTO-inconsistency of this type of domestic content requirement measures adopted by the Canadian province of Ontario. Japan would contribute to discussions in the Panel's proceedings in this dispute

as an interested third party. Canada had referred to the complete harmonization of the Panel proceedings in DS412 and DS426 under Article 9.3 of the DSU as a precondition for its acceptance of the establishment of a panel in this dispute at the present meeting. As much as Japan was supportive of the principle of harmonization in the event of multiple complaints on the same matter, Article 9.3 of the DSU provided that harmonization shall be made "to the greatest extent possible"; but nothing in Article 9.3 of the DSU required that there be harmonization "in all cases", "at any cost" or "notwithstanding the principle of 'prompt settlement' of dispute articulated in DSU Article 3.3". Given that the Panel proceedings in DS412 had already been at the advanced stage, Japan wondered how it would be possible or even practical to completely harmonize, or synchronize, the Panel proceedings in these two disputes without causing substantial delays in DS412 or otherwise adopting an extremely expedited time-table in DS426. Any harmonization of proceedings in DS412 and DS426, assuming such harmonization would be possible, should not be solely at the expense of Japan's interests in its DS412 dispute and must be explored in a way that would not cause any substantial delay and would preserve the rights and interests of the parties in these proceedings.

86. However, the Panel in DS412 had just communicated to the parties its decision to suspend the time-table and to harmonize the time-tables in both cases by postponing the first substantive meeting by almost two months. Japan regretted and was extremely disappointed with the Panel's decision. Two months of delay in the already prolonged proceedings could be in no way considered as minimum or insignificant and the rationale behind this decision briefly set out in the Panel's communication was hardly compelling. Japan could object to the establishment of a panel at the present meeting with a view to preserving its rights and interests in DS412. But Japan had decided not to do so. Japan did not object to the panel establishment at the present meeting, in a spirit of cooperation and on the understanding that the time-table subsequent to the first substantive meeting would be expedited so as to compensate the initial substantive delay in DS412 that the Panel had just decided. Japan trusted the Panel's assurance that "any new harmonized time-table" would be drafted by the Panel "with a view to keeping the delay in the resolution of DS412, beyond what is stipulated in the current time-table, to a minimum". Japan stood ready to discuss with the Panel and other parties a new draft timetable to be proposed by the Panel and to explore possible ways forward that would serve and fully respect the interests of all parties.

87. 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.

88. The representatives of Australia, China, India, Japan, Saudi Arabia, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

7. Philippines – Taxes on distilled spirits

(a) Report of the Appellate Body (WT/DS396/AB/R) and Report of the Panel (WT/DS396/R)

(b) Report of the Appellate Body (WT/DS403/AB/R) and Report of the Panel (WT/DS403/R)

89. The Chairperson proposed that the two sub-items under Agenda item 8 be taken up together. She then drew attention to the communication from the Appellate Body contained in document WT/DS396/10 – WT/DS403/10 transmitting the Appellate Body Reports on: "Philippines – Taxes on Distilled Spirits", which had been circulated on 21 December 2011 in document WT/DS396/AB/R – WT/DS403/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. She noted that, as Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

90. The representative of the Philippines said that his country wished to thank the Appellate Body members, the Panel and the Secretariat for the hard work and time they had devoted to this dispute. The Philippines also thanked the DSB for the opportunity to comment on the adoption of the Panel and the Appellate Body Reports in this matter. The Philippines welcomed a number of the Appellate Body's findings, including the reversal of the Panel's findings that all distilled spirits were "like" each other and that the tariff classification of these products at both the four and six-digit level had indicated "likeness" of the products being examined. The Philippines also agreed with some of the apparent implications of the Appellate Body's statement that Article III:2 of the GATT 1994 was concerned to a degree with protecting competitive opportunities. However, the Philippines also believed that the Appellate Body had missed the opportunity to interpret and apply Article III:2, in a manner that recognized the structural features of the market to which it was being applied, a function that was necessarily built into the text found in Article III of the GATT 1994. The reality in this case was that the 1914 Philippine excise tax measure, alleged to be inconsistent with Article III:2 of the GATT 1994, could not have been intended to affect and, did not in fact affect in any legally meaningful way, the manner in which imported and domestic distilled spirits competed in the Philippine market. The Philippines continued to believe that under Article III:2, each WTO Member retained the right to implement whatever tax measure or system it deemed fit, in response to the particular social, historical and fiscal challenges it faced, as long as such a system did not alter the real world competition in the Philippine market between imported and domestic distilled spirits. These disputes (DS396 and DS403) had presented the WTO with a long-overdue opportunity to reaffirm the true scope and reach of the disciplines articulated under Article III:2 of the GATT 1994 and presently accepted by all WTO Members. In the submission of the Philippines', the Reports being adopted at the present meeting went well beyond the true scope of Article III:2.

91. In the Philippines' view, it was very difficult to understand how domestically manufactured and imported distilled spirits could be characterized as "like" unto one another when the imported spirits were simply out of the financial reach of 98.2 per cent of the Philippine households. The GATT 1994 had not been adopted as an inventory of conceptual constructs of trade economics, to be applied without regard to the actual topography of the market of the sovereign which promulgated the excise tax measure involved. Fundamentally, it was not easy to accept that Article III:2 of the GATT 1994's notion of "like" and "directly competitive and substitutable" distilled spirits products when there was no actual capacity of the consumers to purchase, hence no actual purchases of theoretically directly competing and substitutable imported products, was built into some of the findings or implicit reaffirmation of the Appellate Body. In this case, it appeared to suppose that the markets were perfect markets, that a 0.5 per cent overlap in retail prices between imported and domestically produced distilled spirits was enough to sustain a finding of violation of Article III:2 of the GATT 1994. It seemed to imply to the Philippines that even a .01 per cent price overlap was likely to be found WTO inconsistent, with treaty obligations under Article III:2 of the GATT 1994. Such interpretation necessarily implied that the universal and fundamental norm of "*de minimis non curat lex et praetor*" was not part of the law of the WTO. It seemed to assume that the GATT 1947 and the GATT 1994 would reach every norm-based existential market system, no matter how far into the future such contact and impact might take place. The Philippines was not arguing that poverty be recognized as a legal defence. The Philippines did, however, suggest that where poverty prevented actual meaningful purchases of imported products, no actual or direct competition could arise and no actual breach of Article III:2 could materialize. Notwithstanding these painful and systemic concerns, the Philippines accepted the decision of the Appellate Body as final, in respect of the issues it actually addressed and disposed of. The Philippines recognized the high importance of compliance with specific decisions while, at the same time, hoping for further consideration and development by the WTO. The Philippines looked forward to working with the EU and the United States in the next stages of this dispute.

92. The representative of the European Union said that the EU thanked the Appellate Body, the Panel, and the Secretariat for their work on this dispute. The EU was satisfied that the Appellate Body had upheld the Panel findings concerning the Philippines' violation of the principle of non-

discrimination with regard to its taxation system for distilled spirits. In light of the clear findings of the Panel and the Appellate Body, the EU trusted that the Philippines would promptly take the necessary steps to remedy this long-standing discrimination and re-establish WTO compatibility.

93. The representative of the United States said his country thanked the Appellate Body, the panelists, and the Secretariat for their work on this matter. The United States had been concerned for many years about the Philippines' discriminatory taxes on distilled spirits and was pleased to propose the adoption of the Panel and Appellate Body Reports in the dispute brought by the United States (WT/DS403/AB/R and WT/DS403/R). The Reports were precise and thorough, and were a strong affirmation of the long-standing commitments in the GATT 1994 to the non-discriminatory treatment of imported products. The legal claims that had been presented in this dispute were not novel, but there were a number of new issues raised, and both the Appellate Body and the Panel had carefully considered the evidence before it in the context of this specific dispute, focusing on the operation of the Philippine measures at issue. The Appellate Body's analysis was methodical, and focused on the Panel's treatment of the evidence before it. Separately, it had reviewed the appellant's claims of error as they related to the specific elements of the claims against the Philippines' measures, and had tailored its analysis to the specific facts in this dispute. As a result, the Report provided clear and specific findings with respect to the Philippines' measures. Moreover, the United States appreciated the focused nature of the Reports. Although the Panel and Appellate Body had fully addressed the parties' arguments and evidence, it did not add to the Reports additional discussion or speculation not necessary to resolve the questions before it. The Panel and the Appellate Body Reports definitively confirmed that these taxes were not consistent with the Philippines' obligations. Further, the Reports separately and independently supported the two claims by the United States: that the Philippine measures were inconsistent with the Philippines' obligations under the first and second sentences of Article III:2 of the GATT 1994. The United States looked forward to action very soon by the Philippines to reform its tax system to meet its WTO obligations.

94. The DSB took note of the statements, and adopted the Appellate Body Reports contained in WT/DS396/AB/R; WT/DS403/AB/R and the Panel Reports contained in WT/DS396/R; WT/DS403/R, as modified by the Appellate Body Reports.

8. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/473)

95. The Chairperson drew attention to document WT/DSB/W/473, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the name contained in document WT/DSB/W/473.

96. The DSB so agreed.

9. Statement by the Chairperson regarding some matters related to the Appellate Body

97. The Chairperson, speaking under "Other Business", said that, as had been announced at the outset of the present meeting, she wished to make a statement concerning some matters related to the Appellate Body. She said that, as Members were aware, she had received a letter from the Chairperson of the Appellate Body in which she had informed her that Mr. Shotaro Oshima, Appellate Body member, had expressed his intention to resign for personal reasons from the office of member of the Appellate Body. The letter of resignation had been circulated to all delegations in document WT/DSB/56. She expressed regret that Mr. Oshima had been obliged to cut short his four-year tenure on the Appellate Body and, on behalf of all WTO Members, she wished to express appreciation for Mr. Oshima's contribution to the work of the Appellate Body over the past years. She noted that, pursuant to Rule 14 of the Working Procedures for Appellate Review, Mr. Oshima's resignation

would take effect 90 days from the date of his letter of resignation, which would mean that effectively after 6 April 2012, there would be a vacancy in the Appellate Body which would have to be filled.

98. She recalled that originally the first four-year term of office of Mr. Oshima was to expire on 31 May 2012. In addition, the first four-year term of office of Ms. Yuejiao Zhang would expire on 31 May 2012. Ms Zhang was eligible for reappointment for a second term. In this regard, she informed Members that Ms. Zhang had expressed her interest and willingness to be reappointed for a second four-year term. In light of this, she said that she intended to submit to the DSB, at its regular meeting on 22 February 2012, the following proposal: (i) to agree to launch as from 22 February 2012 the selection process for appointment of a new member of the Appellate Body for the position currently held by Mr. Oshima; (ii) to agree that the replacement for Mr. Oshima be appointed for a four-year term beginning 1 June 2012 or as soon thereafter as possible; (iii) to agree to set a deadline of 30 March 2012 for Members' nominations of candidates for Mr. Oshima's position; (iv) to agree to establish a Selection Committee, as was customary practice based on the procedures set forth in document WT/DSB/1, which would consist of the Director-General and the 2012 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council and the DSB, and would be chaired by the 2012 Chair of the DSB; (v) to request the Selection Committee to conduct interviews with candidates in April 2012, to hear the views of WTO Members in the first half of May 2012, and to make its recommendation to the DSB by 11 May 2012, if possible, so that the DSB could take a final decision at its regular meeting on 24 May 2012; and, (vi) to ask the DSB Chair to carry out consultations on the possible reappointment of Ms. Zhang, who was eligible for reappointment for a second four-year term beginning on 1 June 2012, and who had expressed her interest and willingness to be reappointed. She said that, in the meantime, her door was open to all delegations to discuss this matter and, if necessary, she would be willing to hold informal consultations prior to submitting her proposal to the DSB for approval at its meeting on 22 February 2012.

99. The DSB took note of the statement.