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Dispute Settlement Body
19 January 2010

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 January 2010

Chairman: Mr. John Gero (Canada)

Subjects discussed: Page

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

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.86)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.86)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.61)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.24 – WT/DS293/31/Add.24)

(e) United states – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.5)

(f) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.4)

(g) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.1)

(h) China – Measures affecting the protection and enforcement of intellectual property rights: Status report by China (WT/DS362/14)

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.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.86)

2. The Chairman drew attention to document WT/DS176/11/Add.86, 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 7 January 2010, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the First Session of the current (111th) Congress. The Second Session of the 111th Congress had begun earlier in January. The US administration was working with Congress to implement the DSB's recommendations and rulings.

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

5. The representative of Cuba recalled that, in January 2002, the DSB had adopted the Appellate Body Report pertaining to this dispute and, in February of the same year, the United States had sought a reasonable period of time for implementation of the DSB's recommendations and rulings in this dispute. However, eight years later, Members were still waiting for the respondent to meet its obligations. The respondent and the complainant should explain what they understood by the term "a reasonable period of time". It could happen in the future that Members who were under obligation to comply with the DSB's rulings would delay implementation on the grounds that their authorities were working to resolve the matter. Neither the United States nor the EU were in a position to demand that other Members should promptly comply with their obligations, as required by Article 21.1 of the DSU. This fundamental principle had been ignored by them for many years. In accordance with Article 21.6 of the DSU, the United States was required to submit status reports on progress in implementation, but every month the same reports were being submitted. They contained the same words and indicated only that a number of legislative proposals relating to Section 211, which would implement the DSB's recommendations and rulings, had been introduced in the Senate and the House of Representatives. It was inappropriate to submit the same report every month. It was obvious that the United States had nothing to report nor was it working to end this dispute, the cause of which was a legislation that was over ten years old. Exploitation of the prestige of Cuban trademarks was a widespread phenomenon in the United States, despite the fact that the United States advocated to comply strictly with intellectual property rules. In December 2009, it had been announced that a US federal judge had ruled in favour of the Cuban company CUBATABACO in its lawsuit against the US company GENERAL CIGAR which, since 1997, had been selling in the United States COHIBA cigars made with non-Cuban tobacco. This showed how powerful US companies were exploiting Cuban trademarks, the difference with the case at hand being that BACARDI, in close collaboration with the US authorities, had set out to oppose the registration of the trademark and had succeeded in stripping Cuba of its rights. Cuba would continue to request the parties to take the necessary steps to revoke Section 211. It was common knowledge that the Members in question were anxious to harmonize new and higher standards in the enforcement of intellectual property rights. Cuba called on all Members to work together to end this dispute. Failure to do so could bring only discredit, bearing in mind that the legislation violated the fundamental principles of the most important multilateral agreement on intellectual property rights.

6. The representative of Ecuador said that his country thanked the United States for its status report and fully supported the statement made by Cuba. Ecuador recalled that Article 21 of the DSU expressly referred to prompt compliance with the DSB's recommendations and rulings, in particular with regard to issues affecting the interests of developing countries. Ecuador yet, again, urged the US

administration and Congress to speed up compliance with the DSB's recommendations and rulings by repealing Section 211.

7. The representative of China said that her country thanked the United States for its status report and its statement. However, China was disappointed since the report did not contain any new information but simply confirmed the continuation of non-compliance after more than seven years following the adoption of the relevant reports by the DSB. This was inconsistent with the principle of prompt implementation under the DSU provisions, and undermined the authority and credibility of the WTO dispute settlement system. China thus supported Cuba and urged the United States to implement the DSB's decision as soon as possible.

8. The representative of Viet Nam said that his country thanked the United States for its status report. Viet Nam supported the statement made by Cuba and urged the United States to comply with the DSB's rulings and recommendations as soon as possible.

9. The representative of Brazil said that his country thanked the United States for its status report in this dispute. Unfortunately, that report merely repeated previous reports by showing a complete lack of progress. Brazil continued to be concerned about this matter, and urged the United States to bring its measures into conformity with WTO disciplines without delay.

10. The representative of Paraguay said that her country thanked the United States for its status report. Paraguay supported the statements made by previous speakers, and urged the United States to comply with the DSB's recommendations and rulings by repealing Section 211.

11. The representative of the Bolivarian Republic of Venezuela said that, as 2009 had ended, many Members and the international community itself had good reason to welcome and commend the WTO's work and its role in achieving conciliation and settlement of disputes. Such praise was well earned given the long-awaited agreement on bananas which had brought an end to one of the most well-known and long-standing disputes on the DSB's Agenda. However, Venezuela remained concerned that Members insisted on maintaining measures of a clearly discriminatory nature, such as Section 211. The principle of non-discrimination was one of the cornerstones of the multilateral trading system and as a result of its failure to comply with the 2002 Appellate Body's rulings, the United States showed disregard for the DSU provisions, which continued to be viewed as one of the overriding achievements under the WTO. Venezuela urged the United States to consider taking a sensible step and send a positive signal by accepting and implementing the Appellate Body's recommendations. Venezuela believed that Members were aware of the severe disruption of, and obstacles to, Cuba's trade flows as a result of being prevented from registering or renewing certain trademarks. The measure in question, which had been repeatedly denounced by Cuba and the overwhelming majority of the international community, provided clear evidence of a breach of intellectual property rights and unambiguous proof of the continuing blockade that Cuba had coped with since 1962. Venezuela recalled the WTO principle that every case and its settlement extended far beyond the parties involved.

12. The representative of Argentina said that his country called on the parties, in particular the United States, to ensure that the DSB's recommendations and rulings were fully implemented. Argentina reiterated its concern that the failure to implement the decisions of the DSB undermined the credibility of the system. Argentina hoped that, in 2010, this item would be removed from the DSB's Agenda, as had been the case with other long-standing disputes.

13. The representative of Nicaragua said that the WTO rules did not allow one Member to exclude, unilaterally and indefinitely, another Member from all the benefits of the multilateral trading system. She recalled that, in 2002, the DSB had found Section 211 to be inconsistent with WTO rules and, in particular, with the TRIPS Agreement. Nicaragua was concerned about the lack of progress

and the lack of prompt compliance and urged the United States to comply as soon as possible with the DSB's recommendations and rulings.

14. The representative of India said that her country thanked the United States for its status report and its statement. India noted that there had been no substantive change in the situation, and that the principle of prompt compliance was continuously missing in this dispute. India, therefore, renewed its systemic concerns about non-compliance, which clearly undermined the credibility and confidence that Members had in the system.

15. The representative of Mexico said that his country thanked the United States for its status report and called upon the parties to seek a solution to the matter through the legal means provided under the DSU provisions. In this connection, Mexico wished to note that if a Member considered that another Member violated its rights, a new procedure under the DSU could be initiated. This option was available to all Members under the DSU provisions.

16. The representative of the United States said that with respect to the statements made by some Members that this dispute raised concerns for the dispute settlement system, Members knew well that the United States did not believe that those concerns were well-founded. In the interest of time, the United States referred Members to its past statements on this matter, for example, WT/DSB/M/273 at paragraph 15.

17. The representative of Cuba said that his delegation wished to refer to the previous statements made by Cuba, in which it had clearly addressed the US position, as well as the selective approach and double standard used by the United States in applying international law. One year after the new US administration had taken office, it was time for the United States to show that it was as genuinely concerned about international law as it was about health care reform and other domestic issues. The United States should demonstrate its concern in deeds rather than in documents and words. Thus, 2010 was an opportunity for the United States to stop violating the rules of international law and, in particular, the law governing trade among nations.

18. 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.86)

19. The Chairman drew attention to document WT/DS184/15/Add.86, 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.

20. The representative of the United States said that his country had provided a status report in this dispute on 7 January 2010, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. With respect to the DSB's recommendations and rulings that had not already been addressed by the US authorities, the US administration would work with Congress with respect to appropriate statutory measures that would resolve this matter.

21. The representative of Japan said that his country thanked the United States for its statement and its latest status report. Japan noted in the US report that the United States had taken certain measures to implement part of the DSB recommendations in November 2002. Japan hoped that the United States would soon be in a position to report to the DSB tangible progress for the remaining

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

22. 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.61)

23. The Chairman drew attention to document WT/DS160/24/Add.61, 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.

24. The representative of the United States said that his country had provided a status report in this dispute on 7 January 2010, 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.

25. The representative of the European Union said that the United States had again reported non-compliance and her delegation was again disappointed, especially in light of the importance the United States attached to intellectual property protection. The EU was aware that the United States was in favour of strong intellectual property protection throughout the world, and hoped that the United States would lead by example. The EU remained ready to work with the US authorities towards the complete resolution of this case, and hoped that the financial loss suffered by the EU industry could be brought to an end soon.

26. 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.24 – WT/DS293/31/Add.24)

27. The Chairman drew attention to document WT/DS291/37/Add.24 – WT/DS293/31/Add.24, 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.

28. The representative of the European Union said that EU regulatory procedures on biotech products continued to work as foreseen in the legislation. With the most recent authorization of four GM maize events, the number of GMOs authorized since the date of establishment of the Panel had risen to twenty-five. The EU remained open to dialogue on issues related to trade in biotech products. The EU and Canada had already formalized such dialogue in the mutually agreed solution reached in 2009 (WT/DS292/40). The EU welcomed the constructive dialogue held with Argentina, and hoped that that would soon lead to a similar agreement.

29. The representative of Argentina said that his country welcomed the status report submitted by the EU. As announced at the previous meeting, Argentina was working together with the EU on a mutually agreed solution to this dispute, but unfortunately it had not yet been possible to reach a

[2] Article 3.3 of the DSU.

settlement. Therefore, the parties to the dispute had decided, once more, to extend the reasonable period of time for implementation, and hoped to conclude an agreement shortly, which would then be notified to the DSB and to all WTO Members.

30. The representative the United States said that his country thanked the EU for its status report and its statement. The United States recalled its concerns that approximately 60 biotech products were awaiting approval, which was more than double the number of applications pending at the time this dispute had been initiated in 2003. The EU's failure to move those products through its approval process had the effect of blocking trade in important agricultural products produced in the United States. As the United States had noted in prior DSB meetings, the EU approval system contained several steps. Although the United States had concerns about delays in all of those steps, at the present meeting it wished to highlight its concerns regarding the delays at the second step of the EU process, after an application had been reviewed by a scientific authority. The second step involved the EU's Standing Committee on the Food Chain and Animal Health. The Standing Committee was composed of EU member State representatives, and it normally met on a monthly basis. If the risk assessment of the scientific authority was positive, the EU Commission must submit an approval measure to the Standing Committee within three months of the positive risk assessment. The Standing Committee must then vote on the proposed approval measure. The United States noted that the Standing Committee had not voted on a proposed biotech approval in over three months. Yet the EU's approval pipeline contained a number of applications that had received positive risk assessments more than three months ago. One application, in fact, received a positive risk assessment in November 2007, but had yet to be voted on by the Standing Committee. The United States was concerned with this lack of activity by the Standing Committee. Moreover, the United States noted with concern that the EU was not holding a meeting of the Standing Committee in January, and that the first meeting of 2010 was not scheduled until the following month. Clearly, if the EU chose not to schedule the meetings provided for under its approval process, the EU could not consider applications in a timely manner. The United States noted that the EU had selected a new Commission, and had modified its organizational structure with regard to the operation of its biotech approval process. The United States was hopeful that these changes would finally result in a biotech approval system that could operate without endemic delays. The United States urged the EU to address those matters.

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

(e) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.5)

32. The Chairman drew attention to document WT/DS294/34/Add.5, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

33. The representative of the United States said that his country had provided a status report in this dispute on 7 January 2010, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had already taken a number of steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

34. The representative of the European Union said that for the sixth time since the adoption by the DSB of the compliance Panel Report and the Appellate Body Report in this dispute, and nearly three years after the expiry of the reasonable period of time for implementation, the EU wished to ask the United States when it intended to put an end to zeroing. As was the case with the five preceding reports, the status report by the United States confirmed that the United States had not taken any action whatsoever to correct the shortcomings in its implementation. The Appellate Body had made

the legal situation on zeroing crystal clear. Zeroing was prohibited in both original investigations and reviews. In addition, any anti-dumping duties collected after the end of the implementation period must be calculated without zeroing, whenever the goods in question were imported or the review determination made. The only step left for the United States to take was to bring itself into full compliance without further delay.

35. The representative of Japan said that the issue of implementation in this dispute was closely related to the dispute on: "US – Measures Relating to Zeroing and Sunset Reviews", in which Japan was a complaining party. Thus, Japan was closely following the situation and any new developments in this dispute with great interest.

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

(f) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.4)

37. The Chairman drew attention to document WT/DS322/36/Add.4, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

38. The representative of the United States said that his country had provided a status report in this dispute on 7 January 2010, in accordance with Article 21.6 of the DSU. As noted in the status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

39. The representative of Japan said that his country thanked the United States for its statement and its latest status report. He said that the United States had stated in its report that it "will continue to consult with interested parties in order to address the findings contained in [the Appellate Body and the panel] reports" adopted by the DSB on 31 August 2009. Japan understood the US statement as an expression of commitment by the United States to bring into conformity the measures found in those reports to be inconsistent with the Anti-Dumping Agreement and the GATT 1994. Japan called on the United States to fulfil its commitment by taking immediate and concrete action to fully comply with the DSB's recommendations and rulings in order to resolve this dispute.

40. The representative of the European Union said that her delegation reiterated its disappointment over the lack of any progress by the United States on compliance with adverse rulings on zeroing in yet another dispute and recalled that immediate compliance with the DSB's recommendations and rulings was not an option, but an obligation under the DSU provisions.

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

(g) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.1)

42. The Chairman drew attention to document WT/DS350/18/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the continued existence and application of zeroing methodology by the United States.

43. The representative of the United States said that his country had provided a status report in this dispute on 7 January 2010, in accordance with Article 21.6 of the DSU. As noted in that status

report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With regard to the remaining issues, the United States would continue to consult with interested parties.

44. The representative of the European Union said that it was the third time that the issue of US zeroing was on the Agenda of the present meeting under the item on surveillance of implementation of recommendations adopted by the DSB. Most worryingly, it was also the third time, at the present meeting, that the DSB was considering a situation where the reasonable period of time for implementation had expired but, despite a clear legal obligation to the contrary, the United States had not brought itself into compliance. The EU commended the fact that the United States would "continue to consult with interested parties, in order to address the other recommendations and rulings of the DSB", but reminded the United States that it was required, as a WTO Member, to complete those actions and bring itself into full compliance during, not after, the reasonable period of time. The EU reiterated its deepest disappointment over the fact that practically nothing had been done during the reasonable period of time agreed to address the relevant issues in this case. The status report presented by the United States, once again, only referred to proceedings under Section 129(b) of the Uruguay Round Agreements Act that would implement the DSB's recommendations and rulings with respect to four final determinations (Purified Carboxymethylcellulose from Sweden; Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose from the Netherlands; Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose from Finland; and Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from Spain).

45. In addition to the fact that the United States had failed to conclude the proceeding before the end of the reasonable period of time, there were a number of glaring substantive failures in implementation. First, as the EU suspected, the proceeding only covered the original investigations in the four cases above. Indeed, the preliminary determinations only referred to the panel report in this dispute and no reference had been made in the Section 129 proceeding to the findings of the Appellate Body Report adopted by the DSB on 19 February 2009. In each original investigation, the US Department of Commerce had re-examined the dumping margin with the use of the zeroing methodology. However, subsequent administrative reviews had been concluded in those cases, involving the use of the zeroing methodology. It was well established in WTO case law that such subsequent reviews fell within the scope of implementation and, therefore, the relevant dumping margins should be recalculated without zeroing, yet the Department's preliminary findings had completely failed to address them. Second, the Section 129 proceeding thus far covered measures relating to only four of the 18 anti-dumping cases challenged by the EU in this dispute. The Appellate Body Report had concluded that, *inter alia*, the use of zeroing by the United States in measures covering 34 administrative reviews and eight sunset reviews was in breach of WTO rules and yet none of these were covered by the preliminary findings of the Section 129 proceeding. Third, as regards four of the cases – Ball Bearings and Parts Thereof from Italy (Case II), Ball Bearings and Parts Thereof from Germany (Case III), Ball Bearings and Parts Thereof from France (Case IV), and Stainless Steel Sheet and Strip in Coils from Germany (Case VI), the Appellate Body had explicitly ruled the use of zeroing in all future reviews to be WTO-inconsistent. Furthermore, for the other cases, established case law made it clear that reviews conducted subsequent to the challenged measure must be free of zeroing. Again, those issues had not been addressed in the preliminary findings. Finally, the Panel and the Appellate Body Reports had also made it clear that the United States was required, at the end of the reasonable period of time (19 December 2009), to recalculate the cash deposit rates for each measure without zeroing. Furthermore, from this date onwards, the United States was only allowed to liquidate duties at non-zeroed rates. In addition, the calculation of the dumping margin in ongoing and future reviews must be free of zeroing. None of these considerations appeared to have been addressed in the Section 129 proceeding up to now.

46. The representative of Japan said that the issue of implementation in this dispute was closely related to the one in Japan's zeroing dispute with the United States. Thus, Japan was closely following the situation and any new developments in this dispute with great interest.

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

(h) China – Measures affecting the protection and enforcement of intellectual property rights: Status report by China (WT/DS362/14)

48. The Chairman drew attention to document WT/DS362/14, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning China's measures affecting the protection and enforcement of intellectual property rights.

49. The representative of China said that the DSB had adopted the Panel Report in this dispute at its meeting on 20 March 2009. On 15 April 2009, China had informed the DSB of its intention to implement the DSB's recommendations and rulings. On 29 June 2009, China and the United States had agreed and notified the DSB that the reasonable period of time for implementation shall be 12 months and would expire on 20 March 2010. A lot of work related to implementation had, thus far, been done by China. The legislative proposals relating to the amendment of the Copyright Law of China and the Regulations for Customs Protection of Intellectual Property Rights had already been submitted to the State Council for due examination. China would continue working on the amendment of the measures, according to its domestic legislative procedures, that would resolve this matter.

50. The representative of the United States said that his country thanked China for its status report and its statement and looked forward to China's implementation of the DSB's recommendations and rulings in connection with this matter by 20 March 2010, which was the expiration of the reasonable period of time for China to comply in this dispute.

51. The representative of the European Union said that the Panel in this dispute had recommended that China bring its Copyright law and Customs measures into conformity with its obligations under the TRIPS Agreement. The EU was glad that China had already submitted the relevant legislative proposals to the State Council. The EU called on China to carefully implement the recommendations in order to remove what constituted significant shortcomings in China's intellectual property rights regime. The EU trusted that China would adopt measures that were in full compliance with its obligations and that this dispute would contribute to the improvement of China's intellectual property rights framework. The EU recognized the efforts deployed thus far by the Chinese government to improve the protection and enforcement of intellectual property rights. The EU looked forward to further cooperating with China in order to reduce infringement levels and to ensure a strong and legally certain environment for intellectual property rights in China.

52. 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

53. 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.

54. The representative of Japan said that, in December 2009, US Customs and Border Protection issued the CDSOA Annual Reports for FY2009.[3] According to the Reports, some US$248 million had been disbursed for FY2009. These latest distributions showed that the CDSOA still remained operational.[4] Japan urged the United States to stop illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance.

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

56. The representative of Brazil said that his country, once again, thanked the EU and Japan for keeping this item on the DSB's Agenda. As had been stated at previous DSB meetings, Brazil was of the view that 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 the issue could have been "resolved" within the meaning of the DSU and the United States would have been released from its obligation to provide status reports in this dispute.

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

58. The representative of India said that her country thanked the EU and Japan for, once again, maintaining this issue before the DSB. India shared the concerns expressed by them on this matter. India remained disappointed at the US maintenance of the WTO-inconsistent disbursements. As mentioned by previous speakers, the CDSOA remained fully operational, allowing for disbursements by the US administration to its domestic industry. This fact continued to raise concerns to WTO Members. India had repeatedly pointed out that the disbursements made by the United States to its industry under the Byrd Amendment continued to affect the rights of WTO Members. This non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. India agreed with the EU and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

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

60. The representative of Thailand said that his country thanked the EU and Japan for, once again, bringing this item before the DSB. Thailand urged the United States to cease disbursements under the Continued Dumping and Subsidy Offset Act and to provide status reports until such actions were taken and this matter was fully resolved.

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[3] CDSOA 2009 Annual Reports dated 10 December 2009. See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/fy09_annual_report.xml

[4] In the words of the US Customs, "the distribution process will continue for an undetermined period". See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml

61. The representative of the United States said that, as his country had already explained at many previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled that Members, including the EU and Japan, had acknowledged during some 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 did not, therefore, understand the purpose for which the EU and Japan had inscribed this item at the present meeting. With respect to comments regarding further status reports in this matter, as the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes, the United States failed to see what purpose would be served by the further submission of status reports repeating the progress it had made in the implementation of the DSB's recommendations and rulings.

62. The DSB took note of the statements.

3. United States – Measures affecting imports of certain passenger vehicle and light truck tyres from China

(a) Request for the establishment of a panel by China (WT/DS399/2)

63. The Chairman recalled that the DSB considered this matter at its meeting on 21 December 2009 and had agreed to revert to it. He then drew attention to the communication from China contained in document WT/DS399/2, and invited the representative of China to speak.

64. The representative of China said that, in accordance with relevant provisions of the DSU, the GATT 1994 and the Safeguard Agreement, China was requesting the DSB to establish a panel to examine certain US measures affecting imports of certain tyres from China. The legal basis for challenging those measures were elaborated in China's panel request (WT/DS399/2). As had been stated at the previous DSB meeting, the Chinese government deeply regretted the US decision to impose restrictions on Chinese tyres and believed that it was a departure from the international consensus of G20 leaders to fight against protectionism. Since the US decision itself ran short of factual basis and breached the US obligations under the WTO, China, once again, urged the United States to promptly withdraw its measures. China believed that the panel would make an impartial determination in this case.

65. The representative of the United States said that his country was disappointed that China had chosen to move forward with its request for panel establishment a second time. The United States remained confident that its measure was consistent with its WTO obligations and, specifically, with the product-specific safeguard mechanism provided for in Section 16 of China's Protocol of Accession. The United States was not the first WTO Member to impose a product-specific safeguard on Chinese products, but it was the first that China had challenged in the WTO for that reason. The United States found it regrettable that China, which had benefited so greatly from its exports to the United States, would dispute this safeguard. The United States recalled that in just four years, US tyre imports from China had more than tripled by volume, with the value of those imports rising to US$1.8 billion. In those same four years, US production fell by more than 25 per cent while 14 per cent of US workers in the industry had lost their jobs. Those facts alone showed that China's claims lacked merit. The special safeguard mechanism was agreed to by all WTO Members and China, as part of China's accession to the WTO. When Members negotiated China's WTO accession, they had agreed to allow China to phase in some of its obligations. For example, China had been allowed three years to reduce certain tariffs. In return for the flexibility to phase in obligations and, in recognition of the fact that China's economy was, and remained, in transition to a market economy, WTO Members negotiated the ability to use this temporary mechanism if Chinese imports surged. This

mechanism was thus a key part of the bargain that permitted China to become a WTO Member. The United States rejected the notion that having recourse to this bargain through the proper application of the safeguard mechanism was unfair, unreasonable, or protectionist, as China had asserted at the previous DSB meeting. The United States understood that a panel would be established at the present meeting and it intended to defend its measures vigorously before that panel. The United States was confident that a panel would agree that it had acted consistently with its WTO obligations when it had imposed remedies to stop the harmful surge of Chinese tyre imports.

66. The representative of China said that her delegation wished to respond the statement just made by the United States. She said that China's request did not mean that China did not want to honour its commitments for entering the WTO. Section 16 of China's Protocol of Accession provided a legal basis for taking any action under that provision. What China was challenging was whether or not the United States was in compliance with the legal basis under Section 16.

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

68. The representatives of the European Union, Japan, Chinese Taipei, Turkey and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

4. Philippines – Taxes on distilled spirits

(a) Request for the establishment of a panel by the European Union (WT/DS396/4)

69. The Chairman recalled that the DSB had considered this matter at its meeting on 21 December 2009 and had agreed to revert to it. He drew attention to the communication from the European Union contained in document WT/DS396/4, and invited the representative of the European Union to speak.

70. The representative of the European Union said that, regrettably, her delegation found itself left with no choice but to request, for a second time, the establishment of a panel in this dispute. The EU noted that there had been no indications that the long-standing tax discrimination would be remedied any time soon. Much to the contrary, recent statements both by members of Congress and the Philippine Government had clearly indicated that there was no prospect of passing a bill that would bring a solution to this problem. The EU noted that this was a case of a long-standing tax discrimination that had only worsened over the years. At present, imported spirits were subject to an excise tax 10 to 15 times higher than the tax imposed on domestic spirits. This prevented EU spirits producers from benefiting from the growing demand for spirits in the Philippine market. Furthermore, it was estimated that EU exports to the Philippines had more than halved between 2004 and 2007, as a result of the increasing discrimination. The EU believed that the Philippines excise tax regime was in clear violation of Article III:2 of the GATT 1994. With this request for the establishment of a panel the EU was seeking the reestablishment of a level playing field by ensuring Philippines's observance of its WTO obligations.

71. The representative of the United States said that, as his country had stated at the previous DSB meeting, the United States had been closely following this issue and was also concerned about the Philippine excise tax system and its effect on market access for US exports of distilled spirits. This was an issue that the United States had raised with the Philippines many times but, regrettably, without result. In light of its concerns, on Thursday, 14 January 2010, the United States had filed a request for dispute settlement consultations. The United States urged the Philippines to address the concerns that had been raised, and hoped that the Philippines would take action soon to level the playing field for imported and domestic spirits in the Philippine market.

72. The representative of the Philippines said that his country regretted that the EU had chosen to renew its request to the DSB to establish a panel in this matter and noted the US statement, as well as the US request for consultations on this matter. The Philippines reiterated, for the record, that it was fully committed to a rules-based multilateral trading system and accorded utmost importance to complying with all its obligations under the WTO Agreements. The Philippines firmly believed that its excise tax regime was fully consistent with its WTO obligations, and remained of the view that this matter could have been resolved to the mutual satisfaction of all the parties if the respective interests, legitimate sensitivities, and policy objectives of all sides had been taken into account to balance their respective interests.

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

74. The representatives of Australia, China, Mexico, Chinese Taipei, Thailand and the United States reserved their third-party rights to participate in the Panel's proceedings.

5. China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products

(a) Report of the Appellate Body (WT/DS363/AB/R) and Report of the Panel (WT/DS363/R and Corr.1)

75. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS363/13 transmitting the Appellate Body Report on: "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", which had been circulated on 21 December 2009 in document WT/DS363/AB/R, in accordance with Article 17.5 of the DSU. He reminded Members that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He said that, as Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

76. The representative of the United States said that his country thanked the members of the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work during this proceeding. The United States had been concerned for some time with China's restrictions on trading rights, market access, and distributors for a wide range of copyright-intensive products, including reading materials, audiovisual home entertainment products such as DVDs, sound recordings, and theatrical films. The United States was pleased that the Panel had found in favour of the United States on the vast majority of its claims, and that the Appellate Body had upheld each of the Panel's findings challenged by China. Many of the Panel and Appellate Body findings were of great importance and would provide useful guidance to Members. At the present meeting, the United States wanted to highlight three areas of particular interest. The first aspect involved China's requirement that the relevant products be imported exclusively through a limited number of state-owned enterprises. The Panel had found this requirement inconsistent with the trading rights commitments in China's Protocol of Accession. In so finding, the Panel had confirmed that China's trading rights commitments extended to foreign-invested enterprises and foreign individuals and enterprises, including those not invested or registered in China. The Panel, in a finding upheld by the Appellate Body, had further confirmed that theatrical films, DVDs and sound recordings were goods subject to China's trading rights commitments. As the Panel and the Appellate Body had correctly found, the goods relevant to the US claim were integrated products consisting of a physical medium containing content, and thus within the scope of China's trading rights commitments. The Appellate Body had also properly

rejected the assertion that these products were mere accessories to a series of services through which the physical goods were commercially exploited. Had this argument by China been accepted, it would have exempted the vast majority of goods from the WTO's goods disciplines simply because those goods were used to provide a service. The United States applauded the findings of the Panel and Appellate Body on these issues.

77. The United States was also gratified that both the Panel and the Appellate Body had agreed with it that China's trading rights restrictions were not justified by Article XX(a) of the GATT 1994. The Panel and Appellate Body had concluded that China's restrictions were not necessary for China to accomplish its specific policy goals. The United States was pleased with those findings and hoped that China would bear them in mind as it moved forward with implementation. However, the United States noted its concern with one aspect of the Appellate Body's discussion of the "necessity" analysis under Article XX(a). In particular, the Appellate Body had referred to a panel's examining an alternative that was "consistent (or less inconsistent)"[5] with the covered agreements. The reference to "less inconsistent" was difficult to understand. In the first place, the parties and the Panel accepted that the alternative proposed by the United States was WTO-consistent (e.g., Panel Report, para. 7.907). Moreover, both parties' submissions had also referred to the discussion in the Appellate Body report on "US - Gambling" of the need to examine "WTO-consistent alternative measures". The United States had difficulty seeing any basis under the WTO Agreement for ranking degrees of inconsistency with a Member's WTO obligations, and considered the formulation found in the "US - Gambling" report to be the better approach. The United States also noted that the Appellate Body had found that Article XX(a) of the GATT 1994 could, in principle, be a defence to a trading rights claim under paragraph 5.1 of China's Accession Protocol. The United States was somewhat surprised that the Appellate Body had undertaken an interpretation of paragraph 5.1, which had not been addressed in the parties' appellate submissions, and which was, at most, the subject of a contingent appeal for which the contingency had never been triggered. The United States also noted that the Appellate Body's discussion of this issue was not entirely clear. That discussion listed factors that "may" be relevant, and used terminology not found in the Protocol whose precise meaning was not immediately apparent. Clearly there would need to be further discussion of these issues.

78. Second, with respect to distribution services, the Panel had also agreed with the United States on virtually all of its claims under the GATS. The United States especially welcomed the Panel's finding, which had been upheld by the Appellate Body, that China's services commitments for sound recording distribution services included the electronic distribution of sound recordings. The Panel and the Appellate Body findings had confirmed that a Member's services commitments cover all means of supplying a service unless otherwise specified in the Member's schedule. A contrary finding would have diminished significantly the value of services commitments in an ever-innovating world.

79. Finally, the United States wished to turn to its claims under the GATT 1994. With respect to reading materials, the United States was pleased that the Panel had found that certain critical restrictions on the distribution of imported reading materials inside China were inconsistent with the national treatment obligation of Article III:4 of the GATT 1994. In the context of the US GATT claim related to theatrical films, the United States noted the Panel's reliance on China's statements that China did not limit distribution of imported theatrical films to two state-owned distributors. The United States welcomed the assurances from China that imported films would be able to take advantage of the complete film distribution network available to Chinese films. The United States would be monitoring developments in China in this connection. With respect to sound recordings, however, the United States was disappointed that the Panel declined to find that China's measures were inconsistent with Article III:4 of the GATT 1994. Those measures set up a legal regime in which imported sound recordings were subjected to a more onerous and lengthy content review process than their domestic counterparts. This regime presented precisely the type of product

[5] AB Report, para. 318.

discrimination that the GATT's national treatment obligation addressed. The US panel request set forth a claim that the relevant Chinese measures were inconsistent with Article III:4 of the GATT 1994. However, the Panel had found that the question of whether the measures affected the "use" of the imported products was outside of its terms of reference because the US panel request did not include the word "use". The United States had serious concerns about that finding. The Panel's reasoning, contrary to what Article 6.2 of the DSU required, would suggest that a complaining party must set forth its arguments in support of its claim in a panel request, rather than just setting forth its claims. Although the Panel had declined to find that China's measures with respect to sound recordings were inconsistent with Article III:4 in part based on its narrow reading of the US panel request, the Panel noted the measures' inherent discrimination between imported and domestic products. Accordingly, as China considered reforms to its content review regime for sound recordings, the United States trusted that China would keep the Panel's understanding of these measures in mind and ensure that its regime avoided any discrimination.

80. In sum, while the United States did not agree with all aspects of the findings in the reports, it was nonetheless pleased to request the adoption of the Panel and the Appellate Body Reports at the present meeting. China had repeatedly affirmed its intention to act consistently with WTO rules and to respond swiftly to any findings of non-compliance. In that spirit, and in light of the pressing barriers to market access for the relevant products and distributors of those products, the United States looked forward to China moving promptly to implement the DSB's recommendations and rulings upon adoption of the Reports.

81. The representative of China said that her country thanked the Appellate Body, the Panel and the Secretariat for their hard work and dedication during the Panel and the Appellate Body stages of this dispute. China appreciated the Appellate Body's confirmation that it had the right to invoke the general exception clauses, Article XX of GATT 1994. China firmly believed that Article XX of the GATT 1994 was certainly applicable to all commitments related to trade in goods in the Protocol of Accession and reports of any new WTO Member. This was a serious systematic issue and must be handled very cautiously so as to guarantee that both old and new WTO Members had equal rights to invoke general exception provisions. China was also pleased to see that, in many critical respects, the Panel had agreed with China and had rejected a large number of the US claims. China wanted to emphasize that because the cultural product was naturally embedded with not only commercial values but also cultural values, the administration of trade in cultural products should be different from the regulation of general goods. China was disappointed that the Appellate Body had not upheld its claims on trade right issues and network music issues. China thanked for the opportunity to express its views on the Reports in this matter. China would be examining the Appellate Body Report and the Panel Report carefully and prudently and would inform the DSB of its intentions in respect of the implementation of the DSB's recommendations and rulings, as provided for under Article 21.3 of the DSU.

82. The representative of the European Union said that her delegation had followed this dispute with great interest and had participated in the proceedings as a third party. Beyond the specific recommendations in the Panel and the Appellate Body Reports, the EU welcomed the important clarifications offered by the Panel and the Appellate Body on some key WTO provisions, which would be essential for the future operation of the WTO Agreements. On the specific interpretative questions addressed in the Reports, the EU underlined the importance of the interpretations regarding China's Accession Protocol. The Panel had made it clear that, on the basis of China's Accession Protocol obligations, all enterprises in China, including foreign-invested enterprises registered in China, had the right to import into China all goods covered by the dispute. It had also made clear that this obligation did not detrimentally affect China's right to regulate trade in a WTO-consistent manner, so that "China's right to regulate trade takes precedence over China's obligation to ensure that all enterprises in China have the right to trade". However, the Panel had chosen not to rule on the availability of Article XX(a) of the GATT 1994 as a defence against China's breaches of its trading

rights obligations, although it had in its arguendo analysis concluded that the relevant measures were not "necessary" to protect public morals in China. The EU commended the Appellate Body for having ruled on the availability of Article XX(a) as a defence in this case. As the Appellate Body had rightly pointed out, and in line with the EU's submission to the Appellate Body, sticking to the arguendo approach would have been at odds with the objective of promoting security and predictability through dispute settlement, and may have not assisted in the resolution of the dispute, in particular because of the risks involved with creating uncertainty with respect to China's implementation obligations. Although the EU had argued in favour of a slightly more refined approach, in line with the Panel's view that China's "right to regulate trade" would, in a particular case, permit China to regulate who could be importers or exporters of the relevant goods, where this regulation of importers or exporters "is incidental (or necessary) to the regulation of the relevant goods" (Panel Report, para. 7.276), the EC noted the Appellate Body's conclusion on whether China's right to regulate trade included regulations on the right to trade. The Appellate Body had confirmed this for the measures at issue because the provisions that China sought to justify under Article XX had a clearly discernible, objective link to China's regulation of the relevant products, and fell, as a result, within the scope of China's right to regulate trade. Accordingly, the existence of such objective link in a specific case would need to be established through a careful scrutiny of the relevant measure in future cases. The Panel and the Appellate Body had found, in respect of a large number of the claims made by the United States, that China had acted inconsistently with its WTO obligations, be it under the Accession Protocol, the GATS or the GATT 1994. The EU called on China to expeditiously implement the recommendations in order to remove what constituted important shortcomings in China's import and distribution regime. The EU remained convinced that China could develop and implement its cultural policies within the boundaries set by its WTO obligations.

83. The representative of Japan said that his country thanked the Appellate Body and the Panel for their time and efforts devoted to this dispute and for their respective Reports. Even though this dispute had presented complex issues of facts and raised difficult legal questions, the Panel's and the Appellate Body's analysis were thorough, and their overall findings were sound and well-reasoned. The Reports would provide a useful guidance for the future implementation efforts by China and for the ultimate resolution of this dispute. Japan wished to briefly comment on one particular issue contained in the Appellate Body Report, namely its decision to examine, and rule on, the issue of the availability of a defence under Article XX(a) of the GATT 1994 by virtue of the introductory clause of paragraph 5.1 of China's Protocol of Accession. The Panel, recognizing that this issue "presents complex legal issues"[6], had prudently taken a so-called "arguendo approach" and eventually had not resolved the issue because the measures at issue could not be justified under Article XX(a) anyway. Most of the participants in this appeal, including Japan, had called for caution to be exercised by the Appellate Body on this issue. Nevertheless, the Appellate Body had ruled on this issue upfront. Japan wished to offer some observations in this respect.

84. First, Japan recalled that the Panel's "arguendo approach" or its decision not to rule on the availability of Article XX(a) defence had not been appealed by either participant. Instead, China's request for the Appellate Body to rule on this issue had been made conditional on the reversal of the Panel's findings on the "necessity" of the measures at issue and as a part of the request for completing the analysis.[7] Since the Appellate Body had upheld the Panel's finding on the "necessity", this condition had not been met. Second, the Appellate Body noted that the availability of Article XX defence in this dispute was "an issue of legal interpretation falling within the scope of Article 17.6 of the DSU".[8] However, since the Panel had not made any finding on this issue, there was no "legal interpretation developed by the panel"[9] that the Appellate Body could review. This meant that the

[6] Panel Report, para. 7.743.
[7] AB Report, para.211 and Annex 1 (Notification of an Appeal by China), para. 1.
[8] AB Report, para.215.
[9] Article 17.6 of the DSU.

Appellate Body had reviewed this complex issue of law *de novo* and had decided on it in the first instance. Furthermore, the availability of an Article XX defence by virtue of the introductory clause of paragraph 5.1 of China's Protocol of Accession presented a novel issue of law, which had never been raised in previous disputes, and had never been examined, let alone decided, by panels or the Appellate Body before. Apart from the propriety of the analysis developed by the Appellate Body on this issue, which Japan would not address at the present meeting, there would be a risk that the complex issue of law, the novel one in particular, could be prematurely, and possibly improperly, decided by adjudicative body of appellate jurisdiction in situations where the issue was not well presented by the parties and not fully explored or developed by lower tribunals. In this respect, Japan noted that, under the DSU, the time available for appellate reviews was extremely limited. Third, the "arguendo approach" adopted by the Panel in this dispute was what the Appellate Body had taken in "US – Shrimp (Thailand)/US – Customs Bond Directive" disputes.[10] And most, if not all, of the rationales developed by the Appellate Body in abandoning the "arguendo approach" in this dispute, including the concern about possible uncertainty with respect to the scope of implementation obligations[11], appeared to be equally applicable to these previous disputes. Even assuming that this change in the analytical approach did not amount to a departure from the legal interpretations previously made by the Appellate Body in similar situations, which, the Appellate Body had explained, must be made with "cogent reasons"[12], Japan wished to know what would be the difference between the "US – Shrimp (Thailand)/US – Customs Bond Directive" cases, on the one hand, and the present case, on the other, that justified the change in its analytical approach. Fourth, Japan was not sure that ruling on the availability of Article XX defence would provide certainty or clarity regarding the scope of China's implementation obligations and would "assist in the resolution of this dispute".[13] In the discussion of "reasonably available alternative measure" in the context of the "necessity" analysis under Article XX(a), the United States had proposed several "WTO-consistent alternatives to achieve [China's] content review objectives that do not restrict the right to import".[14] At least one of them, "the proposal that the Chinese Government be given sole responsibility for conducting content review"[15] had been examined and found to be a genuine alternative measure that was "reasonably available" to China under Article XX(a) by the Panel and the Appellate Body.[16] The measures thus proposed by the United States, which were presumably WTO-consistent[17] measures, or otherwise less-trade restrictive ones, which could be reasonably available to China and thus be justifiable under Article XX, would provide a good basis and useful guidance for China's implementation actions. However, by ruling that a defence under Article XX was available to China, the Appellate Body had implicitly indicated that there would be another unspecified category of measures that were WTO-inconsistent (and possibly more trade-restrictive) but could be justifiable under Article XX in this dispute. This could encourage China to explore such category of WTO-inconsistent and presumably more trade-restrictive measures, rather than to turn to arguably WTO-consistent (or less trade-restrictive) measures which had been discussed during these proceedings, as its implementing actions. This, in turn, could create a future disagreement between the parties as to the WTO-consistency of such measures taken to comply. In Japan's view, the resolution of the availability of Article XX defence should have been saved for another day when the resolution of the issue was absolutely necessary and the issue would be more properly presented and fully explored.

[10] AB Report: "US - Shrimp (Thailand)/US - Customs Bond Directive", para. 310.
[11] AB Report, para. 215.
[12] AB Report: "US - Stainless Steel" (Mexico), para. 160.
[13] AB Report, para. 215.
[14] Panel Report, para. 7.873.
[15] See, e.g. AB Report, para. 312.
[16] Panel Report, para. 7.908; AB Report, para. 332.
[17] Panel Report, para. 7.907.

85. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS363/AB/R and the Panel Report contained in WT/DS363/R and Corr.1, as modified by the Appellate Body Report.

6. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/419)

86. The Chairman drew attention to document WT/DSB/W/419, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/419.

87. The DSB so agreed.

7. Statement by Colombia concerning the Report by the Director-General on the use of his Good Offices pertaining to the disputes on bananas

88. The representative of Colombia, speaking under "Other Business", said that his country thanked the Director-General and his team for using their good offices to facilitate an agreement between certain Latin American Members and the EU, on the EU regime for the importation of bananas. The outcomes of that facilitation were fundamental for agreeing to the terms and conditions that would allow several disputes pending before the WTO to be settled shortly. The "Geneva Agreement on Trade in Bananas", presented to Members at the 17 December 2009 General Council meeting, stated that the disputes and claims referred to therein shall be settled upon Certification that the specified tariff cuts had been bound. Colombia, therefore, understood that the report by the Director-General, contained in WT/DS361/2 – WT/DS364/2 of 22 December 2009, addressed to the Chairman of the DSB and later circulated to Members, did not prejudice or impair Colombia's rights under the WTO Agreement, including rights deriving from the disputes and claims identified in paragraph 5 of the "Geneva Agreement on Trade in Bananas", under the terms specified in paragraph 6 thereof.

89. The DSB took note of the statement.

8. Proposed amendments to the Working Procedures for Appellate Review

(a) Statement by the Chairman

90. The Chairman, speaking under "Other Business", said that, as he had announced at the outset of the present meeting, he wished to make a statement under "Other Business" concerning a communication addressed to him, dated 16 December 2009, from the Appellate Body regarding several proposed amendments to the Working Procedures for Appellate Review. Due to the holidays, that communication, which contained the text of the proposed amendments and an explanation regarding those amendments, had only been circulated to Members on 12 January 2010 in document WT/AB/WP/W/10. A copy of this communication was available outside the meeting room. The Appellate Body had also sent a similar communication to the Director-General on 16 December 2009. For Members' information, a copy of the Director-General's response to the Appellate Body's communication was available as a room document at the present meeting. The proposed amendments to the Appellate Body's Working Procedures related to three matters: (i) the timeline for written submissions; (ii) electronic filing and service of documents; and (iii) consolidation of Appellate proceedings. In this regard, he noted that these proposals were separate from, and without prejudice to, any amendments to the Working Procedures that might be needed once negotiations on the improvements to, and clarifications of, the DSU had been completed. As for the process to be followed in this situation, he recalled that, under Article 17.9 of the DSU: "Working procedures shall

be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to Members for their information". In addition, in accordance with the decision of the DSB of 19 December 2002, contained in document WT/DSB/31 concerning "Additional Procedures for Consultations Between the Chairperson of the DSB and the WTO Members in Relation to Amendments to the Working Procedures for Appellate Review", "the Chairperson of the DSB shall provide Members with an opportunity to comment on the proposed amendments, including in writing. The Chairperson shall place an item on the agenda of an appropriate DSB meeting in which Members can discuss in that context the proposed amendments". Pursuant to the above, the Appellate Body had asked him, as Chairman of the DSB, for assistance in obtaining the views of Members on the proposed amendments. Since those proposed amendments had only been circulated to Members the previous week, he thought that Members would want some time to examine them carefully. Therefore, before the matter was formally placed on the DSB Agenda, it would seem appropriate to allow a period of time for reflection and, as appropriate, informal consultations. Thereafter, the DSB would need to revert formally to this matter at which time it would seem that the Chair should make a specific proposal as how to proceed, taking into account past practice and the 19 December 2002 DSB decision.

91. The DSB took note of the statement.