WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/320
28 September 2012

(12-5212)

Dispute Settlement Body
23 July 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 23 July 2012

Chairman: Mr. Shahid Bashir (Pakistan)

Prior to the adoption of the Agenda, the item concerning the Panel Report in the case on: "China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States" (DS414) was removed from the proposed Agenda following China's 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.116)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.116)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.91)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.54)

(e) 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.7)

(f) United States – Definitive anti-dumping and countervailing duties on certain products from China: Status report by the United States (WT/DS379/12/Add.6)

(g) Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.3)

(h) United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.2)

(i) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Status report by the European Union (WT/DS397/15)

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 nine 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.116)

2. The Chairman drew attention to document WT/DS176/11/Add.116, 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 12 July 2012, in accordance with Article 21.6 of the DSU. Legislative proposals had been introduced in the current 112th Congress to 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 most recent status report, and hoped that the US authorities would very soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba said that her country noted that after ten years of non-compliance there was a risk that the United States would assume that its obligations had been diminished over time. Cuba recalled that, on 1 February 2002, the DSB had adopted a ruling to request the United States to bring Section 211 into conformity with the TRIPS Agreement and the Paris Convention. Subsequently, no other decision had been taken to change it. Therefore, the United States must respect its commitments and the only way to do so was by repealing Section 211. It was unacceptable for the United States to claim, each month, that the legislative proposals introduced in Congress constituted the US commitment to the dispute settlement system. Those proposals were, in practice, merely cosmetic, as nothing had happened for the past ten years. None of the proposals had been discussed in the bodies in which they had been introduced. Therefore, Cuba wondered about the US commitment and its political will towards implementation. As Cuba had mentioned on previous occasions, not only Section 211 remained in effect but, since its entry into force, the Cuban company Cubaexport had been denied the right to renew the Havana Club trademark and thus retained ownership of a trademark that it had held since 1976. Cuba wished to underline that this trademark had been abandoned by the original owners. The violations in this case were significant, since the US legislation was in breach of the US obligations. The US trademark law, known as the Lanham Act, gave particular importance to the abandonment of trademarks by their original owners and enabled third parties to register an abandoned trademark if it had not been used for two years, or if there was no intention of it being used, as in the case of the Havana Club trademark. Section 211, however, superseded the Lanham Act so as to prevent the US courts from taking into consideration rights to trademarks confiscated in Cuba, regardless of whether such trademarks had been abandoned or not. This had also given rise to the so-called "zombie trademarks" after the death of a trademark's original owner or a successor's indefinite refusal to allow third parties to use a trademark.

6. A large number of Members, including Cuba, believed that the US failure to comply undermined the credibility and effectiveness of the dispute settlement system and their concerns were not unfounded. Cuba noted that according to the DSB Annual Report circulated in November 2011 by the WTO Secretariat, the United States had ended 2011 without complying with its obligations in six disputes. Cuba drew attention to the Agenda of the present meeting, which showed that the number of cases of non-compliance continued to exist in 2012. Cuba would continue to condemn the US blatant violation of Cuban intellectual property rights by allowing the Bacardi company to engage in the fraudulent and unlawful sale of products that had not been produced in Cuba, using the Havana

Club trademark, which indicated Cuban origin. Section 211 undermined the legitimate rights of Cuban trademark holders. Cuba urged the United States to comply with the DSB's rulings without further delay. Cuba believed that there was no legal or ethical basis for the US excuses not to comply with the DSB's recommendations and rulings. The United States, the world's leading economy, had no right to be exempt from compliance with the WTO obligations.

7. The representative of the Bolivarian Republic of Venezuela said that her country supported Cuba's statement. Venezuela wished to point out that ten years had passed since the DSB had ruled on the inconsistency of Section 211 with Article 42 of the TRIPS Agreement, the principles of national treatment and most-favoured-nation treatment and the Paris Convention. Venezuela noted that the most recent status report submitted by the United States contained the same information as the previous reports. The only changes made were the date and document symbol. The report stated that: "the US Administration will continue to work on a solution that would resolve this matter". In Venezuela's view, this amounted to "action without results". Venezuela noted that Section 211 remained in force, despite having been found to be inconsistent with the TRIPS Agreement. This undermined the dispute settlement system, which was considered to be one of the main achievements of the Uruguay Round. Venezuela was, therefore, concerned about the US failure to implement the Appellate Body's ruling. As it had already done on numerous occasions, Venezuela urged the United States to end its policy of economic, commercial and financial blockade against Cuba and to comply with the DSB's recommendations.

8. The representative of Zimbabwe said that his country thanked the United States for its report, but was disappointed that the United States continued to disregard the DSB's rulings and recommendations in this dispute, thereby undermining the international trading system. This was in spite of the numerous calls made in the DSB for the United States to respect its international obligations in this area. Therefore, Zimbabwe, once again, supported Cuba and the other delegations who had urged the United States to comply with the DSB's recommendations and rulings.

9. The representative of Uruguay said that his country thanked the United States for its status report. Once again, Uruguay called on the parties to this dispute to bring an end to this long-standing situation of non-compliance with the DSB's recommendations and rulings. Uruguay also called on the United States to rectify its status reports, which did not provide any information on progress in implementation. Uruguay noted that Section 211was not in line with the US commitments under the WTO.

10. The representative of Brazil said that her country thanked the United States for its status report but noted that, once again, the United States reported lack of progress. Brazil remained concerned about this situation of non-compliance with the DSB's recommendations and urged the United States to bring its measures into conformity with WTO rules.

11. The representative of China said that her country thanked the United States for its status report and statement made at the present meeting. The prolonged situation of non-compliance in this dispute was highly incompatible with the prompt and effective implementation required under the DSU provisions, in particular since the interests of a developing-country Member were affected. Thus, China urged the United States to implement the DSB's rulings and recommendations without further delay.

12. The representative of Nicaragua said that her country thanked the United States for its status report which, apart from the date of circulation, was identical to previous reports submitted by the United States over the past ten years. The United States had, for ten years, been telling delegations that it was working on the implementation of the DSB's recommendations in this dispute. Nicaragua was concerned that this had become a routine and permanent feature of DSB meetings. The United States failed to comply with its obligations in many disputes. The US failure to comply

undermined the credibility of the DSB and the multilateral trading system and could set a negative precedent for other Members, in particular developing countries. Nicaragua supported Cuba's statement and urged the United States to bring its legislation into conformity with the DSB's rulings and recommendations and to repeal Section 211, which was inconsistent with the TRIPS Agreement and violated the legitimate rights of Cuban trademark holders.

13. The representative of the Dominican Republic said that her country thanked the United States for its most recent status report. The Dominican Republic, once again, urged the United States to implement the DSB's recommendations and to bring Section 211 into conformity with those recommendations with a view to strengthening and enhancing the role of the multilateral trading system and the dispute settlement system.

14. The representative of Angola said that her country thanked the United States for its status report but regretted that no concrete effort had been made in the implementation of the DSB's decision and the Appellate Body's conclusion of 12 February 2002 on Section 211. As Members were aware, the delay in the implementation of the DSB's decision affected the security and the predictability of the multilateral trading system and set a negative precedent for other cases. Thus, Angola hoped that concrete actions would be undertaken to bring this measure into conformity with WTO rules without any further delay.

15. The representative of Argentina said that his country thanked the United States for its status report and its statement made at the present meeting. However, Argentina regretted that the United States had, once again, reported non-compliance. This prolonged situation of non-compliance for ten years was highly incompatible with the principle of prompt and effective implementation stipulated in the DSU provisions, in particular since the interests of a developing-country Member were affected. In that regard, and as it had done on other occasions, Argentina drew attention to the fact that when Members with relatively greater economic weight failed to comply with the DSB's rulings, to the detriment of the interests of developing-country Members, this undermined the stability of the multilateral trading system and jeopardized its viability with an impact that affected not just commercial interests. Argentina, therefore, supported Cuba and joined previous speakers in urging both parties to the dispute, in particular the United States, to take all necessary measures to finally remove this item from the DSB's Agenda.

16. The representative of Viet Nam said that his country thanked the United States for its status report and statement made at the present meeting. Once again, Viet Nam was concerned about the US lack of progress in the implementation of the DSB's recommendations and rulings on this case. Viet Nam urged the United States to implement the DSB's recommendations without further delay.

17. The representative of Ecuador said that his country supported the statement made by Cuba. Ecuador stressed, once again, that Article 21 of the DSU referred to prompt compliance with the DSB's recommendations and rulings, in particular since the interests of a developing-country Member were affected. Ecuador hoped that the United States would step up its efforts in order to immediately comply with the DSB's rulings and recommendations by repealing Section 211. Ecuador noted that this case, which involved prolonged non-compliance, had been on the DSB's Agenda for more than ten years. This highlighted some of the weaknesses of the dispute settlement system regarding effective compliance, which had an impact on the interests of developing countries and countries with small economies.

18. The representative of the United States said that his country would like to respond briefly to some of the comments made in the preceding interventions. In response to the comments about "systemic" concerns about the dispute settlement system, as the United States had noted on previous occasions, the facts simply did not support Members' assertions or justify such systemic concerns. The record was clear: the United States had come into compliance, fully and promptly, in the vast

majority of its disputes. As for the remaining few instances where US efforts to do so had not yet been entirely successful, the United States had been working actively towards compliance, such as in this dispute. The United States said that it would note that several Members speaking under this item had brought disputes against the United States even over the past year, which reflected their confidence that the United States would comply with any resulting DSB recommendations and rulings. Finally, the United States said that it would like to recall that Section 211 addressed the uncompensated expropriation of assets or businesses. As had been explained previously, the DSB held that when a WTO Member chose not to recognize intellectual property rights in its own territory relating to a confiscation of rights in another territory, its measures must comport with the national treatment and most-favoured nation (MFN) obligations of the TRIPS Agreement. The United States continued to make efforts to address these inconsistencies. The United States had not been made aware of another situation in which intellectual property rights had been expropriated or confiscated in another Member's territory without compensation, but if Members were aware of such a situation, the United States would appreciate receiving that information, which could be quite useful for discussions.

19. The representative of Cuba said that, once again, her country disagreed with what had just been stated by the United States. For the past ten years, the United States had failed to comply with its obligations, and Cuba believed that this situation of non-compliance must end. The US statements made in the DSB meetings lacked substance regarding uncompensated expropriation under Section 211. Paragraph 111 of the Appellate Body Report pertaining to this dispute stated that the United States contended that Section 211 was an expression of the long-standing US doctrine that those whose claim to ownership of a trademark was based on an uncompensated confiscation of assets could not claim rights of ownership in the United States, absent the consent of the owners whose assets had been confiscated. The fact that the US position was reflected in the Report did not give the United States any right to claim legal superiority of that view. Looking back at Cuba's nationalization process, the representative of Cuba said that the United States had deprived its citizens of the right to compensation, which Cuba had sought to offer. Cuba did not agree with the view on uncompensated expropriation. The Appellate Body acknowledged that: "this ruling is not a judgment on confiscation as that term is defined in Section 211. The validity of the expropriation of intellectual or any other property rights without compensation by a WTO Member within its own territory is not before us. Nor do we express any view, nor are we required to express any view in this appeal, on whether a Member of the WTO should, or should not, recognize in its own territory trademarks, trade names, or any other rights relating to any intellectual or other property rights that may have been expropriated or otherwise confiscated in other territories". [1] Cuba wished to indicate that in the case of Havana Club trademark, the assets associated with it that had been nationalized in Cuba belonged to José Arechabala who was not a US national. Cuba found it unacceptable for the United States to defend an entity or legal person that was not a US national. In Cuba's view, the accepted principle of a compensation agreement signed by Cuba was that the right holders had to be nationals of the claimant's country at the time when they were affected by the expropriation of the right.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.116)

21. The Chairman drew attention to document WT/DS184/15/Add.116, 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.

[1] WT/DS176/AB/R, para. 362.

22. The representative of the United States said that his country had provided a status report in this dispute on 12 July 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.

23. The representative of Japan said that his country thanked the United States for, and took note of, its statement and status report. Once again, Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.91)

25. The Chairman drew attention to document WT/DS160/24/Add.91, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

26. The representative of the United States said that his country had provided a status report in this dispute on 12 July 2012, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

27. The representative of the European Union said that the EU noted and thanked the United States for its status report. As it had stated many times in the past, the EU wished to resolve this case as soon as possible.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.54)

29. The Chairman drew attention to document WT/DS291/37/Add.54, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

30. The representative of the European Union said that the EU, once again, wished to express its hope that it would continue on the constructive path of dialogue with the United States. Three technical meetings had taken place since 2011. Those meetings had offered a good opportunity to discuss directly issues of concern to both sides and to follow up closely on developments in the biotech field. In 2012, the European Commission had already authorized four more GMOs[2] and had renewed the authorization of a fifth one.[3] Three of those decisions[4] had been adopted only six months after the relevant EFSA opinions had been published. In addition, EFSA had adopted an opinion on maize MIR 162, which had been published on 21 June 2012. EFSA had presented the opinion to

[2] A5547-127 soybean, 356043 soybean, MON87701 soybean, MON 87701 X MON 89788 soybean.
[3] 40-3-2 soybean.
[4] Authorization decision for 356043 and MON87701 soybeans, MON 87701 X MON 89788 soybean.

member States on 16 July 2012. It was foreseen that a draft decision would be presented to the regulatory Committee on 10 September 2012. Regarding the concerns expressed by the United States on the back-log of approvals, the EU, once again, recalled that the EU approval system was not covered by the DSB's recommendations and rulings. The EU underlined that the GMO regulatory regime was working normally as evidenced by the approval decisions just mentioned. The functioning of the GMO regime should not be rigidly assessed purely quantitatively and in the abstract, in terms of the number of authorizations per year, since this was dependent on various product and case-specific elements and in particular on the quality of applications and on the time needed by applicants to answer requests from EFSA on additional scientific information.

31. The representative of the United States said that his country thanked the EU for its status report and for the information in its statement made at the present meeting. As it had explained at past meetings of the DSB, the United States remained greatly concerned about the effects of EU delays on US exports of agricultural commodities and food products. At the end of June 2012, the EU had approved a new variety of biotech soybean. That approval was welcomed, but the United States noted that this approval had been delayed due to the failure of the EU's Standing Committee on the Food Chain and Animal Health to act following the issuance of a positive risk assessment issued by the EU's own scientific authority, the European Food Safety Authority. These delays were the rule, not the exception. In fact, not once in the past ten years had the EU's regulatory committee approved a biotech product. Instead, products had only been approved through the invocation of additional steps in the EU process. In the present month, the European Food Safety Authority had issued a favourable opinion on an insect resistant variety of maize. In accordance with that opinion, the United States hoped that the EU would be able to approve this application without further delays. The United States further noted that drought conditions in the United States and other growing areas were affecting worldwide supplies of maize and other feed products. As a result, it should be particularly important to the EU's own interests that the approval of this variety of maize not be subject to delay.

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

(e) 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.7)

33. The Chairman drew attention to document WT/DS382/10/Add.7, 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.

34. The representative of the United States said that his country had provided a status report in this dispute on 12 July 2012. Pursuant to the sequencing agreement between Brazil and the United States[5], the United States was ready to engage with Brazil should it have any further questions regarding this matter.

35. The representative of Brazil said that her country thanked the United States for its status report. Brazil was following attentively the implementation of the final rule published by the US Department of Commerce, which had modified the calculation of dumping margins in reviews. Brazil would consult with the United States with a view to achieving a solution to this dispute.

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

[5] WT/DS382/11.

(f) United States – Definitive anti-dumping and countervailing duties on certain products from China: Status report by the United States (WT/DS379/12/Add.6)

37. The Chairman drew attention to document WT/DS379/12/Add.6, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US definitive anti-dumping and countervailing duties on certain products from China.

38. The representative of the United States said that his country had provided a status report in this dispute on 12 July 2012, in accordance with Article 21.6 of the DSU. As had been noted at prior meetings of the DSB, in April and May 2012, the US Department of Commerce had issued preliminary determinations with respect to issues in this dispute. The Department of Commerce had provided an opportunity for interested parties to provide comments on those preliminary determinations, and to provide rebuttal comments on any comments submitted by other interested parties. The Department of Commerce was taking those comments into account as it worked on preparing the final determinations.

39. The representative of China said that her country thanked the United States for its status report and statement made at the present meeting. China noted that this would be another case in which the United States had failed to comply with the DSB's recommendations and rulings. Although 16 months had elapsed since the adoption of the Appellate Body and Panel Reports and the reasonable period of time as agreed by the parties had expired on 25 April 2012, the United States had not yet completed its implementation process and the process was quite delayed. Regarding the US preliminary determinations, as had been mentioned in its most recent status report, especially with respect to the determination of public bodies and "double remedy", China still had strong concerns and deep doubts that they were not fully consistent with the DSB's recommendations and rulings. On the contrary, it seemed that the United States went even further in the wrong direction, which was inconsistent with its WTO obligations. China urged the United States to expedite its work and fully implement the DSB's rulings and recommendations without any further delay. China would carefully study the preliminary determinations, pay close attention to the US implementation progress and reserved its right to take further action in accordance with the DSU provisions.

40. The representative of the United States said that his country was aware that the reasonable period of time agreed by China and the United States had expired. The United States had discussed this matter with China bilaterally. As a result of those discussions, the United States and China had reached an agreement on procedures under Articles 21 and 22 of the DSU. The United States was working to bring the relevant measures into conformity with the recommendations and rulings of the DSB as quickly as possible. However, the United States assumed that China had appreciated the opportunity to provide full comments on the preliminary determinations and the opportunity to fully defend its interests in the Section 129 proceeding.

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

(g) Thailand – Customs and fiscal measures on cigarettes from the Philippines: Status report by Thailand (WT/DS371/15/Add.3)

42. The Chairman drew attention to document WT/DS371/15/Add.3, which contained the status report by Thailand on progress in the implementation of the DSB's recommendations in the case concerning Thailand's customs and fiscal measures on cigarettes from the Philippines.

43. The representative of Thailand said that her country had provided a status report in this dispute on 13 July 2012. Thailand wished to note that it had recently held informal consultations in Bangkok with the Philippines regarding Thailand's implementation. Thailand appreciated the

Philippines' participation in those informal exchanges, which Thailand considered to be a valuable means of clarifying Thailand's intentions with respect to implementation in this dispute and of enabling useful discussions of some of the more technical aspects of the regulations being adopted by Thailand as part of its implementation in this dispute. Thailand looked forward to continuing these exchanges with the Philippines.

44. The representative of the Philippines said that his country thanked Thailand for its fourth status report and statement made at the present meeting. The Philippines continued to be concerned that Thailand had not fully complied with the DSB's recommendations and rulings regarding the measures subject to the reasonable period of time that had expired on 15 May 2012, more than two months ago. The Philippines was working with Thailand to resolve the outstanding issues as quickly as possible, and was also evaluating all of its options under the DSU provisions.

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

(h) United States – Anti-dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.2)

46. The Chairman drew attention to document WT/DS404/11/Add.2, 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 shrimp from Viet Nam.

47. The representative of the United States said that his country had provided a status report in this dispute on 12 July 2012, in accordance with Article 21.6 of the DSU. In October 2011, the United States and Viet Nam had jointly notified the DSB of their agreement that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on 2 July 2012.[6] In February 2012, the US Department of Commerce had published a modification to its procedures in order to implement the DSB's recommendations and rulings regarding the use of zeroing in anti-dumping reviews. That modification addressed certain findings in this dispute. On 28 June 2012, the US Trade Representative had requested, pursuant to Section 129 of the Uruguay Round Agreements Act, that the Department of Commerce take action necessary to implement the DSB's recommendations and rulings in this dispute. The United States would continue to consult with interested parties as it worked to address the recommendations and rulings of the DSB.

48. The representative of Viet Nam said that his country thanked the United States for its status report. Viet Nam was concerned that a proceeding under Section 129 of the Uruguay Round Agreement had recently been initiated by USTR on 28 June 2012, only four days before the expiry of the reasonable period of time on 2 July 2012, as agreed by the parties. This process had delayed the US full compliance with the DSB's recommendations and rulings. Viet Nam reiterated that Article 21 of the DSU stipulated that prompt compliance with the DSB's recommendations or rulings was essential in order to ensure effective resolution of disputes to the benefit of all Members. Viet Nam would consult with the United States with a view to achieving an appropriate solution to this matter.

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

[6] WT/DS404/10.

(i) European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China: Status report by the European Union (WT/DS397/15)

50. The Chairman drew attention to document WT/DS397/15, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning EU anti-dumping measures on certain iron or steel fasteners from China.

51. The representative of the European Union said that the EU was working on the implementation of the DSB's recommendations and rulings in this dispute and was making an effort to complete the implementation before the expiry of the agreed reasonable period of time on 12 October 2012. First, the provision of the EU Basic Anti-Dumping Regulation that had been found to be "as such" incompatible with the Anti-Dumping Agreement was being amended in a manner that fully respected the EU's WTO obligations. The legislative procedure was expected to be concluded with the publication of the amendment in the Official Journal of the EU in early September 2012. Second, a review had been initiated in order to implement the DSB's recommendations and rulings related to the specific EU anti-dumping measures on certain iron or steel fasteners originating in China. The relevant procedures were ongoing and were expected to be finalized in the near future. Finally, the EU wished to note that, regardless of the clear limits of the EU's implementation obligations arising from this dispute, the EU had also offered exporting producers in non-market economy countries, including China, the possibility to request a review of other anti-dumping measures currently in force with respect to any application of Article 9(5) of the EU basic Anti-Dumping Regulation in those measures allegedly in contradiction with the reasoning set out in the Appellate Body Report. The EU hoped that this initiative would inspire other WTO Members in similar circumstances.

52. The representative of China said that her country thanked the EU for its status report and statement made at the present meeting. On 28 July 2012, the DSB had adopted the Appellate Body Report and the Panel Report in this dispute. The Appellate Body and the Panel had concluded that the individual treatment regime laid down in Article 9(5) of the European Union's Basic Anti-Dumping Regulation was, both "as such" and "as applied" in the fasteners investigation, inconsistent with WTO law. According to the agreement between both parties, the reasonable period of time for the EU to implement the DSB's recommendations and rulings would expire on 12 October 2012. China welcomed the progress the EU had made to implement the DSB's recommendations and rulings. In particular, China welcomed the fact that the EU anticipated the amendment to the Basic Anti-Dumping Regulation of 30 November 2009 to be published and come into effect in early September 2012. China hoped that the EU would fully implement the DSB's rulings in relation to both the Basic Anti-Dumping Regulation "as such" and "as applied" in the fasteners investigation as soon as possible before the end of the reasonable period of time. With respect to the draft amendment to the Basic Anti-Dumping Regulation and the review of the anti-dumping investigation at issue, China would evaluate and monitor its development.

53. 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

54. 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.

55. The representative of the European Union said that, as it had done many times before, the EU requested 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. Once again, the EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports pertaining to this dispute.

56. The representative of Japan said that the CDSOA continued to be operational as FY 2012 Preliminary CDSOA Amounts Available[7] announced last month by US Customs and Border Protection showed. 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 pertaining to this dispute.

57. The representative of Brazil said that her country thanked the EU and Japan for keeping this item on the DSB's Agenda. As it had expressed in previous meetings, Brazil was of the view that the United States was under obligation to submit status reports in this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue be "resolved" within the meaning of the DSU.

58. The representative of India said that his country thanked Japan and the EU for regularly keeping this item on the DSB's Agenda. India agreed with the previous speakers that this issue should continue to remain under the surveillance of the DSB until such time full compliance was achieved.

59. The representative of Canada said that his country wished to refer to its statements made previously under this Agenda item. Canada's position did not change on this matter.

60. The representative of Thailand said that his country 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.

61. The representative of the United States said that, as his country had already explained at some previous DSB meetings, the 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, including the EU and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, the United States failed to see what purpose would be served by further submission of status reports repeating, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

62. The DSB took note of the statements.

[7] http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/

3. China – Measures related to the exportation of rare earths, tungsten and molybdenum

(a) Request for the establishment of a panel by the United States (WT/DS431/6)

(b) Request for the establishment of a panel by the European Union (WT/DS432/6)

(c) Request for the establishment of a panel by Japan (WT/DS433/6)

63. The Chairman proposed that the three sub-items to which he had just referred be considered together. He recalled that the DSB had considered these matters at its meeting on 10 July 2012 and had agreed to revert to them. He then drew attention to the communication from the United States contained in document WT/DS431/6 and invited the representative of the United States to speak.

64. The representative of the United States said that, as explained at the 10 July 2012 DSB meeting, the United States continued to be concerned with Chinese export restraints on certain raw materials – i.e., rare earths, tungsten and molybdenum – that were critical to manufacturing industries in the United States and in other Members. The export restraints at issue included export quotas, export duties, various restrictions on the right to export, as well as administrative requirements that limited exports of these materials from China by increasing the burdens and costs for exporting. As the United States had explained at the 10 July 2012 DSB meeting, China's export restraints were similar to the policies that the United States, the EU and Mexico had successfully challenged in the "China - Raw Materials" dispute as inconsistent with China's obligation under the GATT 1994 and China's Protocol of Accession. Therefore, the United States requested that the DSB establish a panel to examine the matter set out in the US panel request with standard terms of reference. As the panel requests of the co-complainants, the EU and Japan, related to the same matter, the United States requested pursuant to DSU Article 9.1 that a single panel be established to examine these complaints.

65. The Chairman drew attention to the communication from the European Union contained in document WT/DS432/6 and invited the representative of the European Union to speak.

66. The representative of the European Union said that the EU regretted that it had no choice but to make a second request for the establishment of a panel in this dispute. As had been noted during the previous DSB meeting, the consultations, while helpful in clarifying the Chinese measures and their application, had provided no basis for a negotiated solution to the dispute. As had also previously been noted, the export restrictions imposed by China on raw materials were by no means a recent phenomenon. They had been a problem when China acceded to the WTO and they continued to be so at the present time. The EU regretted that China had not signalled any intentions to remove those export restrictions, despite the clear ruling issued by a panel and the Appellate Body earlier this year on a similar set of measures. The EU believed that the export restrictions at issue in this dispute constituted a violation of China's WTO commitments undertaken under the GATT as well as commitments undertaken in its Accession Protocol, specifically aiming at these types of restrictions. The export restrictions at issue significantly distorted the market and created competitive advantages in favour of the Chinese manufacturing industry to the detriment of foreign competitors. Furthermore, these policies put pressure on foreign producers to move their operations and technologies to China, as companies outside China were either cut off from supplies or had access only at much higher prices than Chinese companies. The EU wished to reiterate again that it supported and encouraged the promotion of a cleaner and sustainable production of raw materials. Environmental protection and sustainable resource management were legitimate aims, recognized and fully achievable under WTO rules. However, the EU strongly believed that export restrictions were not the appropriate tools to promote these aims and welcomed the clear findings of the Panel in the first raw materials dispute to that effect. Finally, in light of the panel requests made by the United States and Japan in DS431 and DS433, the EU requested that a single panel be established in accordance with Article 9.1 of the DSU.

67. The Chairman drew attention to the communication from Japan contained in document WT/DS433/6 and invited the representative of Japan to speak.

68. The representative of Japan said that his country would not repeat its position and claims in this dispute at the present meeting, as they were explained in detail in the panel request and in Japan's statement made at the previous DSB meeting of 10 July 2012. This case concerned China's export restrictions on various forms of rare earths, tungsten and molybdenum through export duties, export quotas and their administration. Japan considered that China's export restrictions were inconsistent with China's various obligations under the WTO Agreement. This panel request had appeared as an item on the Agenda of the previous DSB meeting of 10 July 2012. Following that meeting, Japan once again requested, pursuant to Article 6 of the DSU, that a panel be established to examine the matter set out in its panel request with standard terms of reference in accordance with Article 7.1 of the DSU. Japan further requested that, pursuant to Article 9.1 of the DSU, a single panel be established to examine the complaints of Japan, the United States and the European Union which related to the same matter.

69. The representative of China said that her country wished to reiterate that after the complaining parties had requested consultations in these disputes, China had held sincere consultations with them and had positively responded to their relevant questions. China regretted that the complaining parties requested the DSB to establish a panel in these disputes for a second time. As it had reiterated on many occasions, China's policies concerning the products at issue were aimed at protecting natural resources and achieving sustainable economic development. Once again, China noted that it had no intention to protect its domestic industry through means that would distort trade. According to the statistics, China supplied over 90 per cent of rare earths on the global market with just 23 per cent of the world's total reserves, and had made great contributions to the world economic developments. At the same time, it had to be recognized that over-exploitation of resources also resulted in the outstanding problems, such as ecological destruction, which in turn had seriously hampered the sustainable development of the rare earths. Therefore, China was puzzled by the complainants' intention of initiating the panel process. China understood that a panel would be established at the present meeting and, although not obligated, in the spirit of collaboration, China agreed to the establishment of a single panel to examine the three disputes.

70. The DSB took note of the statements and agreed to establish a single panel pursuant to Article 9.1 of the DSU, with standard terms of reference to examine the complaint by the United States contained in WT/DS431/6, the complaint by the European Union contained in WT/DS432/6 and the complaint by Japan contained in WT/DS433/6.

71. The representatives of Brazil, Canada, Colombia, the European Union, India, Japan, Korea, Norway, Oman, Saudi Arabia, Chinese Taipei, the United States and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

4. United States – Countervailing measures on certain hot-rolled carbon steel flat products from India

(a) Request for the establishment of a panel by India (WT/DS436/3)

72. The Chairman drew attention to the communication from India contained in document WT/DS436/3, and invited the representative of India to speak.

73. The representative of India said that the United States had conducted a countervailing duty investigation and had levied countervailing duties on certain hot-rolled carbon steel products from India. The provisional measures had been imposed with effect from 20 April 2001 and the final measures had been imposed with effect from 3 December 2001. The United States had concluded a

sunset review in 2007 and had continued the duties for a further period of five years. The United States had also conducted several Administrative Reviews to determine the countervailing duty rates to be applied on the imports made during the relevant period. The measures continued to be in force and India considered that these measures were inconsistent with US obligations under several provisions of the SCM Agreement and the GATT 1994. On 24 April 2012, India had requested consultations with the United States, pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 30 of the SCM Agreement. Consultations had been held on 31 May and 1 June 2012. Unfortunately, the consultations were unsuccessful in resolving the dispute and, therefore, pursuant to Articles 4.7 and 6 of the DSU and Article 30 of the SCM Agreement, India respectfully requested that the DSB establish a panel to examine this matter, with standard terms of reference.

74. The representative of the United States said that his country was disappointed that India had requested the establishment of a panel on this matter. Members had the right to levy a countervailing duty in order to offset subsidies bestowed by another Member on the manufacture, production or export of goods in or from that other Member's jurisdiction. India, at both the national and state levels, provided subsidies that benefitted domestic manufacturers of certain hot-rolled carbon steel flat products and that caused material injury to the industry of other Members. In that regard, the United States noted that it was not the only WTO Member to have found that India's domestic steel industry received subsidies from national and state governmental entities and that these subsidies caused injury. With respect to the countervailing duty order at issue in this dispute, the United States had conducted the initial investigation and subsequent reviews transparently and with all necessary procedural safeguards. The United States considered that US procedures compared very favourably to those of certain other Members subject to multiple WTO challenges to their investigations recently. Nevertheless, many of the very issues that India now raised in its panel request arose from the failure of the Government of India and the relevant Indian companies to avail themselves of the opportunity to fully participate in those proceedings. The United States also had a number of concerns with the way in which India had framed its panel request. For example, the request appeared to include provisions of US law about which consultations had neither been requested nor held. For all of these reasons, the United States was not in a position to agree to the establishment of a panel at the present meeting.

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

5. United States – Anti-dumping measures on certain shrimp and diamond sawblades from China

(a) Report of the Panel (WT/DS422/R and Add.1)

76. The Chairman recalled that, at its meeting on 25 October 2011, the DSB had established a panel to examine the complaint by China pertaining to this dispute. The Report of the Panel contained in document WT/DS422/R and Add.1 had been circulated on 8 June 2012 as an unrestricted document. The Report of the Panel was before the DSB for adoption at the request of China. The adoption procedure was without prejudice to the right of Members to express their views on the Report.

77. The representative of China said that her country thanked the Panel and the Secretariat for their work in this dispute. China welcomed the fact that the Panel had upheld China's claim concerning the USDOC's use of zeroing in the calculation of dumping margins for individually-examined exporters and producers. The Panel had found that the "zeroing" methodology used by the USDOC in calculating the margins of dumping in the three anti-dumping investigations at issue was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement, and therefore had concluded that the United States had acted inconsistently with its obligations under WTO rules. According to the

Agreement on Procedures between China and the United States in this dispute (WT/DS422/4), the parties had agreed that the reasonable period of time for the United States to bring each measure into conformity with the Anti-Dumping Agreement would be eight months. China hoped that the United States would fully implement the DSB's recommendations and rulings as soon as possible.

78. The representative of the United States said that his country would like to also thank the members of the Panel and the Secretariat for their work on this dispute. With regard to the specific methodology challenged by China in this dispute – i.e. zeroing in the context of average-to-average comparisons in anti-dumping duty investigations – the US Department of Commerce had announced years ago that it would discontinue zeroing in this context as a result of earlier DSB recommendations and rulings. Accordingly, in the present dispute, the United States and China had reached a procedural agreement that provided an efficient means of addressing China's claims with reduced burdens on the resources of the parties and the dispute settlement system. As had been agreed with China and consistent with the procedural agreement, the United States said that it would like to state that it intended to implement the recommendations and rulings of the DSB in this dispute in a manner that respected US WTO obligations. The United States would need a reasonable period of time in which to do so, and China and the United States had agreed that the reasonable period of time in this dispute would be eight months.

79. The representative of China said that her country thanked the United States for its statement regarding the US intentions to implement the DSB's recommendations and rulings. China noted that, pursuant to Article 21.3 of the DSU, the United States had an obligation to inform the DSB of its intentions in respect of implementation in this dispute within the next 30 days. However, the parties had reached a procedural agreement in this regard. Therefore, China appreciated the US statement of intentions made at the present meeting.

80. The DSB took note of the statements and adopted the Panel Report contained in documents WT/DS422/R and WT/DS422/R/Add.1.

6. United States – Certain country of origin labelling (COOL) requirements

(a) Report of the Appellate Body (WT/DS384/AB/R) and Report of the Panel (WT/DS384/R)

(b) Report of the Appellate Body (WT/DS386/AB/R) and Report of the Panel (WT/DS386/R)

81. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS384/16 – WT/DS386/15 transmitting the Appellate Body Reports on: "United States – Certain Country of Origin Labelling (COOL) Requirements", which had been circulated on 29 June 2012 in document WT/DS384/AB/R – WT/DS386/AB/R. He reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. 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".

82. The representative of Canada said that his country thanked the Panel, the Appellate Body and their respective Secretariats for their work on this dispute. Canada also wished to acknowledge the valuable cooperation with Mexico, which had launched its own challenge of the same measure, the Report for which would also be adopted at the present meeting. Canada welcomed the Panel and the Appellate Body's findings and recommendations, which confirmed that the measure taken by the United States relating to requirements for Country of Origin Labelling (COOL) was inconsistent with its WTO obligations. When the United States had first implemented the COOL requirements in 2008,

the impact on Canadian industry was immediate and significant. Within a year of the adoption of the measure, exports to the United States of Canadian feeder cattle and slaughter hogs were cut in half. Virtually overnight, the COOL measure had led to the disintegration of the North American supply chain, created unpredictability in the market and imposed additional costs on producers on both sides of the border. In the lead-up to the adoption of the measure and beyond, Canada had repeatedly raised with the United States its strong concerns about the consequences of COOL, but to no avail. Canada was left with no choice but to initiate dispute settlement proceedings. The Appellate Body and Panel Reports being adopted at the present meeting had confirmed Canada and Mexico's concerns on the most significant issues. At the present meeting, Canada wished to comment briefly on three issues that had been raised in this dispute. First, the Appellate Body had confirmed that the COOL measure negatively affected the conditions of competition of Canadian cattle and hogs in the US market. It had further confirmed that the segregation costs imposed disproportionately on Canadian cattle and hogs, together with an excessive administrative and recordkeeping burden, were not even-handed. As a result, the Appellate Body had agreed that the COOL measure was inconsistent with Article 2.1 of the TBT Agreement by discriminating against Canadian cattle and hogs.

83. Second, while Canada regretted that the Appellate Body had been unable to complete its analysis under Article 2.2 of the TBT Agreement, Canada nonetheless welcomed the clear guidance that the Appellate Body had provided for the application of Article 2.2 of the TBT Agreement in future cases. The recent trilogy of disputes involving Article 2.2 of the TBT Agreement claims had, in a very short period of time, enriched the collective understanding of the nature of the obligations this provision imposed on Members governments. In particular, in this dispute, Canada appreciated the Appellate Body's consideration of the alternative measures proposed by Canada. That consideration suggested that those alternative measures, such as voluntary labelling or substantial transformation, were potentially viable less trade-restrictive alternatives to the COOL measure. However, the outcome of Canada's claims under Article 2.2 of the TBT Agreement was also a reminder of the importance of finalizing the review of the operation of the DSU. The Appellate Body's inability to complete the analysis under Article 2.2 of the TBT Agreement in this dispute highlighted, once again, that the absence of a remand procedure exposed all complaining parties to the risk that they may go through an entire proceeding, only to see a final resolution of the claim concerned frustrated due to this procedural lacuna.

84. Third, Canada noted that the Appellate Body had reiterated that the test under Article III:4 of the GATT 1994 was not the same as under Article 2.1 of the TBT Agreement. While the Appellate Body had not found it necessary to make a finding, it was clear nonetheless that the finding of negative effects on the conditions of competition related to Article 2.1 of the TBT would also ground a GATT Article III:4 violation, if that had been necessary. As a result of the recommendations and rulings that the DSB would adopt at the present meeting, Canada trusted that the United States would act promptly to remove the discriminatory elements of the COOL measure, by amending the statute concerned to end the violation of national treatment that had been found by the Panel and confirmed by the Appellate Body.

85. Finally, Canada wished to conclude with a comment about the length of time it had taken to arrive at that point in the resolution of the dispute. Almost 33 months had passed since the establishment of the Panel in November 2009, far in excess of the 12 months foreseen in Article 20 of the DSU. Canada acknowledged that a good amount of the additional time taken had been with the consent of, and sometimes at the behest of, the disputing parties. But other delays had been imposed upon those parties through the domino effect of systemic delays that had been affecting disputes in recent years. Canada's understanding was that many of the conditions that had led to recent delays had passed, but Members should not be naïve in believing that they would not return. It was in the interest of Members and potential disputing parties, and the responsibility of DSB delegates, to take immediate steps to ensure that the system was prepared to deal with such conditions should, or when, those conditions returned.

86. The representative of Mexico said that his country welcomed the opportunity to express its views on this matter. First, Mexico wished to thank the Appellate Body members and the AB Secretariat, in particular the division that had examined the case. Mexico also thanked the Panel and the Secretariat that had assisted in their work in this dispute. Mexico also welcomed the participation of third parties at the panel stage and third participants in the appeal. Their interesting views had helped to enhance the quality of the discussion at both stages of the proceedings. The TBT Agreement recognized Members' right to establish technical regulations, which constituted obstacles to trade, when they were needed to fulfil or protect a legitimate objective, such as the protection of human or animal life or health or the prevention of deceptive practices. However, such technical regulations, regardless of their legitimate objective, remained subject to TBT Agreement obligations, most notably the requirement that they shall not be discriminatory or more trade restrictive than necessary to fulfil their legitimate objective. Mexico recognized that providing consumer information could be an important legitimate objective. However, in the case brought by Mexico before a panel and the Appellate Body, the intention had not been to question this objective in general, but the specific features of the country of origin labelling (COOL) requirements of the United States.

87. In Mexico's view, the COOL requirements had not been created for the real and legitimate purpose of providing consumer information, but with a view to US livestock producers recovering the market share that livestock born in Mexico and Canada had legitimately held for decades. The method that had been used to try to recover this share of the market was to require that all participants in the meat production chain provide information on the place where the livestock concerned was born, raised and processed, even if it had gained most of its weight and its meat had been produced in the United States, as in the case of Mexican feeder cattle. As the information provided to consumers had served only a protectionist and not genuine purpose, the charges for livestock born in the United States had been minimized, and all costs had been transferred to production chain operators that had decided to use livestock of different origins. The result was a discriminatory measure, the ultimate aim of which was protectionist, and which, instead of fulfilling its objective to inform consumers, created confusion. In short, while the COOL requirements had been totally ineffective in fulfilling the objective of providing consumer information, especially when the meat concerned derived from livestock of different origins, they had been very effective in fulfilling their protectionist purpose. The Panel and the Appellate Body had confirmed that the COOL requirements created an incentive to use only livestock born in the United States and a disincentive to use livestock born in another country.

88. At the present meeting, Mexico also wished to make some specific comments on the Appellate Body's analysis by first looking at Article 2.1 of the TBT Agreement and then Article 2.2 of the TBT Agreement. Mexico welcomed the Panel and Appellate Body's findings that the COOL measure was inconsistent with the national treatment and non-discrimination obligation set out in Article 2.1 of the TBT Agreement.[8] Mexico considered the Appellate Body's interpretation, as previously developed in the reports on "US - Clove Cigarettes" and "US - Tuna II (Mexico)", to be appropriate, in that the correct way to analyse whether a technical regulation was inconsistent with Article 2.1 of the TBT Agreement was to determine whether it modified the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. Furthermore, recognizing that technical regulations simply by establishing product characteristics may have a detrimental impact, the Appellate Body had clarified that in order to determine whether this provision had been violated, it was necessary to analyse whether the existence of the detrimental impact reflected the existence of discrimination, and that it was, therefore, necessary to analyse in detail whether the detrimental impact on imports stemmed exclusively from a legitimate regulatory distinction. For this, it was necessary to analyse whether the measure was even-handed.[9] On the basis of that interpretation, the Appellate Body had recognized in this specific

[8] Appellate Body Report, para. 496(a)(iv).
[9] Appellate Body Report, paras. 266-272.

case that the COOL requirements modified the conditions of competition in the US market to the detriment of livestock born in Mexico. In that respect, Mexico noted that the Appellate Body had recognized that its "examination of the COOL measure under Article 2.1 reveals that its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors ..."[10] and that "it is these same recordkeeping and verification requirements that 'necessitate' segregation, meaning that their associated compliance costs are higher for entities that process livestock of different origins. Given that the least costly way of complying with these requirements is to rely exclusively on domestic livestock, the COOL measure creates an incentive for US producers to use exclusively domestic livestock and thus has a detrimental impact on the competitive opportunities of imported livestock."[11] As to whether the detrimental impact reflected the existence of discrimination or, in other words, whether it stemmed exclusively from a legitimate regulatory distinction, Mexico noted that the Appellate Body had concluded that "the recordkeeping and verification requirements imposed on upstream producers and processors cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered, because the detailed information required to be tracked and transmitted by those producers is not necessarily conveyed to consumers through the labels prescribed under the COOL measure. This is either because the prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate origin information, or because the meat or meat products are exempt from the labelling requirements altogether. Therefore, the detrimental impact caused by the same recordkeeping and verification requirements under the COOL measure can also not be explained by the need to provide origin information to consumers. Based on these findings, we consider that the regulatory distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner."[12]

89. In light of the foregoing, the Appellate Body had found that "the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1 of the TBT Agreement".[13] Mexico agreed with the factual findings and the interpretation of the Panel, as upheld by the Appellate Body but for different reasons, which had led both to conclude that the COOL requirements were inconsistent with the national treatment and non-discrimination obligation under Article 2.1 of the TBT Agreement. Mexico welcomed the Appellate Body's recommendation to the DSB to request the United States to bring its COOL requirements into conformity with Article 2.1 of the TBT Agreement.[14]

90. With regard to Article 2 of the TBT Agreement, in Mexico's view, the Panel had correctly concluded that the COOL measure was inconsistent with Article 2.2 of the TBT Agreement, as it did not fulfil the objective of providing consumer information on origin with respect to meat products. Mexico regretted the Appellate Body's reversal of that conclusion. In Mexico's view, the Appellate Body, based on the guidance given in its recent report in "US - Tuna II", had correctly determined that "to make an objective and independent assessment of the objective that a Member seeks to achieve, the panel must take account of all the evidence put before it in this regard, including 'the texts of statutes, legislative history, and other evidence regarding the structure and operation' of the technical regulation at issue".[15] Mexico also agreed with the Appellate Body's view that if the objective did not fall among those specifically listed, a panel must make a determination of legitimacy.[16] Mexico regretted, however, that the Panel had not given due consideration to the evidence submitted by

[10] Appellate Body Report, para. 349.
[11] Appellate Body Report, para. 349
[12] Appellate Body Report, para. 349
[13] Appellate Body Report, para. 349
[14] Appellate Body Report, para. 497.
[15] Appellate Body Report, para. 371.
[16] Appellate Body Report, para. 372.

Mexico and Canada, which showed that the objective of the COOL measure was protectionist and, therefore, illegitimate, or to the Appellate Body's finding that, in identifying the objective, the Panel had not acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the facts.

91. With regard to the term "fulfil", the Appellate Body recalled that in "US - Tuna II (Mexico)", it had found that, while read in isolation, the word "fulfil" could be understood to signify the complete achievement of something, this term was concerned with the degree of contribution that the technical regulation made towards the achievement of the legitimate objective, and that a panel must seek to ascertain, from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application, to what degree, if at all, the challenged technical regulation, as written and applied, actually contributed to the achievement of the legitimate objective pursued by the Member.[17] The Appellate Body had subsequently noted that "because the Panel seems to have considered it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment to be consistent with Article 2.2, it erred in its interpretation of Article 2.2".[18] Mexico was concerned that a measure not fulfilling its objective but contributing minimally to that objective may be considered consistent with Article 2.2 of the TBT Agreement. A measure that contributed minimally or insignificantly to the fulfilment of its supposed objective created an unnecessary barrier to trade. In Mexico's view, the Appellate Body should have followed the Panel's approach in that if a measure did not fulfil its objective, or contributed minimally or insignificantly, it was not necessary to continue the analysis.

92. When reversing the Panel's finding that the COOL requirements were inconsistent with Article 2.2 of the TBT Agreement, the Appellate Body had found that due to the absence of relevant factual findings by the Panel, and of sufficient undisputed facts on the record, it was unable to complete the legal analysis and determine whether the COOL measure was more trade restrictive than necessary to fulfil its legitimate objective.[19] Mexico deeply regretted this situation and wished to emphasize that Article 3.4 of the DSU provided that recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter, and that, pursuant to Article 2.1 of the DSU, the DSB relied on panels and the Appellate Body to achieve this. In the present case, the Appellate Body had not been in a position to complete its analysis in respect of Article 2.2 of the TBT Agreement, as the Panel had made no factual findings regarding the less restrictive alternatives proposed by Mexico. Therefore, in this particular case, the Panel could not fully complete its task. Mexico noted that in the context of the ongoing negotiations on clarifications and improvements to the DSU, there were two proposals on remand which, in light of this case, could be viable for ensuring that the Appellate Body completed its analysis in future disputes. In that respect, Mexico called upon Members to consider this case as proof of the need to find solutions to this problem and to analyse in greater detail and more seriously the proposals on remand that some Members had put forward for consideration. In light of the Panel and Appellate Body's findings and recommendations, Mexico hoped that the United States would promptly comply with the DSB's recommendations and that the measures taken to comply would be consistent with the covered agreements and would lead to the satisfactory settlement of this dispute.

93. The representative of the United States said that his country would like to thank the members of the Panel, the Appellate Body, and the Secretariat assisting them for their work on this dispute. This dispute involved US country of origin labelling (COOL) requirements for beef and pork products sold at the retail level. These requirements applied equally to products, whether imported or domestic. As was the case with country of origin labelling provisions in many Members, they allowed consumers to make more informed purchasing decisions about the food they bought. The

[17] Appellate Body Report, para. 373.
[18] Appellate Body Report, para. 468.
[19] Appellate Body Report, para. 491.

United States was pleased that the Panel and the Appellate Body had both agreed that the objective of the COOL measure was to provide consumers information on origin and that they had further confirmed that the provision of consumer information on the origin of food products was a legitimate objective. The United States was also pleased that the Appellate Body had reversed the Panel's finding that the COOL measure was "more trade restrictive than necessary" under Article 2.2 of the TBT Agreement. In so doing, the Appellate Body had appropriately concluded that whether a measure was "more trade restrictive than necessary" in this case required a comparison of the measure at issue with another measure that a complaining party asserted would fulfil the Member's objective at the level the Member considered appropriate, but in a less trade restrictive manner.

94. With respect to the appeal under Article 2.1 of the TBT Agreement, concerning whether the COOL measure treated imports less favourably than domestic products, the Panel and Appellate Body's findings and approach raised a number of significant concerns. The Panel and Appellate Body had found that the COOL measure had modified the conditions of competition to the detriment of imported products without ever identifying any different treatment under the COOL measure of imported livestock from domestic livestock in either a *de jure* or *de facto* sense. Instead, the Panel and Appellate Body, unlike in any prior GATT or WTO dispute relating to national treatment, had taken an approach where a difference in market impact was sufficient to establish a breach of national treatment obligations.[20] In other words, the identical treatment of like imported and domestic products under a measure could nonetheless be found to discriminate against imported products if there was a different market impact.

95. The Panel and Appellate Body had not, in their Reports, identified the textual or other basis for this novel approach, its implications, or how this approach would account for the fact that there often, if not always, would be different market impacts on products from different entities from any measure. Further, and as third parties had pointed out during the appellate proceedings, it was inappropriate to fashion a national treatment analysis that determined whether a measure was WTO inconsistent solely based on the market in which it was enacted, for example, whether the Member taking the measures had a big or small market or was a big or small producer. The Appellate Body also did not acknowledge that this was a novel and unprecedented approach. The previous reports cited by the Appellate Body to support its approach[21] – such as "Korea - Beef" and "China - Auto Parts" – all involved measures that explicitly treated imported and domestic products differently on their face. In those prior reports, only after this different treatment had been established did the Appellate Body turn to the question of market impact.[22] By contrast, the Appellate Body in this dispute had jumped immediately to market impact without finding any different treatment. This approach would shift the analysis from whether a measure differentiated between products in a manner adverse to imports to whether a measure that did not differentiate between products had the same market impact on imports compared to domestic products. The national treatment inquiry would then become a trade effects test that could open to challenge any number of origin-neutral measures. As a result, legislators and regulators would not only need to consider whether a measure treated imports differently and less favourably, but they may also need to conduct a market impact analysis of the measures on imports. That would be a new, significant obligation nowhere agreed to by WTO Members. The Appellate Body added an additional step to the Panel's analysis and had ultimately concluded that the US measure was inconsistent with Article 2.1 of the TBT Agreement because the amount of information the labels conveyed was out of proportion to the administrative requirements imposed on upstream producers. It appeared to the United States that this issue was far attenuated from a national treatment analysis under Article 2.1 of the TBT Agreement.

[20] Panel Report, para. 7.372.
[21] Appellate Body Report, paras. 286-294.
[22] Korea - Beef (AB), paras. 130-151; US - FSC (Article 21.5 - EC) (AB), para. 217; China - Auto Parts (AB), paras. 192-197.

96. In particular, whether or not the COOL measure's administrative requirements were commensurate with the level of information ultimately provided to consumers, it was unclear what this had to do with the question the Panel and Appellate Body had been called to examine – whether the measure reflected discrimination. Rather, the United States was greatly concerned that the Appellate Body's approach to Article 2.1 of the TBT Agreement asked adjudicators to review the calibration of a measure to risk, cost, and benefit, even if in the end the difference in treatment was not related to origin. Article 2.1 of the TBT Agreement did not create the need or the authority to conduct such an analysis. Instead, it could set up panels and the Appellate Body to be the ultimate arbiters of a range of important regulatory questions, a role that Members had not agreed to provide to them under the WTO. Further, the United States understood that panels and the Appellate Body were not equipped to conduct such an inquiry and to second-guess the myriad regulatory issues involved in many technical regulations. A far preferable approach to reviewing national treatment claims under Article 2.1 of the TBT Agreement would be a return to determining whether a measure at issue accorded less favourable treatment that was related to the origin of the product.

97. Finally, in relation to the circulation of these reports beyond the 90-day time-limit set out in Article 17.5 of the DSU, the United States said that it would like to recall for Members the communications that had been circulated by Canada, Mexico, and the United States in which they had confirmed that they, like the Appellate Body[23], each considered the Appellate Body Report in their respective dispute to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[24] In those communications, the three parties had jointly stated as follows: "The parties note that the Division hearing this appeal did not consult with them on its need to exceed the 90-day time-limit. We consider that, consistent with the practice of Members and the Appellate Body until 2011, the Appellate Body should consult with the parties and obtain their agreement to receive reports that are to be circulated after the deadline provided for in the DSU. We particularly regret the lack of consultation with the Division hearing this appeal given that the parties would have been willing to positively consider a communication from the Division of its need for additional time. While we note our understanding that further delays will not be required in upcoming disputes given the anticipated workload of the Appellate Body in the immediate future, should delays in the circulation of reports beyond the 90-day deadline be again considered necessary, we would expect a return to the Appellate Body's pre-2011 practice".[25] Members would recall that at the DSB meeting on 10 July 2012, Canada, Mexico, and the United States had expressed their concerns relating to the situation in these appeals, including only being informed towards the end of the appeal period that the Reports would be delayed beyond 90 days, and had put forward some ideas on how Members could begin to address the issues raised. The United States looked forward to continuing its discussions with any interested delegations on how to find solutions to the problems raised by the recent practice in appeals. The United States thanked the DSB for its attention.

98. The representative of Costa Rica said that his country had not participated as a third party in these disputes and, therefore, it would not comment on the substance of the Reports. However, Costa Rica wished to be associated with the statements made by the parties to the disputes regarding the circulation of the Appellate Body Reports outside the 90-day time-limit. In that regard, Costa Rica underlined that Article 17.5 of the DSU clearly stated that in no case shall appeal proceedings exceed 90 days. Costa Rica valued the quality of the Appellate Body reports and understood that, in some cases, the Appellate Body may face exceptional circumstances that would prevent it from meeting the 90-day deadline. In such cases, Costa Rica believed that the Appellate

[23] WT/DS384/16 (3 July 2012); WT/DS384/15 (3 July 2012).

[24] Joint communication from Canada and the United States, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/17 (3 July 2012); Joint communication from Mexico and the United States, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS386/16 (3 July 2012).

[25] WT/DS384/17; WT/DS386/16 (footnotes omitted).

Body should seek consent from the parties to the dispute and inform the DSB of the reasons for the delay. This would ensure the legal certainty of the reports and transparency for all Members. Therefore, Costa Rica supported the proposal to continue discussions on this matter with a view to finding a solution to this situation.

99. The representative of the European Union said that the EU had participated as a third party in these disputes due to the systemic issues raised and the interpretation of the relevant obligations set out in Articles 2.1 and 2.2 of the TBT Agreement, as well as Articles X:3(a) and XXIII:1(b) of the GATT 1994. The EU was satisfied with the Appellate Body's consistency in the three recent TBT cases including the "US - Clove Cigarettes" and "US - Tuna II (Mexico)" cases. In particular, the Appellate Body had confirmed that, for a finding of less favourable treatment under Article 2.1 of the TBT Agreement, it was not sufficient that a technical regulation had a detrimental impact on imported products, but also that this detrimental impact did not stem exclusively from a legitimate regulatory distinction. In the circumstances of these disputes, the Appellate Body had correctly concluded that, when a measure arbitrarily and unjustifiably discriminated against imported products, such detrimental impact was not even-handed and, accordingly, must not be considered as stemming exclusively from a legitimate regulatory distinction.

100. With regard to Article 2.2 of the TBT Agreement, the EU welcomed the Appellate Body's clarifications on the interpretation of key normative elements in that provision, in particular the notion: "to fulfil a legitimate objective" as the degree the measure at issue actually contributed to the achievement of a legitimate objective. Likewise, the Appellate Body had correctly interpreted the notion of "necessity" in that provision as involving a comparison of the trade-restrictiveness and the degree of achievement of the measure at issue, with that of a possible alternative measure. The EU was also satisfied with the interpretation of "legitimate objective" as including the provision of information to the consumer on the origin of a product.

101. The United States and Costa Rica had just mentioned how important it was to respect Article 17.5 of the DSU regarding the 90-day deadline and the need to ensure appropriate transparency. The EU also considered that deadlines set out in the DSU relating to the time-limits for Panel and the Appellate Body reports were important and should be respected as far as objectively possible. That being said, it was also true that there were circumstances where the Appellate Body was simply objectively unable to meet the 90-day deadline, if it was to perform its obligations under Article 17.12 of the DSU to "address each of the issues raised" and, as set out in Article 3.2 of the DSU, to "preserve the rights and obligations of Members". Concretely, the EU was thinking about situations such as the simultaneous filing of more appeals than the Appellate Body was objectively able to handle, or filing of individual appeals that were so voluminous and complex that even the entire devotion of the Appellate Body's resources would be insufficient to fulfil its tasks within the 90-day deadline. Exceeding the 90-day deadline should not and could not call into question the "rules-based multilateral trading system" or, for that matter, Article 17.14 of the DSU, as demonstrated by the adoption of the Appellate Body reports at the present meeting. In fact, the EU considered that a high-quality Appellate Body report, albeit slightly late, contributed more to the rules-based trading system than a poor-quality report issued within 90 days. In those cases where the Appellate Body needed to exceed the 90 days, the EU trusted that the Appellate Body would deal with the issue in fairness and would provide the necessary transparency. In that regard, the EU noted that all WTO Members had already been fully informed about the timing of this Report in the communication from the Appellate Body of 23 May 2012[26], which was publicly available on the WTO website. Finally, with regard to the constructive proposal from Canada to examine how to address delays in the system as a whole in the future, the EU stood ready to participate actively and positively in such discussions.

[26] WT/DS384/14 and WT/DS386/13.

102. The representative of Japan said that his country thanked the Panel, the Appellate Body and their respective Secretariats for their hard work on the Reports. Japan had participated in these dispute settlement proceedings as an interested third party. Although Japan was still analysing the Appellate Body's findings, it wished to make two preliminary observations. First, Japan observed that, following its previous findings in "US - Clove Cigarettes" and "US - Tuna II (Mexico)", the Appellate Body continued to emphasize the need to inquire the measure's "even-handedness" in the analysis of no less favourable treatment requirement under Article 2.1of the TBT Agreement.[27] The Appellate Body further clarified, in the present Reports, that the complainant could demonstrate the measure's lack of "even-handedness" by showing "for example"[28] that the measure "is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination"[29], and upon such showing the regulatory distinction under the measure "cannot be considered 'legitimate'".[30] Therefore, "even-handedness" appeared to primarily relate to, and be for discerning, the "legitimacy" of regulatory distinction. However, it was still not clear as to what the precise content or scope of the notion of "even-handedness" would be in the analysis of "less favourable treatment" under Article 2.1 of the TBT Agreement. The notion of "even-handedness", which was not treaty language, would appear to be rather an analytical tool, albeit useful, to determine a violation of Article 2.1 of the TBT Agreement, specifically whether the detrimental impacts stemmed exclusively from the legitimate regulatory distinction.

103. Second, with respect to the issue relating to Article 17.5 of the DSU which previous speakers had just referred to, Japan appreciated that the heavy workload and complexities of appeals had been posing a difficult challenge that may require additional time for the Appellate Body to produce a high-quality report. Japan valued the high quality of the Appellate Body reports, and commended the tireless efforts to seek excellence of their work by the Appellate Body and its Secretariat. However, it should also be recalled that Article 3.3 of the DSU set out the general principle of the "prompt settlement" of disputes in WTO dispute settlement, and the time-limits in the process provided for in the DSU provisions, including the time-period in Article 17.5 of the DSU, were specific expressions of this general principle of "prompt settlement". Parties' interests in "prompt settlement" of disputes reflected in the DSU were also recognized by the Appellate Body as a legitimate due process interest.[31] Furthermore, the 90-day time-limit imposed on the Appellate Body and also on parties to the dispute was written in categorical terms. Because of this categorical language and the general principle of "prompt settlement", and the adjudicatory function assumed by the Appellate Body to decide the consistency or inconsistency of WTO Members' measures with a covered agreement, any departure from the clear text of the DSU must be of temporal or emergency nature and should be limited to address exceptional circumstances. Japan also noted that the parties had voluntarily agreed amongst themselves to deem the Reports to be consistent with Article 17.5 of the DSU. However, Japan believed that, in the interest of legal certainty on the DSB's adoption process for Appellate Body reports, it was important and, even essential, that the Appellate Body would seek to secure the agreement of the parties to deem the reports to be issued within 90 days, as had been the customary practice of the Appellate Body before 2011. Finally, since the 90-day issue concerned systemic interests that all Members should and did share, the underlying problems, including those identified by the parties at the previous DSB meeting, must be discussed by Members so as to find a solution to this issue. Japan stood ready to engage in such discussions.

104. The representative of Australia said that, like previous speakers, his country thanked the Panel, Appellate Body and the Secretariat for their work in finalizing these Reports. Australia had participated as a third party in these disputes and welcomed the findings in these disputes as well as

[27] Appellate Body Report, e.g. paras. 271, 272, 341 and 349.
[28] Appellate Body Report, e.g. paras. 271, 272 and 341.
[29] Appellate Body Report, para. 271.
[30] Appellate Body Report, para. 271.
[31] Appellate Body Report, Thailand - Cigarettes, para. 150.

the guidance that had been provided by the Appellate Body over the recent trilogy of cases in relation to the interpretation of Article 2 of the TBT Agreement. As had been done on a number of occasions, Australia wished to, once again, express its appreciation for the excellent work of the Appellate Body. However, Australia also noted that the Appellate Body had on some occasions not been able to circulate its reports within the 90-day time-frame set out in Article 17.5 of the DSU, in particular in times of heavy workloads, and this again was the case in the COOL disputes. The higher than usual workload had been compounded by the increasing legal and factual complexity of recent cases. While, in Australia's view, ensuring that Appellate Body reports were of the highest possible quality remained critical, Australia continued to hope that the Appellate Body would do all it could to meet the 90-day time-frame. Given that the Appellate Body was currently moving into a period of relatively reduced workload, Australia hoped that this would be achievable in the near future. Australia also wished to encourage the Appellate Body, as soon as it was apparent that it may be difficult to meet the 90-day time-frame, to consult as soon as possible with the parties to the dispute about the status and likely timing of the circulation of the Appellate Body report. In addition, the DSB should be kept apprised of the outcome of such consultations. This practice would provide important transparency to Appellate Body processes. Australia remained willing to continue discussions with other Members with a view to exploring ways to ensure that the dispute settlement system was best able to meet the fundamental objective of the prompt settlement of disputes.

105. The representative of Guatemala said that his country thanked the Panel, the Appellate Body and the Secretariat for the Reports, which would be adopted at the present meeting. Guatemala had participated as a third party in these disputes, which concerned Article 2 of the TBT Agreement, and noted the findings in this regard. Like other delegations, Guatemala wished to express its concern regarding the way the 90-day time-period, provided for in Article 17.5 of the DSU, had been extended. As indicated on various occasions, it was clear that Article 17.5 of the DSU did not allow for any exceptions. It was a mandatory provision that had to be complied with. Guatemala was, however, aware of the fact that, under certain circumstances, the Appellate Body may require more time to produce its reports. Guatemala was not sure why past practice in this regard, which worked well, had been changed. The practice was not perfect, but provided certainty and ensured transparency for Members. In Guatemala's view, the need to consult with the parties to a dispute did not mean that the Appellate Body had to obtain the parties' agreement in order to extend the 90-day deadline. It was clear that the AB reports would be adopted by the DSB and accepted without condition by the parties to the dispute unless the DSB decided by consensus not to adopt them. Therefore, the absence of the parties' agreement regarding the extension of the 90-day period provided for in Article 17.5 of the DSU would not affect or prevent the adoption of the reports unless the DSB decided by consensus not to adopt such reports.

106. The representative of Brazil said that her country wished to be associated with the statement made by the EU regarding the 90-day deadline. Brazil believed that the need to comply with the 90-day time-period should not affect the high-quality of the Appellate Body reports. Since delays occurred, and Brazil noted that there had been 18 cases in the total history of the WTO, Members should try to address the reasons for such delays. In particular, Members needed to recognize the fact that the increasing complexity of the cases had made the deadline under Article 17.5 of the DSU not realistic in some cases. Brazil believed that the deadline should either be extended or more flexibility should be allowed. Another possibility would be to provide the Appellate Body with the necessary resources to enable it to complete its task in a timely manner, while ensuring that the reports were of the same high quality. Brazil believed that the current procedures by which the Appellate Body informed the parties of the delays were appropriate and should be sufficient. There was no need to seek the parties' agreement. Brazil also believed that there was no relationship between the deadline in Article 17.5 of the DSU and the negative consensus rule in Article 17.14 of the DSU.

107. The representative of China said that her country would not comment on the substance of the Panel and Appellate Body Reports, but wished to express systemic concerns about the understanding

of Article 17.5 of the DSU. China recognized the categorical nature of Article 17.5 of the DSU and said that perhaps the negotiators in the Uruguay Round wished to set a strict deadline for circulation of Appellate Body reports to ensure that the Appellate Body's work was conducted in a timely manner. This was important and the Appellate Body had respected that time-frame. The efficiency of the Appellate Body's work had been highly recognized by Members and other international dispute settlement forums. It was commendable to recognize the AB achievements accomplished within the short time-frame to resolve complicated disputes among Members. However, Members needed to recognize that currently it was not possible to resolve all disputes within 90 days. The two large Civil Aircraft cases were good examples that this time-frame, which had been negotiated during the Uruguay Round, was not compatible with the current practices and the complexity of the cases appealed before the Appellate Body. Thus, the issue was how to reconcile the time-frame stipulated in the DSU and the current difficulties in practice.

108. With respect to the due process issue that had been identified by some Members, China noted that the Appellate Body had notified Members, either in person or by letter to the DSB Chair regarding delays. While, it was desirable for the parties to meet with the Appellate Body Secretariat to discuss such matters, China did not agree with some delegations who claimed that the Appellate Body was under obligation to hold consultations in order to seek the parties' consent regarding delays. China believed that sometimes it was impossible for the parties to find agreement on this. As indicated by the EU, the rigidity of the time-frame under Article 17.5 of the DSU and the requirement for the Appellate Body to review each and every issue appealed, according to Article 17.12 of the DSU, was an issue which could be considered by the DSB. China agreed with Brazil that Members should examine whether the resources of the Appellate Body to address the case load were sufficient. China would always prefer high-quality reports to be circulated by the Appellate Body. China agreed with Brazil that there was no linkage between Article 17.5 of the DSU and the negative consensus rule when adopting the report under Article 17.14 of the DSU. China would work constructively with Members on this issue.

109. The representative of Turkey said that, with regard to the 90-day time-limit, no Member questioned the quality of the Appellate Body reports or the quality of the work of the Appellate Body. All Members appreciated the work of the Appellate Body and the quality of its reports. Turkey noted that some Members had mentioned that the Appellate Body had not been able to meet the 90-day time-limit in 18 cases. In Turkey's view, this showed that the Appellate Body had violated Article 17.5 of the DSU 18 times. Turkey acknowledged that there had been times when the Appellate Body was faced with problems and challenges in an effort to meet the 90-day time-limit. In Turkey's view, Article 17.5 of the DSU was clear and should be respected. Turkey noted that the Appellate Body could not make rules, but Members could and, therefore, Turkey was ready to engage in further discussions with other Members to review Article 17.5 of the DSU in order to take into account the reality and needs of the current situation.

110. The DSB took note of the statements, and adopted the Appellate Body Reports contained in WT/DS384/AB/R – WT/DS386/AB/R and the Panel Reports contained in WT/DS384/R – WT/DS386/R, as modified by the Appellate Body Reports.