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Dispute Settlement Body
21 December 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 December 2009

Acting Chairman: Mr. Mario Matus (Chile)

Prior to the adoption of the Agenda, the Chairman of the General Council, Ambassador Mario Matus, welcomed delegations and said that he had been asked to chair the present meeting in the absence of Ambassador John Gero, the Chairman of the DSB. He noted that this was in accordance with the Rules of Procedure for meetings of the DSB. He then drew Members' attention to footnote 1 in the proposed Agenda concerning the recent entry into force of the Lisbon Treaty. He said that he had been advised that the Secretariat intended to use this footnote in the future, as appropriate, in Secretariat-issued documents, particularly those relating to dispute settlement matters involving the former EC which, as the footnote indicated, had now been replaced and succeeded by the European Union. He added that, over time, as pending disputes involving the former EC were resolved, the use of this footnote would no longer be needed.

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.85)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.85)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.60)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.23 – WT/DS293/31/Add.23)

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Union (WT/DS27/96/Add.11)

(f) United states – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.4)

(g) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.3)

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

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.85)

2. The Chairman drew attention to document WT/DS176/11/Add.85, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided its status report in this dispute on 10 December 2009, 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, which had convened in January 2009. 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-sixth status report in this dispute. The EU hoped that the new US authorities would now take steps to finally implement the DSB's ruling and resolve this matter.

5. The representative of Cuba said that, a year ago, the tone of the statements made under this Agenda item was hopeful. With the election of the new US President on 4 November 2008, many had expected that actions would be taken to repeal Section 211. Unfortunately, as Cuba had stated at the December 2008 DSB meeting, one could not be too optimistic. For decades, Cuba had been aware of the US record of non-compliance in the area of international law. The US status reports did not show any sign of change and the United States continued to repeat the same statement and failed to provide Members with any new information. All were aware that the US administration was working with the US Congress to implement the DSB's recommendations and rulings. Members were responsible for ensuring that their laws, regulations and administrative procedures were in conformity with their WTO obligations, as stipulated in Article XVI:4 of the Marrakesh Agreement. According to the November 2009 press release, the number of trade disputes brought into the WTO had now reached four hundred. Although Cuba recognized that the dispute settlement system benefited a number of Members, it considered that cases such as that concerning Section 211 clearly showed that powerful countries could decide not to comply with the rules, and perpetuate non-compliance. Furthermore, in that press release, the WTO Director-General had stated that: "all the political muscle-flexing is discarded at the door once the case enters the WTO". While the statement by the Director-General may have, to a certain extent been true, the Section 211 case showed that muscle-flexing and lack of

political will could unfortunately prevail for a long time, even if certain rulings obliged the most powerful Members to take actions. In this dispute, the parties remained paralyzed, thus enabling legislation, which violated the basic principles of the TRIPS Agreement and the Paris Convention, to remain in force.

6. Cuba recalled that at the 7th WTO Ministerial Conference, the US Trade Representative had stated in the plenary meeting that his negotiating team was "looking for concrete signs from other Members" with regard to the conclusion of the Doha Round. Cuba had been looking for concrete signs and actions from both the United States and the EU since 2002 when the Appellate Body's ruling on Section 211 had been issued. However, as the EU had pointed out, during the Ministerial Conference, the poorest countries were also the most vulnerable ones. Cuba, once again, urged both parties to take urgent steps in 2010 to repeal Section 211. This would send out a very positive signal and would demonstrate their compliance with the WTO rules and commitment towards ensuring that intellectual property rights were duly observed. This was not about making a concession or an effort, but about complying with the Appellate Body's rulings made more than seven years ago.

7. The representative of Ecuador said that his country thanked the United States for its status report and supported the statements made by Cuba and other Members on this issue. Ecuador could not but emphasize, once again, that Article 21 of the DSU expressly referred to prompt compliance with the DSB's recommendations and rulings, in particular with regard to matters affecting the interests of developing countries. The United States closely monitored compliance by all WTO Members with their obligations and had expressed, in different WTO Councils and Committees, its trade and systemic concerns with regard to some commitments assumed by Members. The United States also drew up internal reports on countries' compliance with their obligations in the area of intellectual property rights. Thus, Ecuador expected the United States to set an example. Once again, Ecuador urged the US administration and Congress to accelerate compliance with the DSB's recommendations and rulings by repealing Section 211.

8. The representative of China said that her country thanked the United States for its status report and its statement. However, the report itself showed the continuation of US non-compliance after more than seven years since the adoption of the relevant reports by the DSB. This was obviously not in line with the principle of prompt implementation, as stipulated in the DSU provisions, and undermined the authority and credibility of the WTO dispute settlement system. China supported the statement made by Cuba and urged the United States to implement the DSB's decision without further delay.

9. The representative of Brazil said that his country thanked the United States for its status report pertaining to the Section 211 dispute. He noted that another year had passed, but the United States had not brought itself into compliance with the DSB's recommendations and rulings. Brazil continued to be concerned with this matter and expected that the United States would bring its measures into conformity with the multilateral trade disciplines without further delay.

10. The representative of Bolivia said that her country continued to be concerned by the lack of progress in this case and the consequences for the WTO resulting from the lack of compliance with the agreed obligations. The United States must comply with the DSB's recommendations and rulings and lift the restrictions imposed under Section 211, which were contrary to the rules of international law, in order to preserve the integrity of the WTO system.

11. The representative of Chile said that his country thanked the United States for its status report. Chile continued to have systemic concerns about the lack of compliance in this dispute and called upon the parties, in particular the United States, to put an end to this long-standing dispute. Chile hoped that this matter would soon be removed from the Agenda.

12. The representative of Costa Rica said that his country thanked the United States for its status report and reiterated the importance of complying with the provisions of Article 21.1 of the DSU, which highlighted the importance of prompt compliance with the DSB's rulings and recommendations. Costa Rica urged the United States to rapidly find a solution with the US Congress to ensure the full compliance with the DSB's recommendations and rulings, as indicated in the US status report.

13. The representative of Mexico said his delegation wished to recall that Articles 3.3 and 21.1 of the DSU stated that for the effective functioning of the WTO it was absolutely essential to ensure the prompt resolution of disputes. The prompt compliance with the DSB's recommendations and rulings was essential to guarantee the effective settlement of disputes for all Members. Mexico invited the parties to this dispute to keep in mind those principles and to take the necessary measures to comply with the DSB's recommendations, which would benefit the functioning of the WTO and its Members.

14. The representative of Paraguay said that her country supported the statement made by Cuba and called upon the United States to comply with the DSB's recommendations and rulings by repealing Section 211.

15. 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.85)

16. The Chairman drew attention to document WT/DS184/15/Add.85, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

17. The representative of the United States said that his country had provided a status report in this dispute on 10 December 2009, 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 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 by 23 November 2002, the US administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

18. The representative of Japan said that his country thanked the United States for its statement and its latest status report. Japan noted that, in its report, the United States had indicated that it had taken certain measures to implement part of the DSB's recommendations in November 2002. Japan hoped that the United States would soon be in a position to report to the DSB 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.

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

[2] Article 3.3 of the DSU.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.60)

20. The Chairman drew attention to document WT/DS160/24/Add.60, 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.

21. The representative of the United States said that his country had provided a status report in this dispute on 10 December 2009, in accordance with Article 21.6 of the DSU. The US administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

22. The representative of the European Union said that the United States had again reported non-compliance in this dispute, and the EU 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 it 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 soon brought to an end.

23. 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.23 – WT/DS293/31/Add.23)

24. The Chairman drew attention to document WT/DS291/37/Add.23 – WT/DS293/31/Add.23, 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.

25. The representative of the European Union said that the EU regulatory procedures on biotech products continued to work as foreseen in the legislation. The Commission had recently authorized four GM maize events, which would raise the number of GMOs authorized since the date of establishment of the Panel to twenty-five.

26. The representative of Argentina said that his country thanked the EU for its status report. Argentina was following closely all the developments regarding the approvals and any measures taken within the EU. In view of the very constructive dialogue, Argentina was very close to reaching a mutually agreed solution, under Article 3.6 of the DSU, with regard to this matter.

27. The representative of the United States said that his country thanked the EU for its status report and its statement. The United States recalled its concerns about the large number of biotech products backed up in the EU approval system. Approximately twice as many biotech products were awaiting approval now, compared to the number at the time the dispute had been initiated in 2003. The EU's failure to move forward in a timely manner on those applications for approval had the practical effect of imposing an import ban on important US agricultural products. In the last several weeks, the EU had finally approved four varieties of biotech maize. Those approvals, however, represented only a small fraction of the total backlog of pending applications. At the present meeting, the United States wished to return to another of its serious concerns with the EU's biotech approval process, namely, individual EU member States continued to ban certain biotech products even after those products had received EU-wide approval. The United States recalled that the DSB had found

that bans adopted by six EU member States on products approved at the EU-level were in breach of the EU obligations under the SPS Agreement. Almost two years after the end of the reasonable period of time for compliance in this dispute, the EU had yet to remove these member State bans in their entirety. Moreover, individual EU member States had continued to adopt new bans on products approved at the EU-level, despite the fact that the relevant EU scientific authorities had found these products to be safe. Moreover, most of these new bans covered the very same biotech products that were subject to the member State bans that the DSB had found to be in breach of SPS obligations. The United States urged the EU and the applicable member States to take prompt steps to lift these bans on biotech products approved at the EU-level. The United States thanked the DSB for its attention to this matter.

28. The representative of the European Union said that her delegation thanked Argentina and was looking forward to announcing the good news to Members at the next DSB meeting. With regard to the statement made by the United States, the EU was somewhat confused about the reference to the safeguard measures covered by the Panel Report. Her delegation understood the reference to new safeguard measures, which were not covered by the Panel Report. However, with regard to the ones covered by the Panel Report, she said that those measures were not in effect any longer and the EU would seek clarification on this from the United States bilaterally.

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

(e) European Communities – Regime for the importation, sale and distribution of bananas: Second recourse to Article 21.5 of the DSU by Ecuador: Status report by the European Union (WT/DS27/96/Add.11)

30. The Chairman drew attention to document WT/DS27/96/Add.11, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations and rulings in the case concerning its regime for the importation, sale and distribution of bananas.

31. The representative of the European Union said that her delegation was pleased to report that it had reached a historic agreement with Latin American banana suppliers in the previous week. This was not an easy task, since it had required striking a delicate balance of the different interests of all banana suppliers to the EU. The agreement, together with an agreement regarding the settlement of the case brought by the United States, had been initialled in Geneva on 15 December 2009. The EU hoped that this would bring a long-awaited peace on this thorny file. Those agreements provided for final settlement of all current disputes regarding the EU import regime on bananas upon certification of a new EU tariff schedule on bananas. This included the dispute that had been on the Agenda of the DSB since the adoption of the Appellate Body Report a year ago. Pending such final settlement, Latin American suppliers and the United States had committed themselves not to take any actions under the current disputes, provided that the EU complied with its obligations under the agreement. The so-called Geneva Agreement on Trade in Bananas brought to an end the long-standing negotiations with Latin American banana suppliers (starting already in 2004) regarding the modification of the EU tariff bindings on bananas. Furthermore, the agreement provided for an important progressive reduction of the EU applied and bound tariffs on bananas. Such tariff reduction commitments encompassed also the final EU tariff reduction commitments on bananas in the context of multilateral trade negotiations. The agreement had already been presented to the WTO Membership at the 17 December 2009 meeting of the General Council. The EU had now started internal procedures for the authorization of the signature and provisional application of the agreement, pending the conclusion of ratification procedures. Article 21.6 of the DSU stated that the implementation of the recommendations or rulings shall remain on the DSB's Agenda until the issue was resolved. The Geneva Agreement for Trade in Bananas set clear conditions for the final

settlement of the dispute brought by Ecuador, but the "resolution" of the issue was still some time away. The EU had barely emerged from the negotiations and, therefore, had not had the time yet to discuss this in detail with Ecuador. But in the spirit of cooperation and trust that had developed between the EU and Ecuador in the course of those negotiations, the two parties would work on a joint communication in order to remove this matter from the DSB's Agenda as of next year.

32. The representative of Ecuador said that his country thanked the EU for its status report. As notified to Members at the 17 December 2009 General Council meeting, on 15 December 2009, the Latin American banana suppliers had reached and initialled the Geneva Agreement on Trade in Bananas with the EU. Ecuador hoped that that Agreement would put an end to the longest legal dispute in the history of the GATT and the WTO. The Agreement provided for a number of phases, which had started with the initialling of the text by the parties, and would continue with their signature, and finally the certification of the modified schedule on bananas in the EU's WTO tariff concessions. Once the final phase of the agreement had been reached following Certification, the relevant parties to the Agreement would jointly notify the DSB that they had reached a mutually agreed solution under paragraph 5 of the Geneva Agreement on Trade in Bananas and Article 3.6 of the DSU. In the meantime, Ecuador reserved all its legal rights in respect of this dispute, and in respect of the surveillance of implementation of the recommendations and rulings of the DSB under Article 21.6 of the DSU. The Agreement still had to be signed, and Ecuador hoped that in the meantime, the EU would continue to inform Members periodically of its progress towards that objective on the domestic front. Ecuador was prepared to work with the EU on this matter and would continue to consult in this respect, as well as with regard to any other matter that might derive from, or relate to, the Agreement.

33. The representative of Panama said that his country was pleased to have reached an agreement with the EU and other Latin American producers on the exportation of Latin American bananas. The Agreement aimed at settling this dispute, which had lasted for nearly two decades. In Panama's view, the Agreement, which was the outcome of an arduous and delicate process, would provide an economically beneficial, legally sustainable and lasting solution to all of the parties involved. The initialling of the Agreement on 15 December 2009 did not yet mean the end of this dispute. The parties were now entering the phase of implementation of its provisions and of monitoring to ensure that the EU complied fully with its obligations, so that the Agreement could rapidly enter into force and provide an effective solution to the dispute. In this respect, plenty of work remained to be done and the various steps needed to be coordinated. Panama called on the EU to be as flexible as possible so that a mutually agreed solution could be notified to the DSB in the near future. Panama thanked all those who had contributed to reaching this agreement, including the Director-General and the EU Ambassador.

34. The representative of Colombia said that his country had participated in the negotiations with the EU aimed at reaching an agreement on trade in bananas. Colombia welcomed the conclusion of the negotiations and thanked all participating Members and the Secretariat for their commitment and efforts to achieve that result. The agreement would provide a solution to one of the longest-standing disputes in the WTO. Colombia would act in good faith and would do everything it could to ensure the entry into force of the Agreement. Colombia trusted that the other parties would do the same. Colombia hoped to be able to notify soon the DSB of a mutually agreed solution under the terms of the agreement. Colombia commended, in particular, the EU Ambassador for his patience, flexibility and persistence. What counted first and foremost was that all those involved should be able to turn this page of their history and look together towards the future with greater optimism.

35. The representative of India said that his country joined previous speakers in welcoming the information regarding the understanding reached between the EU and Latin American banana suppliers. India recognized that trade in bananas was vital to the economies of a number of Latin

American and ACP countries, and to this extent welcomed the fact that this understanding removed the contentiousness that had surrounded the issue for a number of years. However, India did not see any negotiating linkage between those issues, especially when the understanding on the treatment of tropical products and preference erosion did not incorporate the concerns of other Members with substantial trading interest in such products. India was, therefore, not in a position to accept such a linkage. India had waited long for the beginning of a multilateral negotiation on tropical products and preference erosion and in the coming weeks would expect the Chairman of the Special Session of the Committee on Agriculture to initiate such a process. It was only through such an inclusive and transparent process that Members could proceed towards a sustainable outcome with balance for the interest of all parties.

36. The representative of the United States said that his country was very pleased that, the previous week, the EU and various Latin American countries, including its co-complainants in this dispute, had successfully completed and initialled the Geneva Agreement on Trade in Bananas. As Members were aware, at the same time, the United States and the EU had also initialled an agreement intended to lead to a settlement of this long-standing dispute. It should not be forgotten that initialling those agreements was just a first step. There were still many steps that each country and, in particular, the EU would need to take for the agreements to be signed and fully implemented. Those agreements had only been initialled and the United States understood that there were various domestic procedures that the EU needed to undertake for signing and for entry into force. The EU should keep the DSB apprised of developments. The United States recalled that, at previous DSB meetings, it had requested that the EU provide status reports with respect to the US dispute and thus the United States renewed that request at the present meeting. The United States believed that a significant step towards achieving final settlement had been taken and looked forward to reaching that point as soon as possible.

37. The representative of Mexico said that his country joined Latin American countries and other Members in welcoming the Agreement, which had recently been initialled by the Latin American banana suppliers and the EU. Mexico hoped that that Agreement would soon be signed by the participants in the Memorandum of Understanding, in particular by the EU. Mexico also hoped that the initialled Agreement would be able to evolve and become a definitive solution to the dispute.

38. The representative of Cameroon said that his country wished to restate its position regarding the manner in which the Appellate Body and Panels had dealt with this case, in particular with regard to the points raised by Cameroon in the course of the proceedings. First, he said that the Appellate Body had not taken into account all the arguments submitted by Cameroon. He hoped that in future, in such cases, panels would be as fair as possible and would take into account all the elements put forward for reasons of equity and justice and give a response to each of the submitted arguments. Second, in Cameroon's view, the Appellate Body, in conducting its proceedings, should have duly taken into account the trading reality. The Appellate Body was not just a Body to rule in law but also to regulate trade. Cameroon welcomed the fact that this particular dispute would finally be closed, and hoped that future procedures would be held in accordance with the terms outlined above.

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

(f) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/34/Add.4)

40. The Chairman drew attention to document WT/DS294/34/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 laws, regulations and methodology for calculating dumping margins.

41. The representative of the United States said that his country had provided a status report in this dispute on 10 December 2009, 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.

42. The representative of the European Union said that the United States had provided its fifth status report in this dispute. As was the case with the four previous reports, the status report confirmed that the United States had not taken any action whatsoever to correct the shortcomings in its implementation. Furthermore, there was no implementing action despite the fact that the reasonable period of time for implementation in this dispute had expired on 9 April 2007. There had been no implementing action despite the fact that the Report of the Appellate Body and the Panel Report, as modified by the Appellate Body, in the compliance proceedings for this dispute, had been adopted by the DSB six months ago. Finally, there was no implementing action despite implementation apparently being subject to the discretion of the US administration and, therefore, accomplishable by administrative action. For the fifth time, the United States was merely telling Members what it had done in 2007. The EU was already well aware that the United States had taken some actions in February 2007 to cease zeroing in weighted-average-to-average comparisons in original investigations. However, as the Panel and the Appellate Body Reports in this dispute had confirmed, that was not enough. The real problem was the use of zeroing in reviews, both administrative reviews (on the basis of which a large percentage of anti-dumping duties paid were collected) and sunset reviews, where "zeroed" margins of dumping were used to justify the continuation of duties. 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 was to bring itself into full compliance without further delay.

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

(g) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.3)

44. The Chairman drew attention to document WT/DS322/36/Add.3, 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.

45. The representative of the United States said that his country had provided a status report in this dispute on 10 December 2009, in accordance with Article 21.6 of the DSU. As noted in that status report, the United States had taken steps to implement the DSB's recommendations and rulings in this dispute. With respect to the outstanding issues, the United States would continue to consult with interested parties in order to address those issues.

46. The representative of Japan said that his country thanked the United States for its statement and its latest status report. The United States had stated in its reports that it "[would] 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 this statement as an expression of commitment by the United States to bring into conformity the measures found to be inconsistent with the Anti-Dumping Agreement and the GATT 1994. Japan recalled that, the adopted reports contained, among others, the finding that the use of zeroing in the subsequent periodic reviews Japan had challenged in the compliance proceedings was inconsistent with Articles 2.4 and 9.3 of the

Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Japan called on the United States to meet its commitment by taking immediate and concrete action to fully comply with the DSB's recommendations and rulings in order to resolve this dispute.

47. The representative of the European Union said that her delegation continued to be disappointed 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.

48. The representative of the United States said that, while his country appreciated Members' concerns that compliance should be prompt, the United States noted that perhaps the EU was not the Member best positioned to be raising such concerns before the DSB.

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

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

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

51. The representative of the United States said that his country had provided a status report in this dispute on 10 December 2009, 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.

52. The representative of the European Union said that her delegation thanked the United States and noted its first status report in this dispute. This was the third time that the issue of US zeroing was on the Agenda of the present DSB meeting under the Agenda item on surveillance of implementation of recommendations adopted by the DSB. The EU was concerned that this 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. At the 20 March 2009 DSB meeting, the United States had stated that it intended to implement the DSB's recommendations and rulings in this dispute, but that it was impracticable for it to comply immediately and that it would, therefore, require a reasonable period of time for implementation. As a result, the EU and the United States had agreed that the reasonable period of time to implement the DSB's recommendations and rulings would be ten months, a rather generous time-frame for implementation in view of the over 20 panel and Appellate Body reports condemning zeroing that had been adopted by the DSB to date, and in view of the statements by the United States itself that the calculation of anti-dumping duties with (or without) zeroing was done simply by pressing a button, which in turn triggered the "zeroing" computer code.

53. The EU was deeply disappointed over the fact that practically nothing had been done during the reasonable period of time, which had been agreed to address the relevant issues in this dispute. The status report presented by the United States at the present meeting referred to a written request by the USTR to the Secretary of Commerce to issue a determination 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). While it would appear that draft results for the above-mentioned four measures could be expected by 18 December 2009, the final results were only due in 2010. The EU, therefore, noted that the deadline of 19 December would be missed with regard to the four measures above. However, the EU had far deeper concerns with regard to this matter. The Section 129 proceeding appeared to have taken no account of the other findings of the Panel and the Appellate Body Reports adopted by the DSB on 19 February 2009. In the present dispute, the EU had challenged measures relating to 18 anti-dumping cases. In particular, the Appellate Body had concluded that the use of zeroing by the United States in measures covering 34 administrative reviews and eight sunset reviews was in breach of WTO rules, yet none of these appeared to have been included in the Section 129 proceeding. In addition, 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 have been WTO-inconsistent.

54. Furthermore, for the other 14 cases (including the four for which the Section 129 proceeding had already been initiated), the established case law made it clear that reviews conducted subsequent to the challenged measure must be free of zeroing. The Panel and the Appellate Body Reports in the case: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) – Recourse to Article 21.5 of the DSU by the European Communities" (DS294) had also made it clear that the United States was required, at the end of the reasonable period of time, 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. To date the United States appeared to have done nothing to address any of the above issues. All the EU could say to describe what the United States had done to bring itself into compliance with the DSB's recommendations and rulings in this dispute was: too little, too late.

55. The representative of the United States said that his country was sure that Members appreciated the difficulties that were raised for the United States by the Appellate Body's findings on zeroing in this dispute and others. As had been noted, with respect to each of the four investigations found inconsistent in this dispute, the US Trade Representative had made a written request to the Secretary of Commerce to issue a determination under Section 129(b) of the Uruguay Round Agreements Act not inconsistent with the DSB's recommendations and rulings. The United States was still consulting with interested parties in order to address the other findings in this dispute.

56. 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

57. 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.

58. The representative of Japan said that US Customs and Border Protection had just issued the CDSOA Annual Reports for FY2009.[3] According to the reports, some US$248 million had been disbursed for FY2009. This amount appeared to have been higher than the amount distributed for the previous year, FY2008. 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.

59. The representative of the European Union said that, as in many previous DSB meetings, her delegation 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.

60. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the Agenda of the DSB. As had previously been stated, Brazil was of the view that the United States was required to submit status reports in this dispute until such time as no more disbursements were made pursuant to the Byrd Amendment. Only then would the issue 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.

61. The representative of India said that his country thanked Japan and the EU for raising this important issue before the DSB. As Japan had pointed out, the CDSOA remained fully operational and allowed even higher disbursements by the US administration to its domestic industry. These facts continued to raise concerns to WTO Members. India wished to know from the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to its domestic industry and finally put an end to the condemned measure. As previously reiterated, India was concerned that non-compliance by Members eroded the credibility of the WTO dispute settlement system.

62. The representative of Thailand said that his country thanked the EU and Japan for, once again, bringing this item before the DSB. Thailand continued to urge 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.

63. The representative of China said that her country thanked the EU and Japan for, once again, having raised 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.

64. 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.

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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

65. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President 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 further recalled that Members had acknowledged, during previous DSB meetings, that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

66. The DSB took note of the statements.

3. China – Measures related to the exportation of various raw materials

(a) Request for the establishment of a panel by the United States (WT/DS394/7)

(b) Request for the establishment of a panel by the European Communities (WT/DS395/7)

(c) Request for the establishment of a panel by Mexico (WT/DS398/6)

67. The Chairman proposed that the three sub-items to which he had just referred be considered together. He recalled that the DSB had considered these matters at its meeting, on 19 November 2009, and had agreed to revert to them. He then drew attention to the communication from the United States, contained in document WT/DS394/7, and invited the representative of the United States to speak.

68. The representative of the United States said that, as his country had explained at the DSB meeting on 19 November 2009, the United States was concerned about Chinese measures that restrained the exportation of certain raw materials that were critical to US manufacturing industries. These restraints not only limited the availability of those raw materials, but also increased the cost of those raw materials to US and other producers outside of China, while providing an artificial cost advantage to downstream industries within China. The materials at issue were either raw or initially processed materials that were essential inputs in the production of steel, aluminium, and industrial chemicals with far-ranging applications. The export restraints at issue included export quotas, export duties, minimum export pricing, various restrictions on the right to export, as well as administrative requirements that increased the burdens and costs for exporting these materials from China. As had been described in more detail in the US panel request, these restraints appeared to be inconsistent with the provisions of the GATT 1994 and China's Protocol of Accession. At the DSB meeting of 19 November 2009, China had mentioned the dialogue between the United States and China on this issue. The United States also regretted that significant US engagement over many years had not resulted in the lifting of the Chinese measures restricting the export of the raw materials at issue. Accordingly, the United States again requested that the DSB establish a panel to examine the matter set out in its panel request with standard terms of reference. The United States further requested, pursuant to Article 9.1 of the DSU, that a single panel be established to examine the complaints of the United States, the EU and Mexico.

69. The Chairman drew attention to the communication contained in document WT/DS395/7, 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 make a second request for the establishment of a panel in this dispute. As had been noted during the previous DSB meeting, the consultations, while helpful in clarifying the Chinese measures and their application, had provided no basis for a negotiated solution to the dispute. Furthermore, as had been previously noted, the Chinese export restraints on raw materials were by no means a recent phenomenon. The restraints had been a problem at the time of China's accession to the WTO, and they remained so now. The EU believed that the restraints constituted a violation of not only provisions of the GATT, but also specific commitments undertaken by China upon accession, commitments which aimed specifically at those types of export restraints. With the second request for the establishment of a panel, the EU was seeking the re-establishment of a level playing field by ensuring China's observance of its WTO obligations. The EU requested, pursuant to Article 9.1 of the DSU, that a single panel be established to examine the complaints of the EU, the United States and Mexico.

71. The Chairman drew attention to the communication from Mexico contained in document WT/DS398/6, and invited the representative of Mexico to speak.

72. The representative of Mexico said that, like the United States and the EU, Mexico had requested the establishment of a panel in this case at the 19 November 2009 DSB meeting. However, it was impossible to establish a panel at that meeting because of China's objection to do so. Thus, Mexico's panel request was now on the DSB Agenda for the second time. In accordance with Article 6.1 of the DSU, Mexico, once again, requested that a panel be established, and referred to the statement made by Mexico at the 19 November 2009 DSB meeting. Mexico also requested, in accordance with Article 9.1 of the DSU, the establishment of a single panel to examine the cases brought by Mexico, the United States and the EU. At the same time, Mexico remained open to the possibility of working with China, with the cooperation and mutual support of the United States and the EU, in order to find a mutually satisfactory solution to this dispute.

73. The Chairman invited the representative of China to speak.

74. The representative of China said that her country was disappointed that the United States, the EU and Mexico had decided to pursue their requests for panel establishment at the present meeting. China was of the view that such action was not conducive to the resolution of the matter given that, at the 19 November 2009 DSB meeting, China had explained the policy objectives of its measures and had expressed its readiness to continue the dialogue with relevant Members. Having said that, China understood that a panel would be established and looked forward to defending its rights and interests before the panel. However, China had certain concerns with the way in which the three complainants had framed their panel requests. China regretted that its ability to prepare its defence in those disputes had been impaired by the complainants' failure to observe the requirements for panel requests, as required under Article 6.2 of the DSU. For example, in Section II of the complainants' panel requests, titled "Export Duties", each had alleged that China's measures were inconsistent with its obligations "under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments referred to in paragraph 342 of the Working Party Report". Paragraph 342 of the Working Party Report incorporated "commitments given by China in relation to certain specific matters" addressed in well over 100 separate paragraphs of the Report. China considered that the reference to paragraph 342 alone was insufficient to identify the legal basis of the claims made in this regard. By way of further example, Section III of the Complainants' Panel Requests, titled "Additional Restraints Imposed on Exportation", described various "complaints", and listed 37 "measures", along with 13 treaty provisions. However, the requests had failed to make any connection between: (1) the "complaints" and the "measures"; (2) the "measures" and the treaty provisions; and, (3) the treaty provisions and the "complaints". As a result, the complainants' requests were "[in]sufficient to present the problem clearly", within the meaning of Article 6.2 of the

DSU. In those and other respects, the three complainants had prejudiced China's ability to prepare its defence. Since the complainants wished to proceed with panel establishment, China would seek a preliminary ruling on the requests' consistency with Article 6.2 of the DSU.

75. The DSB took note of the statements and agreed to establish a single panel pursuant to Article 9.1 of the DSU, with standard terms of reference, to examine the complaint by the United States contained in WT/DS394/7, the complaint by the European Communities contained in WT/DS395/7 and the complaint by Mexico contained in WT/DS398/6.

76. The representatives of Argentina, Brazil, Canada, Chile, Colombia, Ecuador, the European Union, India, Japan, Korea, Mexico, Norway, Chinese Taipei, Turkey and the United States reserved their third-party rights to participate in the Panel's proceedings.

4. 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)

77. The Chairman drew attention to the communication from China contained in document WT/DS399/2, and invited the representative of China to speak.

78. The representative of China said that, on 11 September 2009, the United States had announced the imposition of product specific safeguard on imports of certain passenger vehicle and light truck tyres from China pursuant to section 421 of the Trade Act of 1974. Three days thereafter, on 14 September 2009, China had requested consultations with the United States. Those consultations had been held in November 2009 in Geneva, but the two sides failed to reach a mutually satisfactory resolution. Therefore, China had to request the DSB to establish a panel to examine this matter. China, once again, expressed its deep regret towards the US decision to impose product-specific restrictions on imports of certain tyres from China. Since the start of the financial crisis, world leaders had reiterated in many forums, including the G20 summits, to oppose protectionism and that the free flow of trade was in the fundamental interests of the world. The US tyre industry also opposed the imposition of product specific safeguard measures, and deemed that the imports from China did not cause injury to them. Under the circumstances, the US imposition of restrictions on tyres from China was a compromise to the pressure of US domestic protectionism interests. This restriction was a departure from international consensus, impaired China's interests and also the US interests. What also needed to be pointed out was that US determinations ran short of factual bases and breached its obligations under the WTO. First, there was no rapid increase of imports from China since 2007. According to China's customs data, the increase from 2007 to 2008 was 2.2 per cent , and the data of the first half of 2009 decreased by 16 per cent from 2008. Second, the imports from China did not have a causal link with material injury of the US tyre industry. The biggest increase of imports from China had taken place in 2007 which was the most profitable year for the US tyre industry. The closure of factories was just a strategic choice made by the US industry to restructure and focus on the high end of the market and was not a result of China's imports. Third, the higher tariff imposed on tyres from China would not remedy the US tyre industry, but would hinder the industry's restructure process. In addition, the US statute authorizing those restrictions, namely Section 421 of the US Trade Act of 1974, was inconsistent on its face with Section 16 of the Protocol of Accession in that the US statute impermissibly weakened the standard of "significant cause" by imposing a definition of the term that contradicted Section 16(4) of the Protocol of Accession of China. China firmly believed that, to cope with the financial crisis, the most important thing for countries was to consult and cooperate. Any unfair, unreasonable protectionist measure would injure the country imposing such a measure as well as its trade partners. As a country with a tremendous

trade volume, the United States should undertake its own obligation to secure a fair and free trade environment in the world.

79. 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. The United States was 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 in a position to agree to the establishment of a panel at the present time.

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

5. Philippines – Taxes on distilled spirits

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

81. The Chairman 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.

82. The representative of the European Union said that, regrettably, her delegation found itself left with no choice but to request the establishment of a panel in this dispute. While the consultations had been helpful in clarifying the Philippine measures and their application, there had been no basis for a negotiated solution to the dispute. More regrettably, recent statements by members of Congress in the Philippines gave no prospect to the passing of a bill that would remedy the situation. The EU noted that this was a case of a long-standing tax discrimination that had only worsened over the years. Currently, imported spirits were subject to an excise tax ten to 50 times higher than the tax imposed on domestic spirits. This had 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. By requesting the establishment of a panel, the EU was seeking to ensure the Philippines' observance of its WTO obligations.

83. The representative of the Philippines said that his country regretted that the EU had chosen to request the DSB to establish a panel to examine this matter, given that the Philippines continued to positively engage with the EU on the issue of its excise tax regime for distilled spirits. The Philippines was fully committed to the rules-based multilateral trading system. As a matter of policy and practice, the Philippines accorded utmost importance to complying with all its obligations under the WTO Agreements and firmly believed that its excise tax regime was fully consistent with its WTO obligations. The Philippines and the EU shared the common vision of economic development, growth and trade liberalization, which was rooted in a fair, non-discriminatory, transparent and predictable regulatory environment in which economic operators from both countries could prosper. The Philippines hoped that this matter could still be resolved to the mutual satisfaction of all the parties if the respective interests, legitimate sensitivities, and policy objectives of all sides were taken into account to balance their respective interests. Therefore, the Philippines believed that it would be premature to establish a panel, and was thus not able to agree to the establishment of such a panel at the present time.

84. The representative of the United States said that his country had been closely following this issue and would continue to do so. The United States had participated in the consultations that were held between the EU and the Philippines in this dispute and was concerned about the Philippines' excise tax system and its effect on market access for US exports of distilled spirits. The United States

urged the Philippines to address the concerns that had been raised, and hoped that the Philippines would soon take action to resolve this issue.

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

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/417)

86. The Chairman drew attention to document WT/DSB/W/417, which contained additional names 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 names contained in document WT/DSB/W/417.

87. The DSB so agreed.

7. United States – Subsidies on upland cotton

(a) Statement by Brazil

88. The representative of Brazil, speaking under "Other Business", said that Brazil's internal procedures were underway with a view to defining countermeasures that could be imposed by Brazil in connection with the "US - Cotton" dispute. Brazil thanked the United States for its response to the letter it had sent, on 25 September 2009, requesting some data that, in accordance with the Arbitrators' Decisions, was required to update the value of the countermeasures authorized to Brazil. For the sake of transparency, Brazil informed the DSB that, on the basis of complete data related to fiscal year 2008 and calendar year 2008, obtained from the United States and other sources indicated by the Arbitrator, the total amount of countermeasures authorized to Brazil would be US$829.3 million. On the basis of the same period, the threshold above which Brazil was entitled to take countermeasures in other sectors and agreements outside trade in goods would be US$561 million.

89. The representative of the United States said that his country had taken note of Brazil's statement and would refer it to authorities in capital.

90. The DSB took note of the statements.