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Dispute Settlement Body
23 November 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 23 November 2010

Chairman: Mr. Yonov Frederick Agah (Nigeria)

Prior to the adoption of the Agenda, the representative of Ukraine stated that, in light of the fact that Armenia had recently intensified its consultations with Ukraine in the dispute: "Armenia – Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages" (WT/DS411/2/Rev.l), his country expected that Armenia would shortly propose solutions to end its discriminatory regime for the goods concerned and would comply with its WTO obligations. Therefore, at the present meeting, Ukraine requested that item 3 concerning Ukraine's request for the establishment of a panel be removed from the proposed Agenda. He said that the removal of this item from the proposed Agenda was without prejudice to Ukraine's right to bring this matter back before the next meeting for the second consideration by the DSB should the parties fail to reach an agreement and no resolution of this matter be possible.

The Chairman proposed that, in light of Ukraine's request, item 3 concerning Ukraine's request for the establishment of a panel be removed from the proposed Agenda.

The DSB so agreed.

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(d) European Communities[1] – Measures affecting the approval and marketing of biotech products: Status report by the European Union 6

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

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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.96)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.96)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.71)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.34)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.14)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.11)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.5)

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.96)

2. The Chairman drew attention to document WT/DS176/11/Add.96, 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 11 November 2010, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the First Session of the current (111th) Congress. The Second Session of the 111th Congress had begun in January 2010. The Committee on the Judiciary of the House of Representatives had held a hearing on certain of those proposals earlier in 2010. In addition, the US administration was working with Congress to implement the DSB's recommendations and rulings in this dispute.

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

5. The representative of Cuba recalled that, at the October 2010 DSB meeting, in the context of one dispute, the United States had stated that compliance with the DSB's recommendations and rulings was not an option but an obligation. Thus, in the Section 211 dispute as well as in the other disputes currently on the DSB's Agenda, compliance with the DSB's ruling was also not an option. The US disregard for the system would not stop Cuba in its resolve to defend justice. Cuba and many other Members would continue to call upon the United States to respect the DSB's rulings, until the rule of law prevailed over a super-power's imperial claims to hegemony. The DSU provisions on prompt compliance were ineffective because one Member availed itself of the unwarranted right not to implement the DSB's ruling for eight years, thus ignoring the trade damage it was causing. Cuba believed that the issue of compliance should be examined in the context of the DSU negotiations, which aimed at clarifying and improving the DSU provisions. Clear provisions had to be put into place in order to prevent the recurrence of non-compliance situations. The system must be able to prevent impunity on the part of non-complying parties, in particular if the interests of developing countries were affected. Cuba would not remain silent in the presence of one Member who proclaimed itself to be an advocate of intellectual property rights and, at the same time, it allowed the usurpation of renowned trade marks, such as the HAVANA CLUB trade mark, in its territory. The United States was not above the rules of international law. The United States had a moral duty to listen to the systemic concerns expressed by a number of Members and was under the obligation to comply with the international treaties to which it was party and to implement the decisions made by the international bodies. On 26 October 2010, the international community, through an affirmative vote of 187 out of the 192 members of the UN General Assembly, had once again requested that the United States put an end to the economic, commercial and financial blockade against Cuba. His country was grateful, once again, for the unambiguous expression of solidarity with, and support for, the rightful claims of the Cuban people. Nonetheless, Cuba deplored the cynical statement repeatedly made by the United States every month in the DSB. This demonstrated the lack of political will on the part of the authorities of the world's largest economy to comply with the rules of international law. Cuba called upon the parties to this dispute, and in particular on the United States, to take urgent action to repeal Section 211, which was the only way to end this dispute in a satisfactory manner.

6. The representative of Brazil said that his country thanked the United States for its status report. Brazil joined previous speakers who had expressed concerns about the lack of progress in implementation, as reported, once again, by the United States. Brazil, therefore, urged the United States to bring its measures into conformity with the DSB's recommendations and rulings.

7. The representative of the Dominican Republic said that his country thanked the United States for its status report. The Dominican Republic emphasized the need for WTO Members to comply with the DSB's rulings. A failure to do so would undermine the credibility of the multilateral trading system. The Dominican Republic thanked the United States for taking all the necessary measures in order to resolve this dispute.

8. The representative of India said that his country thanked the United States for its status report and its statement. India noted with disappointment that the US status report had not reported any further progress in the implementation of the DSB's recommendations and rulings pertaining to this dispute. India, therefore, renewed its systemic concerns about the situation of non-compliance, as this undermined the credibility and confidence that Members reposed in the dispute settlement system. India urged the United States to report on compliance in this dispute without any further delay.

9. The representative of China said that her country thanked the United States for its status report. However, China was disappointed that the US status report was merely a repetition of previous status reports, and that there had been no compliance in this dispute after more than eight years since the adoption of the relevant Reports by the DSB. China believed that this situation was not in line with the principle of prompt implementation stipulated in the DSU provisions, and that it was highly inappropriate for a developed-country Member to maintain such prolonged non-compliance in the case that involved the interests of a developing-country Member. China, therefore, strongly supported Cuba and urged the United States to implement the DSB's rulings without further delay.

10. The representative of Bolivia said that her country supported Cuba's statement. Bolivia wished to reiterate its concern about the lack of progress in this dispute and said that this non-compliance would have a negative impact on the credibility of the multilateral trading system and the DSB. Bolivia hoped that the United States would be able to implement the DSB's rulings and lift the restrictions imposed under Section 211.

11. The representative of the Bolivarian Republic of Venezuela said that her country fully supported Cuba on this matter. The US status report was a repetition of its previous reports stating that "[t]he US Administration will continue to work with the US Congress with respect to appropriate statutory measures that would resolve this matter". In Venezuela's view, this constituted "action without results". The United States had been repeating the same thing for more than eight years. Section 211 was not only in violation of the TRIPS Agreement but it was also inconsistent with the principles of national treatment and most-favoured-nation treatment. Furthermore, it harmed Cuba and undermined the credibility and effectiveness of the dispute settlement system. Venezuela continued to wait for positive signals from the United States, which would bring the United States into compliance with the Appellate Body's ruling. Bolivia noted that the lack of compliance by certain Members weakened the multilateral trading system. As had been done on many occasions, Venezuela called upon the United States to put an end to the economic, commercial and financial embargo policy imposed on Cuba and to comply with the DSB's recommendations.

12. The representative of Viet Nam said that her country wished to join previous speakers in urging the United States to comply with the DSB's ruling. Viet Nam wished to underline that the prompt compliance with the DSB's ruling would ensure the effective functioning of the dispute settlement system.

13. The representative of Argentina said that his country thanked the United States for its status report and wished to reiterate its concern about the lack of implementation in this dispute. As had previously been mentioned by Argentina and other delegations, the lack of implementation of the DSB's recommendations and rulings had consequences that went beyond the Section 211 dispute. Argentina, once again, called on the parties to the dispute, and in particular on the United States, to take the necessary steps to ensure full implementation of the DSB's recommendations and rulings so that this matter could finally be removed from the DSB's Agenda.

14. The representative of Mexico said that his country thanked the United States for its status report pertaining to this dispute. Mexico urged the parties to resolve this dispute through the legal remedies provided for under the DSU provisions. It was Mexico's understanding that any Member

may initiate its own dispute if it considered that its benefits were being impaired or nullified. Mexico noted that the discussion under item 1 of the DSB's Agenda could provide useful input for the ongoing discussions carried out in the context of the DSU negotiations.

15. The representative of Ecuador said that his country thanked the United States for its status report. Ecuador supported Cuba and recalled that Article 21 of the DSU made specific reference to the prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing countries. Ecuador hoped that the United States would intensify its efforts to ensure immediate compliance with the DSB's recommendations and rulings by repealing Section 211. This dispute, which had lasted for more than eight years without compliance, highlighted the main shortcoming of the WTO dispute settlement system. In terms of compliance, there was an obvious unequivocal imbalance that affected and seriously prejudiced the rights and interests of small countries.

16. The representative of Angola said that his country thanked the United States for its status report pertaining to the Section 211 dispute. Angola recalled that prompt compliance with the DSB's recommendations and rulings was essential to ensure an effective resolution of disputes to the benefit of all WTO Members. In August 2001, the Panel Report in this dispute had concluded that Section 211 was inconsistent with Article 42 of the TRIPS Agreement and, subsequently, the Appellate Body Report had confirmed that decision. The Appellate Body had found that Section 211 violated national treatment and the most-favoured-nation principles under the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property, and had requested the United States to bring this measure into conformity with its obligations under the TRIPS Agreement. The delay in the implementation of the DSB's decision, despite the fact that the DSB had determined that Section 211 was inconsistent with the WTO's rules and principles, affected the dispute settlement system – the central element of the multilateral trading system – which provided security and predictability for all Members, and set a negative precedent for similar cases. Angola believed that concrete signs and action by the parties in this dispute would send a positive signal of respect for WTO rules.

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.96)

18. The Chairman drew attention to document WT/DS184/15/Add.96, 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 11 November 2010, 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. Details were provided in document WT/DS184/15/Add.3. With respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

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

the DSB on more tangible progress. Full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[2] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.71)

22. The Chairman drew attention to document WT/DS160/24/Add.71, 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 11 November 2010, in accordance with Article 21.6 of the DSU. The US administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

24. The representative of the European Union said that his delegation had noted that the United States was reporting non-compliance. The EU remained keen to work with the US authorities towards the complete resolution of this case.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.34)

26. The Chairman drew attention to document WT/DS291/37/Add.34, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

27. The representative of the European Union said that, once again, his delegation noted that EU regulatory procedures on biotech products continued to work as foreseen in the legislation. The number of GMOs authorized since the date of establishment of the Panel was thirty-four. Progress had also been made on other applications for authorization. Recently, the European Food Safety Agency had delivered favourable opinions on two other GM events (GM MON 89034×1507×MON 88017×59122 and MON 89034×1507×NK 603). The EU hoped that the United States and the EU would continue their constructive technical dialogue on which they had re-engaged on 20 July 2010. The EU hoped that this constructive approach, based on dialogue, would allow the parties to leave litigation aside.

28. The representative of the United States said that his country thanked the EU for its status report and its statement. The United States remained concerned with the operation of the EU's regulatory system for biotech products. At the October meeting of the DSB, the United States had expressed particular concerns with the progress on the applications for approval of three varieties of biotech maize. Those applications had received favourable opinions from the EU's scientific food safety authority in May 2010. Six months later, only one of those applications had even been considered by the EU's regulatory committee and none of those applications had been allowed to

[2] Article 3.3 of the DSU.

complete the approval process. The United States looked forward to the EU making timely decisions on those applications, as well as on the dozens of other applications that were currently pending in the EU's regulatory system.

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.14)

30. The Chairman drew attention to document WT/DS322/36/Add.14, 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 11 November 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

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

33. The representative of the European Union said that his delegation wished to reiterate its disappointment over the lack of progress by the United States on compliance with adverse rulings on zeroing in this dispute.

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

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.11)

35. The Chairman drew attention to document WT/DS350/18/Add.11, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

36. The representative of the United States said that his country had provided a status report in this dispute on 11 November 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

37. The representative of the European Union said that the EU's concerns about the US lack of implementation in this dispute were well known and were recorded in the minutes of past DSB meetings. The EU remained disappointed that the United States continued to use zeroing in reviews which involved products and measures covered by this dispute, as if nothing had happened. The EU

hoped that its patience and trust had not been misplaced and continued to urge the United States to reconsider its Section 129 determination immediately and to implement.

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.5)

39. The Chairman drew attention to document WT/DS294/38/Add.5, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

40. The representative of the United States said that his country had provided a status report in this dispute on 11 November 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had already taken a number of steps to implement the DSB's recommendations and rulings in this dispute. The United States would continue to consult with interested parties with regard to the remaining issues.

41. The representative of the European Union said that his delegation thanked the United States for its status report. The EU welcomed US reassurances that it was taking the necessary steps to bring itself into full compliance with the DSB's rulings and recommendations on zeroing. The EU hoped that the lengthy internal consultations would soon lead to concrete results and that the imposition of sanctions in this dispute would not be necessary.

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

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

(a) Statements by the European Union and Japan

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

44. The representative of Japan said that FY 2010 distributions under the CDSOA appeared to be underway.[3] This showed that the CDSOA remained operational. As US Customs and Border Protection had explained, "the distribution process will continue for an undetermined period".[4] Japan urged the United States to stop the illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report pertaining to this dispute.

45. The representative of the European Union said that, as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry, and hence, put an end to the condemned measure. The EU reiterated that the fact that the United States had stopped disbursing duties collected after a certain point in time did not achieve full compliance. Every disbursement that still took place was clearly an

[3] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_10/

[4] See US Customs and Border Protections website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml

act of non-compliance with the DSB's recommendations. Once again, the EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports pertaining to this dispute.

46. 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 in previous DSB meetings, Brazil was of the view that, until the United States ceased all disbursements made pursuant to the Byrd Amendment, non-compliance in this dispute would persist and the issue would not be "resolved" within the meaning of Article 21.6 of the DSU. Thus, Brazil urged the United States to resume the regular submission of status reports and to fully implement the DSB's recommendations.

47. The representative of Canada said that her country 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.

48. The representative of India said that his country thanked the EU and Japan for continuously bringing this issue before the DSB and fully shared their concerns. The CDSOA remained operational, affecting the legitimate rights of other WTO Members. India was concerned that non-compliance by Members would lead to a lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to immediately cease its WTO-inconsistent disbursements and added that this dispute should continue to be under the surveillance of the DSB until full compliance was achieved.

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

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

51. The representative of the United States said that, as his country had explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Furthermore, the United States recalled that Members had acknowledged 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, 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.

52. The DSB took note of the statements.

3. Adoption of the 2010 draft Annual Report of the Dispute Settlement Body (WT/DSB/W/435 and Add.1)

53. The Chairman said that, in pursuance of the procedures for an annual overview of WTO activities and for reporting under the WTO contained in document WT/L/105, he was submitting, for adoption, the draft text of the 2010 Annual Report of the DSB contained in document WT/DSB/W/435 and Add.1. The Report covered the work of the DSB since the previous annual report contained in document WT/DSB/49 and Add.1. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2010, prepared by the Secretariat on its own responsibility, was included in the addendum to the Report. He proposed that, after the adoption of the draft Annual Report at the present meeting, the Secretariat be authorized to update the Report, under its own responsibility, in order to include actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would then be submitted for consideration by the General Council at its meeting scheduled for 14 and 15 December 2010.

54. The DSB took note of the statement and adopted the draft Annual Report of the DSB contained in WT/DSB/W/435 and Add.1 on the understanding that it would be further updated by the Secretariat.[5]

4. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/437)

55. The Chairman drew attention to document WT/DSB/W/437, which contained an additional name proposed for inclusion in the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/437.

56. The DSB so agreed.

[5] The Annual Report was subsequently circulated in document WT/DSB/51 and Add.1