# WORLD TRADE ORGANIZATION

RESTRICTED

**WT/DSB/M/243**
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**Dispute Settlement Body**
**17 December 2007**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 17 December 2007

*Chairman: Mr. Bruce Gosper (Australia)*

Prior to the adoption of the agenda

The representative of Korea noted that, in relation to item 7 of the proposed agenda: i.e. "Japan – Countervailing Duties on Dynamic Random Access Memories from Korea: Report of the Appellate Body and Report of Panel, a corrigendum had been issued to the Appellate Body Report WT/DS336/AB/R/Corr.1 in order to rectify a typographical error in the Report. Accordingly, Korea proposed that the above-mentioned corrigendum be considered together with the Appellate Body Report as it was an integral part thereof.

It was so agreed.

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.61)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.61)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.36)

(d) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/22/Add.1)

1. The Chairman recalled that Article 21.6 of the DSU requires that "unless the DSB decides 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 pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.61)

2. The Chairman drew attention to document WT/DS176/11/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 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 6 December 2007, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US administration continued to work with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that the EC was, once again, bound to note that the United States had not made any progress towards the implementation of the WTO ruling. The EC considered that the effective and non-discriminatory protection of intellectual property rights was an essential element in the development of strong and mutually beneficial trade relations and, in

that respect, the conclusion of the TRIPS Agreement was a major achievement. There was no doubt that the United States shared that view. The EC sincerely hoped that the introduction of bipartisan bills that would repeal Section 211 would show a renewed and genuine interest of the United States to finally put itself into compliance with its TRIPS obligations.

5. The representative of Cuba said that Members were aware of Cuba's interest in this dispute. For years Cuba had been denouncing, in the WTO, the US blatant non-compliance. As it had already been indicated in a letter addressed to the Chairman of the DSB, Cuba was dissatisfied and disappointed with the sudden circulation of a fax sent out on 27 November reconvening the DSB meeting on the same date. Cuba had never missed any DSB meetings, and had continued to denounce the situation of non-compliance in this dispute. Cuba was determined in its denunciations because it felt that it had the right to do so. His delegation would appreciate if, in future, meetings were not reconvened on short notice. However exceptional the circumstances, faxes convening DSB meetings should not be circulated on short notice in order to ensure transparency, the participation of all Members in different WTO meetings and the smooth functioning of the WTO. Finally, his delegation thanked the Chairman for accepting to circulate Cuba's statement, which Cuba would have wished to make at the 27 November DSB meeting.[1]

6. Cuba said that the United States had recognized the importance of acting in conformity with intellectual property rights legislations and had repeated, time and again, its commitment to the TRIPS Agreement. All Members had heard the United States express its concern with the violation of intellectual property rights. According to WIPO statistics, the US Patent and Trademark Office received more applications for the protection of intellectual property rights than practically any of its counterparts. At the same time, all knew the substantial profits accumulated by the entertainment industry, which owed its very existence to the protection of such rights. It was all the more surprising that in this dispute the United States had disregarded the provisions of the TRIPS Agreement and of the DSU. It had made a mockery of the DSB's rulings and recommendations and the principle of prompt compliance. The statements repeated by the United States to the effect that the US Congress was allegedly working on legislative measures, had failed to satisfy the requirements of the DSB, and constituted a poor excuse for non-compliance. WTO Members had agreed to put into place a multilateral trading system, workable for all, with emphasis on compliance with obligations. In Cuba's view, the dispute settlement system was one of the most important achievements of the Uruguay Round negotiations. So how was it possible for a Member to undermine this system? Members had assumed their obligations and were responsible for actions of their respective administrations in this regard. Section 211 not only undermined the rights of Cuban trademark owners, but above all, it reflected a double standard of a country that put demands on others while pursuing a non-compliance situation with total impunity; a country which violated basic WTO principles such as the national treatment and the most-favoured-nation treatment.

7. By applying Section 211, the United States was pursuing a similar objective like the one under economic, commercial and financial blockade of Cuba, which had been condemned almost unanimously for the sixteenth time in a UN General Assembly Resolution adopted on 30 October 2007 with 184 votes in favour. Attempts to usurp well-known Cuban trademarks identifying products of excellence, such as rum and tobacco, had been occurring repeatedly over the past years. Companies located in and outside of the United States had applied for registration in the United States and elsewhere. Fortunately in some cases without success. Examples of this were Bacardi's claim to the ownership of the Havana Club trademark in Spain, which had been rejected by the Provincial Court of Madrid, and the attempts in the United States to acquire ownership of cigar brands such as "Cohiba", and more recently "Guantanamera", on the grounds that owing to the blockade, Cuba could not be present in that market. Cuba, once again, condemned this continued non-compliance and warned that this was a serious matter. Cuba reiterated its request that

[1] WT/DSB/COM/8.

Section 211 be unconditionally repealed without further delay. Members wanted action, not explanations.

8. The representative of Bolivarian Republic of Venezuela said that her country thanked Cuba for its statement, which it fully supported. As usual, Cuba's statement enabled Venezuela to understand what was currently happening in relation to this dispute. Her delegation noted the status report presented by the United States. Like many other countries, Venezuela had already stated that this continuous disrespect of the DSB's recommendations had negative effects, not only for the credibility of the DSB, but that it also affected the rights negotiated by Members as well as the credibility of the multilateral trading system. Despite the US good will, Members were still discussing Section 211. Article 21 in paragraphs 1 and 2 provided for the prompt implementation of the DSB's recommendations and rulings, and that the attention must be given to the issues that affected the interests of developing countries. However, this had not been the case in the Section 211 dispute. Indeed, the resolution had been awaited for a long time now. Therefore, it had been essential to find alternatives so as to ensure the full implementation of the DSB's recommendations to compensate developing countries, which had been affected by this long and continued non-implementation situation. Perhaps Members would have to wait until the conclusion of the DSU negotiations. However, the United States had to show its willingness to comply with its obligations, if it wanted to have a good record towards full implementation of the recommendations in most of its disputes.

9. The representative of China said that his country, once again, wished to express its concerns on prolonged implementation in this dispute. Five years had passed since the adoption of the Appellate Body and the Panel Reports by the DSB, but the implementation issue in this case was still before the DSB for discussion. China noted the development in the United States on this matter, but there was yet no clear indication when this matter would hopefully be resolved. Bearing in mind the systemic impact that the undue delay of full implementation of the DSB's rulings would cause to the integrity and efficiency of the dispute settlement system, China urged the United States to double its effort to fully implement the decision of the DSB in this dispute.

10. The representative of Thailand said that his delegation wished to thank the United States for its status report and the statement made at the present meeting. Like previous speakers, Thailand wished to express its concern over the systemic implications of this dispute. Non-implementation of the DSB's rulings and recommendations undermined the rules-based multilateral trading system. Thailand, therefore, called on the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

11. The representative of India said that her country, while thanking the United States for its status report and the statement made at the present meeting, wished to renew its systemic concerns about the situation of non-compliance in this dispute. Though the DSB had adopted the panel and the Appellate Body reports more than five years ago, no implementing action had been taken nor could WTO Members discern any clear sign from the US statements that such an action could be envisaged in the near future. As mentioned on past occasions, a protracted non-compliance situation by the Members in this Organization clearly undermined the credibility of the system and the carefully negotiated balance of rights and obligations of the entire Membership.

12. The representative of Viet Nam said that his delegation wished to echo other Members requesting the United States to implement the DSB's rulings and recommendations in this dispute without further delay.

13. 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.61)

14. The Chairman drew attention to document WT/DS184/15/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 US anti-dumping measures on certain hot-rolled steel products from Japan.

15. The representative of the United States said that his country had provided a status report in this dispute on 6 December 2007, 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. The US administration would work with the US Congress with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

16. The representative of Japan said that his country thanked the United States for its statement and the latest status report in this dispute. Japan also acknowledged that, in November 2002, the United States had taken the measure to implement the part of the DSB's recommendations, as reported by the United States. The fact remained, however, that, while it had been more than six years after the DSB had adopted its recommendations, the remaining part of the recommendations had not yet been implemented and the issue of implementation in this case was still on the agenda of the DSB. Japan took note of the US statement that its administration continued to support specific legislative amendments that would address non-implemented parts of the DSB's recommendations and rulings and was working with the current Congress to pass such amendments. Japan strongly hoped that the United States would soon be in a position to report to the DSB on more tangible progress in this respect. A full and prompt implementation of the recommendations and rulings of the DSB was essential for maintaining the credibility of the WTO dispute settlement system. Japan urged the United States to accelerate its work to come to full compliance without further delay.

17. 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.36)

18. The Chairman drew attention to document WT/DS160/24/Add.36, 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.

19. The representative of the United States said that his country had provided a status report in this dispute on 6 December 2007, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and would continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter. In this regard, the United States appreciated the EC's recent statements that it remained prepared to work with the United States to seek a resolution to this dispute. The United States shared the EC's goal of discussing how such a mutually satisfactory solution could be achieved.

20. The representative of the European Communities said that there was no need to repeat what the EC had stated countless times. The EC was still waiting for compliance.

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

(d) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/22/Add.1)

22. The Chairman drew attention to document WT/DS322/22/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

23. The representative of the United States said that his country had provided a status report in this dispute on 6 December 2007, in accordance with Article 21.6 of the DSU. As noted in that report, the United States had already addressed the DSB's recommendations and rulings with respect to certain of the measures at issue in this dispute. In addition, the United States was continuing to consult internally on steps to be taken with respect to the other DSB recommendations and rulings.

24. The representative of Japan said that his country thanked the United States for its statement and the second report on the status of implementation of the DSB's recommendations and rulings in this dispute. In the report, the United States had mentioned that, as from 22 February 2007, the US Department of Commerce had ceased to use the zeroing methodology in weighted average-to-weighted average (W-to-W) comparisons in original investigations. Japan recognized that the withdrawal of zeroing measures in this context was a positive step forward in the right direction. However, this step by the United States had addressed only a part of the DSB's recommendations and rulings. For the remaining part of the DSB's recommendations concerning the other WTO-inconsistent zeroing measures, the status report simply stated that the United States was "continuing to consult internally on steps to be taken". The DSB had adopted the recommendations and rulings on 23 January 2007 and the reasonable period of time mutually agreed between the parties would expire on 24 December 2007. Since the expiry of the reasonable period of time was only days ahead, Japan encouraged the United States to further elaborate on the progress made thus far and to indicate specific steps that it intended to take to comply with the remaining part of the DSB recommendations. Japan believed that a full and prompt implementation of the DSB's recommendations and rulings was essential not only for the effective resolution of particular disputes, but also for maintaining the credibility and proper functioning of the WTO dispute settlement system. Japan urged the US administration to accelerate its efforts to come to full compliance within the RPT as mutually agreed.

25. The representative of the European Communities said that the EC had a direct interest in this matter, as did indeed many other Members, as it was still awaiting full implementation of the rulings in its own zeroing case against the United States (DS294). In addition, the EC had another dispute on the continued application of zeroing by the US pending before the Panel. The issue of zeroing had been the subject of numerous litigations since the first case had been brought against the EC in 1998. To date, 12 disputes had been brought against the use of zeroing by the United States whether as the unique subject of the dispute, or as part of a wider dispute. All issues of law had now been extensively pleaded and analyzed. There was no doubt left that zeroing ran foul of fundamental obligations of the Anti-Dumping Agreement, which were to establish dumping in respect of an exporter and a certain product, and to conduct a fair comparison between the export prices and normal value. The EC hoped that the United States would finally accept this and put an end to all remaining illegal zeroing practices.

26. The representative of the United States said that, in response to Japan's question, his delegation wished to state that the United States was consulting internally on the steps to be taken in connection with those measures and would also continue to consult with Japan in the days ahead.

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

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

(a) Statements by the European Communities and Japan

28. The Chairman said that this item was on the agenda of the present meeting at the request of the EC and Japan. He invited the respective representatives to speak.

29. The representatives of the European Communities said that by the end of this month, the United States would complete its seventh illegal distribution under the CDSOA. The provisional amounts published earlier in 2007 indicated that it was likely to be the most important. On 30 April, already US$279 million had been available for distribution. On the same date, there had been only US$171 million available in 2006 and US$97 million available in 2005. This distribution, and those to come, would continue to produce trade-distorting effects to the detriment of all WTO Members. The EC was still waiting for a convincing explanation as to how this was compatible with the US assertions month after month that it had taken all actions necessary to bring itself into compliance with its WTO obligations. The EC wished to ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties to its industry. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit implementation reports in this dispute.

30. The representative of Japan said that on 5 December 2007, the US Customs and Border Protection had issued the "FY2007 Annual Disbursements Report". Based on information contained in that report, the total figure for fiscal year 2007 disbursements under the CDSOA ,which had just been completed, had amounted to some US$262 million. It was regrettable that the United States continued CDSOA disbursements in spite of Japan's repeated calls for their termination. These latest disbursements demonstrated that the CDSOA had been repealed only in form, but that it was still operational. Although Japan recognized that a duty collected on entries entered as from 1 October 2007 were no longer subject to the distributions, "the distribution process will continue until all entries made before [that date] are liquidated and the duties are collected".[2] In the US system, such liquidation and collection could take years to come, and the distributions that would cause negative trade impacts on Japan and other WTO Members, would continue. Under these circumstances, Japan failed to see the rationale behind the US assertion that it had taken all necessary steps for implementation in this case. Japan, once again, urged the United States to immediately terminate the illegal disbursements and repeal the CDSOA not just in form but also in substance. Under Article 21.6 of the DSU, the issue of implementation must be under surveillance by the DSB until the issue was resolved. Japan would like to remind the United States that it was still under obligation to provide the DSB with a status report pursuant to that provision. Japan reserved all its rights under the DSU until the United States came into full compliance.

31. The representative of China said that his country thanked the EC and Japan for, once again, raising this item on the DSB agenda. China shared the view expressed by previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings.

32. The representative of Canada said that her country was pleased that duty deposits collected by the United States after 30 September would no longer be subject to the Byrd Amendment. While this was a significant step forward, duty deposits collected by the United States before 1 October 2007, would, nevertheless, continue to be subject to the Byrd Amendment. Until the United States ceased to administer the Byrd Amendment, Canada shared the view that surveillance by the DSB had to continue.

[2] 71 Federal Register at 31336 et seq. (dated 1June 2006).

33. The representative of India said that her country thanked the EC and Japan for raising this issue at the present DSB meeting once again. While India noted that no anti-dumping or countervailing duties collected on products entered into the United States after 30 September 2007 would be handed out to the US domestic industry, there remained the fact that distribution still did occur under the Byrd Amendment with trade-distortive effects for foreign producers and exporters. India, therefore, wished to reiterate that full compliance on the part of the United States would only come through the complete elimination of all disbursement under the Byrd Amendment. Until such condition was met, WTO Members should be able to exercise any rights related to the non-compliance situation they faced in this case.

34. The representative of Thailand said that his delegation wished to start by joining previous speakers in thanking the EC and Japan for continuing to bring this item before the DSB. Thailand noted with appreciation the positive steps taken by the United States not to disburse to its industries AD/CVD duties collected on goods entering the United States from 1 October 2007. However, Thailand remained concerned that AD/CVD duties collected on goods that entered the United States prior to 1 October 2007 would continue to be disbursed to the domestic industry under the Byrd Amendment. The updated figures mentioned by the EC and Japan relating to the latest round of disbursements validated Thailand's concern. Thailand, therefore, urged the United States to cease its WTO-inconsistent disbursements, to repeal the Byrd Amendment with immediate practical effects, and to resume providing status reports until such actions were taken and this matter had been fully resolved.

35. The representative of Brazil said that his country thanked the EC and Japan for raising this item on the DSB agenda. Brazil fully shared the views of the EC and Japan and wished to join them, as well as others, in urging the United States to bring itself into full compliance with the DSB's recommendations in this dispute so that the three distortive effects of the disbursement under the Byrd Amendment would no longer occur in the future.

36. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States welcomed the EC and Japan's recognition that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States was, therefore, all the more surprised to hear the EC and Japan make the statement that the United States would remain in breach of its WTO obligations. The United States wanted to know if the EC and Japan were saying that they considered that the United States would remain in breach of its WTO obligations, notwithstanding the fact that anti-dumping duties and countervailing duties that were being collected on goods now entering the United States would not be distributed to domestic firms.

37. With respect to comments regarding further status reports in this matter, as the United States had already explained at previous DSB meetings, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. In this light, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

38. The DSB took note of the statements.

**3. United States – Subsidies and other domestic support for corn and other agricultural products**

(a) Request for the establishment of a panel by Canada (WT/DS357/12 and Corr.1)

**4. United States – Domestic support and export credit guarantees for agricultural products**

(a) Request for the establishment of a panel by Brazil (WT/DS365/13)

39. The Chairman proposed that items 3 and 4 be taken up together since they pertained to the same matter.

40. First the Chairman drew attention to the communication from Canada contained in document WT/DS357/12 and Corr.1. He recalled that the DSB had considered this matter on 27 November 2007 and had agreed to revert to it. He invited the representative of Canada to speak.

41. The representative of Canada said that her country strongly supported the shared commitment of WTO Members to establish fair and market-oriented, world agricultural markets. This was why Canada continued to work with other WTO Members to achieve an ambitious outcome on agriculture as part of the Doha Round negotiations. At the same time, one must ensure that WTO Members were meeting their WTO commitments under the current Agreement on Agriculture. As outlined in its panel request of 8 November 2007, Canada believed that the United States had been providing trade-distorting agriculture subsidies in a manner inconsistent with its WTO commitments. More specifically, it was Canada's view that: the US's Current Total Aggregate Measurement of Support had exceeded its commitment levels in each of 1999, 2000, 2001, 2002, 2004 and 2005, contrary to the Agreement on Agriculture. Canada estimated that during these years the United States had exceeded its WTO commitment levels by billions of dollars each year. The measures at issue included a broad range of US agriculture subsidy programmes and payments, such as Direct Payments, Counter-Cyclical Payments and Loan Deficiency Payments, which provided large amounts of trade-distorting support.

42. Canada and the United States had held consultations on this matter in February 2007. Because those consultations had not resolved the matter, Canada had requested the establishment of a panel at the 19 November DSB meeting. Since the United States, as allowed under the DSU, had blocked that first request, Canada was now making a second request that a panel be established to examine the matter. Given that Canada's and Brazil's requests for the establishment of a panel related to the same matter, Canada requested that pursuant to Article 9.1 of the DSU a single panel be established to examine Canada's and Brazil's complaints.

43. The Chairman draw attention to the communication from Brazil contained in document WT/DS365/13. He recalled that the DSB had considered this matter on 27 November and had agreed to revert to it. He invited the representative of Brazil to speak.

44. The representative of Brazil said that at the DSB meeting, which had been reconvened on 27 November 2007, Brazil had offered brief comments on the concerns raised by domestic support measures maintained by the United States in favour of US agricultural producers. All those measures had been the subject of consultations held on 22 August 2007 with the United States. However, as informed before, despite useful exchanges of views and information during the consultations, the US clarifications had not been sufficient to dissipate Brazil's concerns. Accordingly, Brazil had filed a request for the establishment of a panel on 8 November 2007 (WT/DS365/13), which had been considered by the DSB, for the first time, on 27 November 2007. Brazil still believed that the US measures nullified or impaired the benefits accruing to Brazil under the Agreement on Agriculture and, therefore, requested, for the second time, that a panel be established, with standard terms of

reference, to examine the matter. Additionally, having regard to the request made by Canada relating to the same matter, Brazil respectfully requested that a single panel be established in accordance with Article 9.1 of the DSU. Finally, taking into account that the measures related to export credit guarantees had not been included in Brazil's panel request, Brazil considered appropriate that the name of the present dispute be adjusted, at the appropriate juncture, so as to better reflect its content and scope, i.e. "United States – Domestic Support for Agricultural Products".

45. The representative of the United States said that his country was disappointed that Canada and Brazil had decided to pursue their requests for a panel at the present meeting. The United States understood that a panel would be established at the present meeting. Nonetheless, the United States continued to believe that this dispute represented an unnecessary diversion of time and resources from the important tasks before Members in the Doha Development Agenda (DDA) negotiations. The United States continued to seek a successful outcome for the DDA, including substantial reductions in trade-distorting domestic support for agriculture combined with equally ambitious progress in the other pillars of the agriculture negotiations and the Round as a whole. The United States would continue to work with Canada, Brazil, and other Members to achieve this outcome. The United States had designed its farm programmes to ensure compliance with the existing negotiated limits on domestic support. The United States believed that a panel would so agree. The United States must again point out that some of the measures identified by Canada and Brazil were not properly within the terms of reference of a panel. Some had ceased to exist – in some cases, more than five years ago – and not all of the measures identified by Canada and Brazil had been the subject of consultations.

46. With respect to the requests of Canada and Brazil to establish a single panel, pursuant to Article 9.1 of the DSU, the United States noted that there were some differences in the scope of the measures identified in their respective panel requests. In addition, there were differences in the scope of measures that had been the subject of consultations with Canada and Brazil. Nonetheless, in the view of the United States, there was sufficient overlap between the two panel requests to permit the establishment of a single panel in this matter, under Article 9.1 of the DSU.

47. With respect to Brazil's comment that it believed it appropriate to change the name of its dispute, this issue was not before the DSB as Brazil appeared to recognize in its statement. The names of disputes were assigned by the Secretariat, not by the complaining Member and not by the DSB. The name of a dispute had no effect on the rights or obligations of the parties, and the United States understood that changing the name of a dispute after documents had been circulated involved a considerable administrative burden on the Secretariat. It had never been the task of the DSB to modify the name of a dispute where a panel request was narrower than a consultation request, and the United States saw no reason why the DSB should undertake such a task, nor why the matter should be raised here. Finally, the United States wished to note the cooperation of the parties on a procedural issue, namely, and without prejudice to any systemic views, that the two complaining parties and the United States had agreed that they would jointly request the panel, to be established at the present meeting, to open both of its meetings to all Members and to the public. The United States looked forward to further cooperation on procedural matters with the complaining parties going forward.

48. The representative of Brazil said that, very briefly, his delegation wanted to make a point of clarification. He said that it was not Brazil's understanding that it was within the authority of the DSB to change names of disputes.

49. The DSB took note of the statements and agreed to establish a single panel in accordance with the provisions of Article 9.1 of the DSU, with standard terms of reference, to examine the complaint by Canada contained in WT/DS357/12 and Corr.1 and the complaint by Brazil contained in WT/DS365/13.

50. The representatives of Argentina, Australia, Chile, the European Communities, India, Japan, Mexico, New Zealand, Nicaragua, South Africa, Chinese Taipei, and Thailand reserved their third-party rights to participate in the Panel's proceedings.

**5. Australia – Measures affecting the importation of apples from New Zealand**

(a) Request for the establishment of a panel by New Zealand (WT/DS367/5)

51. The Chairman drew attention to the communication from New Zealand contained in document WT/DS367/5, and invited the representative of New Zealand to speak.

52. The representative of New Zealand said that his country had sought access for New Zealand apples into the Australian market since 1986. New Zealand's fourth and most recent request for access had been made in 1999. In November 2006, Australia had published a "Final Import Risk Analysis Report for Apples from New Zealand ("Final IRA"). The Final IRA recommended that access be granted, but subject to extensive risk management measures. On 27 March 2007, the Australian Director of Animal and Plant Quarantine had determined that importation of New Zealand apples could be permitted subject to the Quarantine Act 1908 and the measures in the Final IRA. New Zealand considered that the measures specified in and required pursuant to Australia's Final IRA were not scientifically justified and were inconsistent with Australia's obligations under the SPS Agreement. New Zealand's panel request described these matters in greater detail. In August 2007, New Zealand had submitted a request for WTO dispute settlement consultations. New Zealand and Australian officials had met in Geneva in October 2007 for consultations. The United States and the EC had participated as third parties. Regrettably, those consultations had not resolved this dispute. New Zealand, therefore, requested that the DSB establish a panel at the present meeting to examine the matters set forth in New Zealand's panel request.

53. The representative of Australia said that her country was disappointed that New Zealand had decided to request a panel in this dispute. Australia appreciated the importance New Zealand attached to this issue. However, Australia considered that bilateral channels were the most effective way to deal with such concerns. Australia remained open to further consultations with New Zealand on the matters it had raised. The measures contained in the Final Import Risk Analysis Report for Apples from New Zealand were science based and fully consistent with Australia's WTO obligations. Australia was not, therefore, able to agree to the establishment of a panel at the present meeting.

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

**6. Brazil – Measures affecting imports of retreaded tyres**

(a) Report of the Appellate Body (WT/DS332/AB/R) and Report of the Panel (WT/DS332/R)

55. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS332/11 transmitting the Appellate Body Report on: "Brazil – Measures Affecting Imports of Retreaded Tyres", which had been circulated on 3 December 2007 in document WT/DS332/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

56. The representative of the European Communities said that the EC wished to thank the Appellate Body and its Secretariat for their work. The EC welcomed the fact that the Appellate Body had reinforced the conclusion which the Panel had already reached, namely that Brazil's challenged measures were incompatible with WTO rules. In so doing, the Appellate Body had rectified a number of serious legal errors which the Panel had committed. Importantly, the Appellate Body had reversed the Panel's ill-conceived approach to what was an "unjustifiable discrimination" and a "disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994. By rejecting the Panel's interpretation, the Appellate Body had not only upheld a fundamental principle of the multilateral trading system, but had also rendered a ruling that served better the non-trade concerns for which Article XX existed. As a result, it was now clear that Brazil's import ban on retreaded tyres was illegal, no matter how few casings or MERCOSUR retreads were actually imported. It was also clear that Brazil's action over the course of last summer, namely the introduction of quantitative import restrictions on retreaded tyres from other Mercosur countries, was not a way to bring about WTO-conformity.

57. Equally beneficial was the Appellate Body's reversal of the Panel's mistaken interpretation of "arbitrary discrimination" as permitting any action in which governmental agencies did not act randomly or capriciously. The Panel, once again, undermined a fundamental WTO principle by accepting a regional trade agreement, and a judicial decision flowing from it, as valid reasons under the chapeau of Article XX to discriminate against other WTO Members. At the same time, the EC was strongly disappointed that the Appellate Body had not reversed the Panel's conclusion under Article XX(b) of the GATT 1994. In the EC's view, the Panel was mistaken in concluding that Brazil's measures contributed to health protection and that no alternative was reasonably available. Brazil bore the burden of proof for these questions, and the evidence submitted to the Panel had left it entirely unclear whether the import ban on retreaded tyres at all contributed to the reduction of tyre waste in Brazil. There also existed more effective alternatives for that purpose, including measures to avoid tyre waste, and measures to improve the management of waste tyres. For these reasons, the EC considered that when all factors were properly weighed and balanced, as required by the case law of the Appellate Body, and taking into account at best marginal contribution of the ban, the measure could not be regarded as necessary.

58. The EC, of course, knew that an appeal was limited to legal errors and, therefore, could not correct all the mistakes of the Panel in the establishment of facts. Yet, it seemed to the EC that the Panel had violated the legal obligation of making an objective assessment of the facts in this case. It seemed important to the EC that this legal standard be upheld by the Appellate Body in cases like this one. It was not good for the dispute settlement system if panels received the message that they could assess the evidence whatever way they wanted, and effectively disregard important pieces of evidence as long as they listed some of them in footnotes. Similarly, it did not seem right to the EC that panels should be able to rely decisively on contested evidence of doubtful credibility or not relevant to the specific case, with no explanation being provided by the panel. In the EC's view, the Panel should have rejected Brazil's defence under Article XX(b), based on the real facts of this case, bearing in mind Brazil's burden of proof. The EC considered weak and flawed the Panel's factual conclusions, which the Panel had reached without recourse to experts on the technical questions involved.

59. The Panel's legal interpretation of Article XX(b) also contained disturbing aspects which the Appellate Body should have reversed. Yet, while formally upholding the Panel's findings, the Appellate Body in reality had modified the Panel's unconvincing reasoning quite significantly. Notably, the EC noted with satisfaction the Appellate Body's clarification that a marginal or insignificant contribution was not sufficient under Article XX(b), and that a "genuine relationship of ends and means" was required. In the case at hand, however, the Appellate Body's and the Panel's findings on Article XX(b) created the wrong and detrimental impression that retreaded tyres were somehow an inferior product, which generated additional and problematic waste in an importing country. The EC would stress that retreading was a very beneficial form of recycling that resulted in

high-quality products and reduced the quantity of fossil fuel expended in the production of tyres as well as the quantity of end-of-life tyres that were burnt. The EC would also recall the existence of international standards for the production of retreaded tyres elaborated by the UNECE which ensured the safety of, and aimed to facilitate trade in, retreaded tyres. In this connection, the EC would voice its protest against Brazil's repeated allegations, before the Panel and the Appellate Body as well as in public fora, that the EC intended to export its waste to Brazil. The EC managed, recycled and recovered waste tyres without relying on exportation. Moreover, like the overwhelming majority of WTO Members, the EC did not ban the importation of retreaded tyres. On the contrary, the EC even imported retreaded tyres from other countries, including Brazil.

60. The EC was known to be strongly in favour of environmental and public health protection. The EC had appealed this Panel Report to defend not only its trade interests, but also the general interest that WTO rules be applied so as to ensure real and effective protection of public health and the environment, rather than allowing protectionism. The interventions by most third parties in this dispute were evidence of this systemic aspect. The Appellate Body Report in this dispute had partly served these interests, and the EC accordingly welcomed the fact that the DSB would adopt this Report at the present meeting.

61. As regards the next steps which Brazil would undertake after the adoption at the present meeting, the EC expected Brazil to lift the import ban on retreaded tyres. This was the fastest and best way to do away with the current discrimination, the continuation of which the Appellate Body's ruling did not permit. This would also ensure that Brazil respected its Mercosur obligations, confirmed by binding arbitral rulings. In these dispute settlement proceedings, Brazil had strongly insisted that it absolutely needed to comply with these obligations. There was no reason for Brazil to now change course, belied its own words and work in the direction of completely stopping the importation of Mercosur retreads. The Appellate Body's ruling certainly did not require any such thing. Brazil should also consider that this course would destroy worthy industries engaged in the retreading of tyres in Brazil and other Mercosur countries, and would further reduce the overall rate of retreading in the world. The EC had no objections whatsoever, if Brazil intended to do more for the protection of its citizens against diseases spread by mosquitoes that breed in abandoned waste tyres. For that purpose, however, there were measures available that would actually make a difference, contrary to the selective targeting of certain imported products that contributed marginally, if at all, to the problem.

62. The representative of Brazil said that his country had received the Appellate Body Report concerning the dispute initiated by the EC with regard Brazil's measure that banned the importation of retreaded tyres, which was proposed for adoption at the present meeting. Without prejudice to the complete and detailed analysis of the Appellate Body Report, which had already been initiated by the relevant authorities in Brazil, his delegation wished to offer some preliminary comments on the main aspects of the Report. The appeal proceedings, which had been initiated by the EC on 3 September 2007, had been concluded with the confirmation of the main findings of the Panel with respect to the environmental and public health policies maintained by Brazil. In particular, the Appellate Body had upheld the findings of the Panel that reckoned the import ban of retreaded tyres as a necessary measure to protect human health and the environment in Brazil and qualified the import ban as a key element in the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. The Appellate Body had upheld the conclusion of the Panel that, by reducing the generation of waste tyres, Brazil's measure contributed to combating the risks that flew from their accumulation, transportation and disposal, which included mosquito-borne diseases and health problems that take place, among other causes, through the contamination of the environment.

63. His delegation also wished to offer just a quick word on the benefits of retreading. Brazil certainly agreed that retreading tyres was a positive practice from the environmental perspective for a country in the sense of waste management. But as the Panel and the Appellate Body had recognized,

it was only a good and sound environmental practice if it was done from domestically found casings or waste tyres. Now, importing retreaded tyres was not equal to importing waste. However, importing retreaded tyres increased the rate at which the waste was generated. This was Brazil's concern with retreaded tyres and this concern had been recognized by the Panel and the Appellate Body.

64. The Appellate Body had also confirmed the Panel's understanding concerning the imports of used tyres made possible through preliminary injunctions obtained from the Judiciary Branch, to be used as raw material for the national retreading industry. According to the Appellate Body, these imports constituted discrimination inconsistent with the multilateral rules. Concerning the imports from Mercosur, Brazil regretted, however, that the Appellate Body had reversed the Panel's findings concerning the imports of retreaded tyres from Mercosur which occurred as a result of an arbitral decision adopted inside the block. As his delegation had previously mentioned, the relevant authorities in Brasilia were carefully examining the findings and conclusions of the Panel and the Appellate Body and Brazil would inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB, in accordance with Article 21.3 of the DSU. Finally, his delegation thanked the Appellate Body and the Secretariat for their hard work and dedication to this case.

65. The representative of the United States said that his country agreed with other Members who had spoken previously that the protection of human health and the environment was a matter of utmost importance. In that regard, the United States very much appreciated that the Panel and the Appellate Body Reports in this dispute had shown an understanding of the need to carefully evaluate these complex issues in the context of a trade dispute. The United States wished to make a few comments concerning the approach that the Appellate Body had taken to certain of the legal issues that arose in this dispute. The United States in particular welcomed the Appellate Body's finding that the volume of tyres imported under the Mercosur exemption to the retreaded tyre ban was not dispositive of whether the ban was being applied in a manner that constituted arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The United States welcomed the Appellate Body's reversal of the Panel's analysis of the Mercosur exemption.

66. On reflection, however, the United States would like to express its reservations about certain aspects of the Appellate Body's Report. First, the United States wished to express its concern that certain parts of the Report could be read to suggest that Members must rank various measures according to their relative degree of "trade-restrictiveness" (see, for example, paragraph 179 of the Report). As the United States had stated on previous occasions, it did not see any textual support for a construction of the word "necessary" in GATT Article XX(b) that would give rise to such an analysis. There was nothing in the ordinary meaning of "necessary" that would support a "trade restrictiveness" analysis. Nothing in Article XX(b) used the term "trade" or "restrictive".

67. At the same time, the analysis used in these parts of the Report was remarkably similar to that called for under Article 5.6, including footnote 3, of the SPS Agreement. As a result, these parts of the Report could be misunderstood as incorporating into Article XX(b) a "least trade restrictive" obligation similar to that specifically negotiated as part of the SPS Agreement. The United States recalled that those SPS negotiations had been complicated and sensitive. Yet no such obligation had been negotiated or agreed to in the context of Article XX(b). Indeed, it was difficult to see what role would be left for the language in the chapeau to Article XX concerning "disguised restriction on trade" if "necessary" were to have the meaning ascribed to it in certain parts of the Report. The United States could not see how it was appropriate to read into Article XX(b) a requirement that did not appear there. And the United States recalled that in its Report in the Gambling dispute (DS285), when considering the GATS provision that was similar to GATT Article XX, the Appellate Body had clarified that Members were not required to "identify the universe of less trade-restrictive alternative measures," and that the issue was whether the complaining party had identified

a reasonably available WTO-consistent alternative. The United States was also concerned with the references to "the importance of the interests or the values underlying the objective pursued by" the measure (see, for example, paragraph 210 of the Report). These references could be misconstrued as suggesting that WTO Panels and the Appellate Body were to rank by degree of importance the various policies pursued by Members and afforded Members greater ability to pursue some policies over others. Nothing in Article XX assigned this rather subjective function to the dispute settlement system.

68. The United States had concerns about the Appellate Body's application of the term "level of protection" in this Report. The term "level of protection" was not found in the text of Article XX(b) of the GATT, but only in certain other WTO Agreements. Accordingly, it appeared, at a minimum, confusing to use this term in the context of a review under Article XX. Adding to that confusion, the United States would not expect that the term should be used differently in this context, when a panel was assessing whether a measure was necessary to protect human health, than it would be used in those contexts where the term was found in the text of the agreement. In this connection, however, the United States noted that the Appellate Body had accepted Brazil's description of its "level of protection" as the "reduction of the risks of waste tyre accumulation to the maximum extent" (see, for example, paragraph 144 of the Report). That statement, however, appeared to confuse a chosen level of protection against risks to human health with the measure to be employed to address such risks. In other words, the "risk" at issue was the risk to human life or health from malaria or other identified risks, and the level of protection should refer to the level of protection from such risks. The references to the reduction of waste tyres appeared to shift the focus to how to reduce waste tyres rather than how to reduce malaria or other risks, and thus might become circular. That was, the analysis verged on becoming: "If a measure reduces waste tyres then it is 'necessary' because the measure helps reduce waste tyres." Finally, some of these difficulties might be due to the approach of treating the import ban and the Mercosur exemption separately. As the United States had explained in its submissions to the Appellate Body, it remained unclear to the United States how the import ban and the Mercosur exemption could be analyzed separately in this dispute when they appeared to be all part of the same measure.

69. The representative of Australia said that her country joined the parties in thanking the Panel, the Appellate Body and the Secretariat for their work on this important case. Australia welcomed the Appellate Body Report in this dispute, which it considered, provided helpful clarification of the factors that needed to be taken into account by a WTO Member in relation to a defence invoked under Article XX of the GATT. As a third party to the dispute, Australia had stated before the Appellate Body that the Panel had committed a number of legal errors in its approach to the chapeau of Article XX. Australia welcomed the Appellate Body's findings that the Panel's reasoning on the chapeau be reversed.

70. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS332/AB/R and the Panel Report contained in WT/DS332/R, as modified by the Appellate Body Report.

## 7. Japan – Countervailing duties on dynamic random access memories from Korea

(a) Report of the Appellate Body (WT/DS336/AB/R & Corr.1) and Report of the Panel (WT/DS336/R)

71. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS336/11 transmitting the Appellate Body Report on: "Japan – Countervailing Duties on Dynamic Random Access Memories from Korea", which had been circulated on 28 November 2007 in document WT/DS336/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this case had

been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

72. The representative of Korea said that his country had carefully studied the final Reports of the Panel and the Appellate Body in this dispute concerning Korea's challenge to Japan's measures imposing countervailing duties on imports of dynamic random access memories (or "DRAMs") from Korea, which was now being considered by the Dispute Settlement Body. In Korea's view, adoption of the Report by the Panel, as modified by the Appellate Body, would eliminate any basis for the continuation of countervailing duties on DRAMs exported by Hynix Semiconductor. Japan's imposition of countervailing measures had been based on findings that the Government of Korea provided subsidies to Hynix by "entrusting or directing" private financial institutions to enter into debt restructuring transactions in October 2001 and December 2002. However, the Panel and Appellate Body had found that neither of those restructurings justified the imposition of countervailing duties.

73. In particular, the Panel and Appellate Body had found that Japan's imposition of duties based on the October 2001 restructuring was inconsistent with the requirements of Article 19.4 of the SCM Agreement where Japan's calculation of the subsidy benefit was based on the assumption that the benefits had lasted only five years, and thus had expired in 2005. Furthermore, the Panel and the Appellate Body had also found that Japan's finding of a benefit from the December 2002 restructuring was contrary to Articles 1.1(b) and 14 of the SCM Agreement. As a result of these findings, neither the October 2001 restructuring nor the December 2002 restructuring could have provided a basis for the imposition of countervailing duties in Japan's 2006 final determination.

74. Korea noted that the implementation of these rulings by the Panel and the Appellate Body should not require any action beyond the Ministerial step of publishing a notice rescinding the countervailing measures that Japan had improperly imposed. Korea, therefore, called upon Japan to immediately rescind those countervailing measures, and to inform the DSB that those measures had been rescinded at the next meeting of the DSB, in accordance with the first sentence of Article 21.3 of the DSU. There were a number of aspects of the decisions by the Panel and the Appellate Body with which Korea did not agree. Korea reserved its rights to raise these issues at a subsequent time, should they arise in future disputes or negotiations. It should be noted, however, that a different ruling by the Panel and the Appellate Body on those issues would not have altered the basic requirement that Japan immediately rescind its countervailing measures. In the interests of brevity, Korea would, therefore, leave its comments on those issues to another day. Korea looked forward to the adoption of the reports by the DSB.

75. The representative of Japan said that, at the outset, his country wished to express its gratitude to the Appellate Body, the Panel, and their respective Secretariats for their time and efforts devoted in this case and their Reports. At the present meeting, his delegation wished to make some brief comments on the Reports. On several issues which Japan had raised in its appeal, the Appellate Body had taken up Japan's views and had reversed the Panel's findings. In particular, the Appellate Body had ruled that the Panel had erred in failing to apply the proper standard of review in its examination of Japan's determination of entrustment or direction by Korea with regard to the December 2002 Restructuring. The Panel and the Appellate Body had also rejected or declined to rule on various claims raised by Korea in this dispute, such as those concerning Japan's Investigating Authorities' determination of benefit with respect to the October 2001 Restructuring and the causation of injury. To that extent, it was clear that Japan's measure had proved to be appropriate.

76. Japan was appreciative of the Appellate Body's Report to the extent referred to above. Japan, however, was disappointed by the findings and conclusions of the Appellate Body on some other points. These included the upholding by the Appellate Body of the Panel's findings on the issues of Japan's Investigating Authorities' benefit determination and imposition of countervailing duties, including the issues of: (i) commercial reasonableness of the Four Creditors' participation in the December 2002 Restructuring in the context of benefit determination; (ii), calculation of the amount of benefit in terms of debt-to-equity swap; and (iii) allocation of benefit and the timing of duty imposition regarding the October 2001 Restructuring. Japan regretted that the Appellate Body had not set out sufficient legal reasoning or thorough analysis in addressing various arguments that Japan had advanced during the proceedings. Although Japan was not entirely satisfied with the findings and conclusions of the Appellate Body Report, it would carefully review the findings and conclusions in these reports and would examine a course of action Japan might need to take, in accordance with the dispute settlement procedures.

77. The representative of the European Communities said that the EC wished to thank the Panel members, the Appellate Body members and the respective Secretariats for their work and welcomed particularly certain findings. First, the EC fully agreed that the chapeau of Article 14 of the SCM Agreement did not require that the national legislation or implementing regulations set out every detail of the method for the calculation of the benefit, such as calculation formulas. Investigating authorities needed a certain degree of flexibility to adapt to the particular factual situation. As rightly found by the Appellate Body, the fact that the method used in a particular case could be derived from the national legislation or implementing regulations was sufficient to ensure that other WTO Members and interested parties were aware of the method that would be used and preserved the needed flexibility.

78. The EC also welcomed the Panel's and the Appellate Body's findings that "interested parties" might also be interpreted from the perspective of the investigating authority. The right to include in "interested parties" entities that were relevant for carrying out an objective investigation and not just those having an interest in the outcome of the investigation was absolutely instrumental for the capacity of Investigating Authorities to conduct an objective and impartial investigation. Finally, the EC expressed its special thanks to the Appellate Body for accepting to seize itself of the issue of the right balance between the protection of Business Confidential Information and the right of third parties and WTO Members. The deletion of substantial parts on the ground of confidentiality had made the public Panel Report unintelligible. As a result, the EC had been prevented from making any meaningful submissions to the Appellate Body on important issues. The EC, therefore, particularly welcomed the Appellate Body's position that the Panel must ensure that the public version of its Report, while protecting confidential information, remained understandable.

79. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS336/AB/R & Corr. 1 and the Panel Report contained in WT/DS336/R, as modified by the Appellate Body Report.