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Dispute Settlement Body
20 May 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 May 2008

Chairman: Mr. Mario Matus (Chile)

Prior to the adoption of the Agenda, the representative of Ecuador said that his country wished to request that the item concerning the adoption of the Panel Report entitled: "European Communities – Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador" (WT/DS27/RW2/ECU) be removed from the proposed Agenda due to the interest of the Government of Ecuador to allow more time for the ongoing negotiations in order to resolve this long-standing dispute. He further indicated that Ecuador would be requesting that a special meeting of the DSB be held before 7 June 2008 in order to consider the adoption of the above-mentioned Panel Report.

The Chairman proposed that, in accordance with Rule 6 of the Rules of Procedure for meetings of the DSB, and as requested by Ecuador, the item related to the adoption of the Panel Report contained in WT/DS27/RW2/ECU, be withdrawn from the proposed Agenda.

The DSB 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.66)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.66)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.41)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.4 – WT/DS292/31/Add.4 – WT/DS293/31/Add.4)

1. The Chairman recalled that Article 21.6 of the DSU required 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.66)

2. The Chairman drew attention to document WT/DS176/11/Add.66, 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 8 May 2008, 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 Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that it had been more than six years since the United States had been in breach of the TRIPS Agreement. And, the EC was still counting and waiting for the United States to implement the DSB's ruling and to respect its obligations under the TRIPS Agreement. The EC hoped that the bipartisan bills introduced to repeal Section 211 would finally progress and put the United States into compliance with its TRIPS obligations.

5. The representative of Cuba noted, with regret, that delegations could easily predict what was to be reported under this Agenda item at each regular DSB meeting. It seemed that the US administration would need many more years in order to be able to bring its legislation into line with its WTO obligations. The Marrakesh Agreement, which had established the WTO, stipulated clearly and unequivocally, in Article XVI:4, that Members shall ensure that their laws, regulations and administrative procedures be in conformity with the WTO Agreements. Cuba was surprised to hear,

at the previous regular DSB meeting, that the United States had refused to be called a non-complying Member because the United States considered that it had complied in the majority of its disputes. However, the United States had been involved in the largest number of disputes either as a defendant or a complainant. According to the information available on the WTO website, the United States had participated as a defendant in 99 disputes and as a complainant in 89 disputes. The Agenda of the present meeting further demonstrated the US failure to comply with its obligations in relation to the disputes under continued surveillance by the DSB.

6. It was well known that Cuba had a significant interest in this dispute. Although Cuba was not a party to this dispute, it had condemned and would continue to condemn the situation of non-compliance, as had also been done by other Members. Section 211 undermined the interest of Cuban trademark owners. This was unacceptable and violated the WTO and the WIPO Agreements. Concerns regarding this situation had gone beyond the dispute settlement system, and questions had been raised over the system's credibility and viability. The way the dispute settlement system worked was now being questioned by WTO Members. Academics and non-governmental organizations were also focusing their attention on the system. Reforms of the system were needed urgently. Those reforms should include putting into place effective measures against non-complying Members in order to ensure the balance of rights and obligations of all developed and developing Members, under equal conditions and without discrimination.

7. The annual report by the Deputy US Trade Representative underlined the increasing importance of intellectual property rights, and the enforcement of those rights, for the US economy. The report, approved by the US Congress, contained a Priority Watch List stipulating countries on which the United States could impose trade sanctions. Cuba believed that this information was useful to other Members and invited them to reflect on this. Cuba questioned whether the United States could press other countries to comply or could impose trade sanctions for failing to comply with intellectual property rules without first bringing its legislation into line with its international obligations. He recalled that Section 211 had been promoted by the Bacardi company to enable the products with the Havana Club trademark to have access to the US market. This was called: "trademark counterfeiting". Therefore, in addition to violating the TRIPS Agreement and the Paris Convention, Section 211 favoured an offence. This type of offence was of concern to the United States, however only when such an offence was committed by other countries. Cuba requested the immediate repeal of Section 211 since the continued delay in the settlement of this dispute was damaging to the parties involved and cast doubt on the DSU provisions, the functioning of the DSB and the multilateral trading system.

8. The representative of Brazil said that his country wished to express, once again, its concerns about the continuous non-compliance situation in this case. It should be emphasized that the US position in this dispute jeopardized one of the foundations of the WTO, namely, the settlement of disputes amongst Members. Brazil urged the United States to comply with the decisions and rulings of the DSB.

9. The representative of India said that her country thanked the United States for the status report and the statement made at the present meeting. India wished to renew its systemic concerns about this situation arising out of non-compliance in this dispute. Despite the adoption of the Panel and the Appellate Body Reports by the DSB in this case several years ago, Members were still waiting for implementation and compliance by the United States. India wished to reiterate that non-compliance of the DSB's recommendations and rulings by any Member undermined the dispute settlement system, which was one of the main achievements of the Uruguay Round negotiations.

10. The representative of Thailand said that his country 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 China said that his country thanked the United States for its status report and the statement made at the present meeting. Once again, China wished to reiterate its systemic concerns about the protracted implementation process in this dispute. China hoped that the current US Congress would realize that it was in the interest of not only other Members, but also in the interest of the United States, to put an end to this situation which damaged the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. Therefore, China urged the United States to make an extra effort to bring itself promptly into conformity with the decision of the DSB.

12. The representative of Viet Nam said that this matter had been on the Agenda of the DSB for six years. Viet Nam was a new WTO Member, and since it had first attended a DSB meeting, one year ago, it had not seen any progress regarding this dispute, and did not know how long this non-compliance situation would last. In order to preserve Members' confidence in the dispute settlement system, Viet Nam, once again, urged the party concerned to respect the DSB's rulings.

13. The representative of Mexico said that the DSU stated that: "prompt compliance with recommendations or rulings of the DSB" was essential in order to ensure the effective resolution of disputes "to the benefit of all Members" (Article 3.3). Mexico, therefore, urged the parties to this dispute to take the necessary steps to comply with the DSB's recommendations and rulings to the benefit of all Members.

14. The representative of the United States said that his delegation noted that the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As noted by one of the speakers, the number of disputes in which the United States had been involved was substantial. As for the remaining few instances where US efforts to do so had not yet been entirely successful, such as the dispute under discussion, the United States continued to work actively towards compliance.

15. The representative of Cuba said that his delegation wished to respond to the second statement that had just been made by the United States. Cuba considered that the DSB's rulings and recommendations did not constitute an optional menu from which one could choose what type of decisions should or should not be implemented. For years, in different legislatures of the US Congress, there had been several bipartisan draft bills to comply with the DSB's ruling on Section 211. However, none of them had been passed because the US Government had done nothing to promote them. On the contrary, it had manoeuvered to create obstacles in order to avoid their adoption.

16. 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.66)

17. The Chairman drew attention to document WT/DS184/15/Add.66, 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.

18. The representative of the United States said that his country had provided a status report in this dispute on 8 May 2008, 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.

19. The representative of Japan said that his country thanked the United States for its statement and the most recent status report. Japan acknowledged that, in November 2002, the United States had taken certain measures to implement part of the DSB's recommendations. The fact remained, however, that the remaining part of the recommendations had not yet been implemented and the issue of implementation in this case was still on the DSB Agenda. Japan strongly hoped that the United States would soon be in a position to report to the DSB on more tangible progress in this long-standing dispute. A full and prompt implementation of the DSB's recommendations and rulings was essential for maintaining the credibility of the WTO dispute settlement system. Japan urged the United States to come into full compliance with its obligations without further delay.

20. 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.41)

21. The Chairman drew attention to document WT/DS160/24/Add.41, 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.

22. The representative of the United States said that his country had provided a status report in this dispute on 8 May 2008, 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 shared the EC's goal of discussing how a mutually satisfactory solution to this dispute could be achieved.

23. The representative of the European Communities said that there was nothing much to say, because nothing much had been happening in previous years. The EC was still waiting for compliance.

24. 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 Communities (WT/DS291/37/Add.4 – WT/DS292/31/Add.4 – WT/DS293/31/Add.4)

25. The Chairman drew attention to document WT/DS291/37/Add.4 – WT/DS292/31/Add.4 – WT/DS293/31/Add.4, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

26. The representative of the European Communities said that the EC was glad to report, once more, that good faith cooperation between the complainants and the EC continued. The EC kept a regular dialogue with the three complainants and held regular technical meetings, which were aimed at addressing all relevant biotech-related issues of their concern. Further technical meetings with the complainants were already foreseen to take place in June 2008. Progress in the processing of pending applications continued. As reported at the previous DSB meeting, another GM product was authorized by the end of March; this made 16 authorizations since the establishment of the WTO panel, seven in 2007 only. Two more draft authorization decisions had been introduced and were now

being processed within the EC institutions. The EC was also pleased to report progress in relation to the national safeguard measures covered by the panel report. On 7 May, two decisions had been adopted requesting Austria to lift its bans on import and processing of GM maize MON810 and T-25. The EC believed that, given the inevitably sensitive nature of biotech issues, dialogue was the appropriate way forward. The EC remained open to continue discussions with the three complainants.

27. The representative of the United States said that his country thanked the EC for its written status report and for its statement made at the present meeting. The reasonable period of time for the EC's compliance in DS291 had expired on 11 January 2008. Five years had passed since the United States had filed its consultation request in May 2003, yet the issues covered in the dispute remained unresolved. The commercial impact of this dispute was significant and would only increase over the coming months. Moreover, the recent rise in world food prices reinforced the importance for timely, science-based decisions on biotech crops. The EC had just cited progress in making approvals. The United States understood, however, that no applications had been approved since the last DSB meeting. Accordingly, over 40 biotech applications remained pending in the EC's biotech approval process. Furthermore, the United States understood that on 7 May, the European Commission had decided to send six pending biotech applications back to an EC scientific authority for further review. The Commission had done so notwithstanding the fact that each of these applications had already received a positive safety assessment from that same authority. A brief discussion of the history of one of those applications – the application for the cultivation of BT-11 maize – served as an instructive example of why the United States continued to have serious concerns with the EC's approval process. To be clear, this was a different product application than the application discussed at the previous DSB meeting.

28. The BT-11 maize application had first been filed in May 1996 – 12 years ago. In November 2000 – over seven years ago – an EC scientific body had issued a positive safety assessment. Notwithstanding that assessment, the EC had failed to move the product forward in its approval process. For this reason, the DSB had ruled that the EC's consideration of BT-11 was subject to undue delay, in breach of the EC's obligations under the SPS Agreement. Effective October 2002, the EC had adopted new biotech approval legislation. In January 2003 – over five years ago – the BT-11 application had been resubmitted under that legislation. In April 2005, an EC scientific body had, once again, issued a positive safety assessment. Under the EC legislation, the application should have moved forward in the approval process, but, again, had not been allowed to do so.

29. Now, three years later, the European Commission was sending the application back yet again to the EC scientific body for further review. As the United States understood it, the Commission had asserted that further review was needed because of the availability of additional scientific studies. But based on this rationale, no new product – whether it resulted from the application of modern biotechnology or otherwise – could ever be approved, because scientific knowledge was always evolving. As the DSB found in this dispute: "Evolving science, scientific complexity and uncertainty, and limited available scientific information or data are not, in and of themselves, grounds for delaying substantive approval decisions, and ... the SPS Agreement does not envisage that Members in such cases defer making substantive SPS decisions". In sum, the history of the BT-11 application, which had first been submitted 12 years ago, helped to illustrate the ongoing problems with the EC's biotech approvals. Despite its concerns with the EC's actions concerning the approval of biotech products, the United States at this point continued to seek a resolution through a dialogue with the EC. The United States continued to hope that the EC would take the steps necessary to resolve this dispute without further DSU proceedings.

30. The representative of Argentina said that his country wished to thank the EC for the status report regarding new developments on this matter. Argentina would continue to work in a positive spirit with the EC in implementing the DSB's recommendations on the basis of the work done thus far, as agreed by the two parties to the dispute.

31. The representative of Canada said that her country thanked the EC for its status report. Canada continued to monitor closely the progress achieved on this matter. Canada hoped and was confident that the EC would follow all of the necessary steps to resolve this dispute in a manner satisfactory to all parties, given that the reasonable period of time to implement was set for the end of June 2008.

32. The representative of the European Communities said that the EC was working on the two applications referred to at the present meeting. In line with the EC rules, the Commission would make a proposal for a decision once EFSA had had the opportunity to review the new scientific information brought to the attention of the Commission in relation to these applications. The GMO regulatory regime was working normally, as could be demonstrated by the seven authorizations granted in 2007 (15 since the establishment of the WTO panel in August 2003) and the authorization of a GM maize on 28 March 2008. Four more applications were in the final stage of the authorization procedure and two draft authorization decisions had been transmitted to the Council for a vote. The approval of the other two applications would be discussed at upcoming relevant Council meetings.

33. 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

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

35. The representative of the European Communities said that the position of the EC was well-known. The repeal of a WTO-incompatible legislation that would not produce effects before several years could not be considered as full implementation of the DSB's ruling. Therefore, 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.

36. The representative of Japan said that the United States claimed that, because the Deficit Reduction Act had been signed into law in February 2006, the CDSOA was now repealed and no further actions were necessary on the part of the United States. However, the latest distributions for 2007 fiscal year, announced in December 2007[1], demonstrated that the CDSOA continued to transfer financial resources from the foreign producers/exporters to their US domestic competitors.[2] Thus the CDSOA remained operational with its "essential feature" and "the decisive basis" for the Appellate Body's conclusion[3] still intact. Under these circumstances, Japan failed to understand why the United States had posited that there was no basis for Japan to state that the CDSOA continued to cause negative trade impacts on Japan and other WTO Members. Japan, once again, urged the United States to immediately terminate the illegal distributions and to 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 with its obligations.

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[1] "FY2007 Annual Disbursements Report", issued by the *US Customs and Border Protection* on 5 December 2007. The total amount of these disbursements is some US$262 million.

[2] Appellate Body Report, "US - Offset Act" (Byrd Amendment), paras. 255 and 259.

[3] Ibid. para. 259.

37. The representative of Canada said that her country thanked the EC and Japan for keeping this matter on the Agenda of the DSB. Canada agreed with the EC and Japan that the CDSOA remained subject to the surveillance of the DSB until the United States ceased to administer it.

38. The representative of China said that his country thanked the EC and Japan for, once again, raising this item at the DSB meeting. China supported the view of the previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings.

39. The representative of Brazil said that his country thanked Japan and the EC for keeping this issue on the Agenda of the DSB. Brazil was concerned that non-compliance by the United States in this dispute would undermine the credibility of the WTO dispute settlement system. The disbursements made by the United States to its domestic industry under the Byrd Amendment affected the rights of other WTO Members. Brazil reiterated the need for the United States to bring this situation to an end and to fully implement the DSB's recommendations and rulings.

40. The representative of Thailand said that first his country wished to thank the EC and Japan for continuing to bring this item before the DSB. Thailand joined previous speakers in expressing ongoing disappointment that the United States continued to illegally disburse funds under the CDSOA, and continued to refuse to submit status reports in this dispute. Thailand, therefore, again urged the United States to provide a status report until the United States brought its actions into full conformity with its WTO obligations, and until this matter had been fully resolved.

41. The representative of India said that her country thanked the EC and Japan for maintaining this issue on the Agenda of the DSB and joined those delegations in urging the United States to eliminate the trade-distorting effects of the disbursements under the Byrd Amendment. The United States was still distributing disbursements under the CDSOA to the US domestic industry as a result of this WTO-inconsistent measure, at the expense of foreign producers and exporters and of WTO Member's rights. India, therefore, urged the United States to cease its WTO-inconsistent disbursement. India supported the view that continued surveillance by the DSB was needed.

42. 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. In its statement, the EC appeared to state that the United States had not implemented the DSB's recommendations and rulings in this dispute. In this regard, the United States noted that in a dispute for which the panel report had recently been circulated, the EC had strongly advocated the position that a Member could not state at a DSB meeting that a measure taken to comply by another Member was not consistent with that Member's WTO obligations, unless the Member had had recourse to dispute settlement proceedings with respect to that measure. The United States, therefore, remained particularly surprised by the statements made by the EC at the present meeting and several recent ones.

43. With respect to the comments regarding further status reports and DSB surveillance 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 made in the implementation of the DSB's recommendations and rulings.

44. The DSB took note of the statements.

3. United States – Final anti-dumping measures on stainless steel from Mexico

(a) Report of the Appellate Body (WT/DS344/AB/R) and Report of the Panel (WT/DS344/R)

45. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS344/9 transmitting the Appellate Body Report on: "United States – Final Anti-Dumping Measures on Stainless Steel from Mexico", which had been circulated on 30 April 2008 in document WT/DS344/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 dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

46. The representative of Mexico said that the United States had been applying countervailing and anti-dumping duties on Mexican exports of stainless steel sheet and strip in coils since 8 June 1999, using the so-called zeroing methodology to calculate the duties in both the original investigation and the subsequent periodic reviews. Mexico had sought and awaited a solution to this problem. On 30 April 2008, the Appellate Body had finally ruled in favour of Mexico, reversing certain aspects of the Panel Report that had been appealed and reiterating that the zeroing methodology was WTO-inconsistent. Mexico considered that these proceedings could have been avoided, given previous Appellate Body rulings of inconsistency of zeroing with the Anti-Dumping Agreement. However, the United States had refused to fully comply with the previous DSB's recommendations. Therefore, Mexico had been compelled to initiate its own proceedings. Mexico welcomed this important ruling of the Appellate Body as well as those elements thereof which gave hope that this would be the last time that the inconsistency of the zeroing methodology had to be brought before a panel. This would avoid further proceedings and would save costs and time spent to examine the same issues. Mexico also thanked the third parties to this dispute for their written and oral submissions supporting positions similar to those of Mexico. Mexico was confident that the United States would fully comply with the DSB's recommendations and rulings in this dispute. In Mexico's view, this would require the United States to abstain from applying the zeroing methodology in future periodic reviews and to eliminate zeroing from the specific measures challenged by Mexico in its "as applied" claims.

47. The representative of the United States said that his country would first like to welcome the Panel Report being adopted at the present meeting. The United States commended the Panel for the professional job that it had performed in this dispute, for its careful analysis of the relevant provisions of the Anti-Dumping Agreement and the GATT 1994 and for taking so seriously its responsibility to Members to conduct an objective examination of the matter placed before it. It was clear from the Panel's Report that the Panel had not lightly chosen not to follow the earlier Appellate Body reports on zeroing. It would have been far simpler, not to mention far more popular, for the Panel just to go along with what the Appellate Body had said on this subject. However, the Panel had clearly been deeply troubled by the flaws in the logic and approach of those previous reports.

48. In light of the Panel's careful examination and obvious struggle in attempting to reconcile the agreed text of the WTO Agreements with statements made by the Appellate Body in its prior reports, it would have seemed that this Appellate Body division would have felt called upon to address most carefully the issues raised and the Panel's concerns. Thus, it was even more troubling that the Appellate Body division on this appeal had not only summarily rejected the Panel's points, but had also taken the Panel to task simply for taking the Panel's duties to heart and trying to ensure that the Panel's findings were consistent with the agreed text of the WTO Agreements. The United States was deeply troubled by the Appellate Body division's response on two levels, each of them posing serious systemic problems for Members. First, once again, the division had devised a new basis to justify

findings against zeroing in reviews – this time that the margin of dumping was exporter based and that somehow this precluded finding a margin of dumping with respect to an individual transaction. The reasoning under this approach continued to be deeply flawed and failed to comport with the actual, agreed treaty text. Second, the division had significantly departed from the established understanding of the relationship between panel and Appellate Body reports and the role of the Appellate Body and that of Members. This Report purported to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that was reserved by the WTO Agreement exclusively to Members.

49. With respect to the first systemic level of concern, the United States simply noted that there were numerous flaws in the Appellate Body's reasoning in this latest report, including in particular its rejection of the fact that the Uruguay Round negotiators had not agreed to prohibit zeroing in assessment reviews. No common understanding had been reached on zeroing in the Uruguay Round because, despite extensive efforts by many participants, proposals to prohibit zeroing had been firmly opposed by many others, including several users of anti-dumping measures. However, if Members of the WTO had never agreed to ban zeroing, then the DSU did not empower the Appellate Body to create new obligations that imposed such a ban. The Appellate Body's approach ought to be of concern to every single WTO Member, any one of which may someday be called upon to defend its own laws and regulations, and every one of which would want to rely on the negotiated outcome of the Uruguay Round, the Doha Round, or other WTO negotiations – and not be held to rules found nowhere in those outcomes. The United States would not dwell on those points further at the present meeting. Instead, it had prepared a written statement that addressed the continuing and evolving flaws with the Appellate Body's analysis of zeroing. A copy of that statement would be available in the room after the meeting and would be circulated to all delegations.[4]

50. The second level of systemic concern was of such enormous institutional significance for the dispute settlement system that the United States was compelled to elaborate on its concerns at the present meeting. In this dispute, the Panel had correctly noted its obligations under Articles 11, 3.2 and 19.1 of the DSU, and had undertaken its work in accordance with those obligations. And, in carrying out its task, this Panel – like another panel before it – had carefully considered, and ultimately disagreed with, the various versions of the Appellate Body's reasoning in prior disputes involving zeroing in assessment reviews. On appeal, Mexico had raised a claim under Article 11 of the DSU. The first few paragraphs of the Appellate Body Report's discussion of that appeal were unexceptional. The division first recalled the task of the Panel under Article 11 of the DSU: to assist the DSB in discharging its responsibilities, and to make an objective assessment of the matter, including the applicability of, and conformity with, the covered agreements. It further recalled that under Article 3.2 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". And, it recalled that the original members of the Appellate Body, in one of the very first appeals it had heard, clarified the status of prior adopted reports: they were not binding, except with respect to the particular dispute between the parties, but they "should be taken into account where they are relevant to any dispute". The United States had no quarrel with any of this, and believed that all Members shared that view.

51. The discussion then turned, however, in a significantly different direction – one that no longer relied on WTO Agreement text or even on prior adopted reports. The discussion began to use terms such as "'security and predictability' in the dispute settlement system" – which was a misstatement of the text, since the DSU only spoke of the dispute settlement system providing security and predictability to the "multilateral trading system". The discussion had also asserted that the Panel's "failure to follow previously adopted Appellate Body reports ... undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements". The division closed by expressing its concern about "the Panel's decision to

[4] Subsequently circulated in document WT/DS344/11.

depart from" the Appellate Body's prior rulings on these issues, stating that the Panel's approach had "serious implications for the proper functioning of the WTO dispute settlement system".

52. The Appellate Body division was mistaken. This second part of the Appellate Body's discussion misperceived the WTO Agreement and this Member-driven organization. It was WTO Members that had negotiated and had agreed to obligations, and they had done so by consensus. Members had also established one and only one means for adopting binding interpretations of the obligations that they agreed to: Article IX:2 of the WTO Agreement provided that the Ministerial Conference and the General Council had the exclusive authority to adopt such interpretations. Yet the approach in this Appellate Body Report would appear to mean that Appellate Body reports should be treated as authoritative interpretations of the covered agreements – they were to be followed by panels regardless of whether a panel in a particular dispute agreed with those prior reports. In other words, panels were simply to abdicate their responsibility to conduct an objective assessment of the matters before them and should simply follow prior Appellate Body reports. This did a disservice to panels and the serious responsibility that the DSB assigned to them.

53. What was more, WTO Members had made it clear – in fact, the DSU said it twice – that the findings of panels and the Appellate Body could not add to, or diminish the rights and obligations in the covered agreements. Perhaps unlike some other institutions, the WTO did not rely on adjudication to advance its objectives. However, this Appellate Body Report's approach, including its references to a "coherent and predictable body of jurisprudence", would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members. And what was more, this division had raised all of these systemic concerns unnecessarily, some might even say gratuitously. The Report had rejected Mexico's Article 11 appeal, so all of this discussion was mere dicta by the division.

54. The United States did, of course, share the Appellate Body's interest in having similar cases treated similarly. The United States expected that all Members would do likewise. The United States did not, however, share this Report's view that this meant that panels must follow Appellate Body reports in different disputes. Rather, to cite again the "Japan – Alcoholic Beverages" Appellate Body Report, the United States would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel. To take account of an adopted report, of course, did not mean to follow it without hesitation. To the contrary, to take account of such a report meant to examine it, to consider it, and to engage with its reasoning. The United States recalled that an objective assessment was one that was critical and searching. Such an assessment could lead, in fact, to further or greater clarification.

55. The WTO dispute settlement system functioned properly when the rules that Members had established for that system were respected. One of those rules was that a panel must make an objective assessment of the matter before it, including an objective assessment of the "applicability of and conformity with the relevant covered agreements". Whatever one's views of the substantive issues in this dispute, there was no question but that the Panel had done so here. The United States, therefore strongly believed that the Appellate Body's concerns about the Panel's approach were misplaced. Rather than presenting "serious implications" for the dispute settlement system, the Panel's actions in this dispute affirmed the strength of that system.

56. The representative of the European Communities said that the EC wished to recall that it had a direct interest in this dispute (as indeed did many other Members) as it was also awaiting full implementation of the DSB's ruling in its own zeroing case against the US (DS294). In addition, the EC had had to initiate another dispute because of the continued application of zeroing by the United States which was now pending before the Panel (DS350). In fact, since the first case brought against the EC in 1998, 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 been extensively pleaded and analysed. 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 was grateful to the Appellate Body and its Secretariat for their work and for having reversed the Panel's controversial findings. This comprehensive report should, once and for all, solve the problem of zeroing in the calculation of margins of dumping.

57. The EC welcomed the fact that the Appellate Body had, once again, confirmed the illegality of zeroing during reviews, an issue which had already been ruled upon in two previous disputes (DS294 and DS322). In so doing, the Appellate Body had rectified a number of the many serious legal errors which the Panel had committed. The EC particularly welcomed the clarifications from the Appellate Body to the effect that "absent cogent reasons, an adjudicatory body would resolve the same legal question in the same way in a subsequent case" (para. 160) and "the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case" (para. 161). Whilst self-evident, these statements confirmed the rules-based nature of the WTO, and the multilateral aspects of dispute settlement.

58. The EC equally welcomed the statement that "compliance with established time limits by all participants regarding the filing of submissions is an important element of due process of law" (para. 164). Whilst also self-evident, this similarly confirmed the rules-based nature of the WTO. The EC anticipated that, following this clarification, Members would take all necessary steps to ensure that their submissions to the Appellate Body, and eventually also to panels, were timely, failing which the appropriate legal consequences would follow. As regards the next steps which the United States would undertake after the adoption at the present meeting, the EC expected the United States to unconditionally accept the adopted Appellate Body's Report, as provided for under Article 17.14 of the DSU, and to put an end to all remaining illegal practices of zeroing. The EC would like to emphasize that it was not an option for the United States to ignore the findings of the Appellate Body and to continue this practice.

59. The representative of Thailand said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work on this case, and would like to warmly welcome the adoption at the present meeting of the Appellate Body Report and the Panel Report, as amended by the Appellate Body Report. Thailand had participated as a third party in this dispute as a result of its long-standing concern about the use of the zeroing methodology in anti-dumping proceedings. In Thailand's view, the zeroing methodology was inconsistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement, whether zeroing was used in the original investigation stage or any type of review. Thailand firmly believed that the Anti-Dumping Agreement, particularly Article 2.4, did not permit the use of zeroing in any circumstance. Therefore, Thailand highly appreciated the Appellate Body's findings and conclusions in this dispute.

60. The representative of Japan said that the Appellate Body had, once again, reversed the Panel's erroneous findings and had affirmed its previous findings that zeroing in periodic reviews was inconsistent with the Anti-Dumping Agreement and the GATT 1994. It was regrettable that the issue of zeroing had been brought back before the Appellate Body for its review repeatedly despite its well-established rulings on the issue, but the Appellate Body had come to the right decision. Japan shared the concerns expressed by the Appellate Body in this Report about "the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues".[5] As the Appellate Body had explained, "[t]he panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreement as contemplated under the DSU".[6] Japan fully supported the adoption of the Appellate Body Report by the DSB at the present meeting. The DSU provided that the adopted Appellate Body

[5] Appellate Body Report, para. 162.
[6] Ibid. para. 161.

Report "shall be ... unconditionally accepted by the parties to the dispute" (Article 17.14) and that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of dispute to the benefit of all Members" (Article 21.1). Japan strongly hoped that the United States would take the decision by the DSB seriously, and would promptly bring illegal zeroing measures into full conformity with the WTO Agreement.

61. The representative of Hong Kong, China said that zeroing was one of the most frequently challenged practices in anti-dumping disputes. Like many other Members, Hong Kong, China had long held the position that zeroing was inconsistent with WTO rules. Hong Kong, China welcomed the reaffirmation of the Panel and the Appellate Body in this case of the illegality of such methodology. Specifically, the Panel had reaffirmed that model of zeroing in the original investigation was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. In this connection, Hong Kong, China was pleased to note that the respondent had already ceased the practice since February 2007. Hong Kong, China welcomed the Appellate Body's finding that zeroing in periodic reviews was a violation of Article V1:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. This was the third Appellate Body Report that prohibited zeroing in such duty assessment proceedings. These consistent and unbroken Appellate Body rulings established a clear line of jurisprudence. They conclusively answered the question of the WTO-consistency of the zeroing practice and would definitely help enhance the predictability and consistency of anti-dumping regimes of WTO Members.

62. Separately, Hong Kong, China shared the concern of the Appellate Body regarding the following of its jurisprudence on the same legal issues by subsequent panels. This was an important systemic issue with profound implications on the functioning of the WTO dispute settlement system, which was a central element in providing security and predictability of the multilateral trading system. Hong Kong, China was grateful for the clarifications and comments made by the Appellate Body in its Report. With these observations and comments, Hong Kong, China supported the adoption of the Report of the Appellate Body, and that of the Panel, as modified by the Appellate Body. Hong Kong, China encouraged all parties concerned to take prompt actions to bring any WTO-inconsistent practices and measures into compliance.

63. The representative of Australia said that her country joined the parties in thanking the Appellate Body and the Secretariat for their hard work on this dispute. Australia would like to take this opportunity to comment on one specific issue raised in the dispute. Australia agreed with the statements made by the Appellate Body in the Report on the importance of the security and predictability of the dispute settlement system, and on "enhancing the prompt settlement of disputes": as noted in Article 3.2 of the DSU, enhancing security and predictability was a key objective of the system; while panel and Appellate Body reports were binding only on the parties concerned, Australia – like other WTO Members – referred extensively to adopted Panel and Appellate Body reports in its own submissions. Australia also agreed with the Appellate Body's statements as to the distinct roles of panels and the Appellate Body in the hierarchical structure contemplated in the DSU.

64. At the same time, Australia noted that Article 19.2 of the DSU provided that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements": similarly, Article 3.2 provided that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". It was, therefore, necessary for panels and the Appellate Body to strike a balance between security and predictability, on the one hand, and maintaining the parties' rights and obligations under the covered agreements, on the other.

65. In the present case, Australia agreed with the Appellate Body that a claim under Article 11 of the DSU was not made out: Article 11 obliged a panel to make an "objective assessment of the matter before it..."; Australia agreed with previous Appellate Body statements that "not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make

an objective assessment of the matter before it"[7] ... and that to constitute a violation of Article 11, there must be "an egregious error that calls into question the good faith of the panel".[8]

66. The representative of Chile said that, first, his country wished to thank the Appellate Body members and the Secretariat for the Report. As a third party to this dispute, Chile supported the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body. In particular, Chile firmly supported the ruling which, for the third time, had established that the use of zeroing in periodic reviews or duty assessment was inconsistent with the provisions of the GATT 1994 and the Anti-Dumping Agreement. Specifically, Chile agreed with the Appellate Body's conclusion that the terms: "margin of dumping" as well as "dumping" had the same meaning throughout the Anti-Dumping Agreement. From this conclusion necessarily stemmed the assertion that "margin of dumping" was an exporter-specific concept. Despite the US claim, an importer-specific margin of dumping did not exist, nor could there be any dumping by an importer. In the view of the Appellate Body, it necessarily followed that there could be no "dumping" or "margin of dumping" at the individual transaction level. On the contrary, as already stated in previous Appellate Body rulings, and in contradiction with the Panel's finding, dumping must be determined in respect of the product as a whole. The key point might be that all those disputes had enabled Members to fully understand the workings of the retroactive anti-dumping duty administration system applied by the United States, making it possible to counter the latter's arguments based on the alleged specificities of the system, from which flowed the sophisticated US interpretations of the Anti-Dumping Agreement. In other words, it had been made clear that continued application of a unique and special system provided no excuse or justification for making interpretations of the Anti-Dumping Agreement that were not permitted.

67. Although Chile entirely agreed with the conclusions and recommendations of the Appellate Body Report, his delegation wished to devote some time to the issue of systemic implications of the decision by the Panel to ignore prior Appellate Body reports and to conduct its own analysis, thereby arriving at a different, and even contradictory, conclusion. Despite arguments by several Members in the appeal proceedings, the Appellate Body had been clear as to the effect of prior Panel and Appellate Body reports. Indeed, panels were not obligated to follow previous reports. In keeping with Chile's line of thought, the Appellate Body had confirmed that its reports created legitimate expectations among Members and should, therefore, be taken into consideration, although they were not – he reiterated not – binding. Chile thanked the Appellate Body for its confirmation in this regard and for refraining from crossing the "obligation" line. Chile concurred with the Appellate Body's analysis in paragraph 161 of its Report, and with the role of the Appellate Body, under the dispute settlement mechanism. Chile could not disregard the core objectives of the DSU. On the other hand, the DSU, panels and the Appellate Body were covered by, and operated within, an inter-governmental, rules-based and Member-driven system. One must not forget that one was not operating within a system under which individuals brought action before a domestic tribunal. By crossing the line in stating that previous reports would provide a mandatory framework in subsequent disputes, according to the wish of some Members, the Panel would have not only prejudged future disputes and even tied the hands of future panels, but it would have also created rights and obligations when the Membership alone could do so. Chile was grateful to the Appellate Body for abiding by the above principle.

68. Chile also noted that the Appellate Body had refrained from ruling that the Panel had acted in breach of the obligations and duties laid down in Article 11 of the DSU. This was in keeping with the logical reasoning above. As Chile pointed out, the fact of abstaining from following a precedent to the letter did not mean that a panel was acting in breach of its Article 11 duties, precisely because the precedents in question were not binding; even though, as Chile had stated earlier, the Panel's line of action in this particular case had been unfortunate. That being said, certain phrases in the Report gave

[7] Appellate Body Report, "US – Steel Safeguards", para. 497.
[8] Appellate Body Report, "EC – Hormones", para. 133.

Chile some cause for concern. According to paragraph 160, "[e]nsuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implied that, absent cogent reasons, an adjudicatory body would resolve the same legal question in the same way as had been done in previous cases. Paragraph 162 likewise stated as follows: "We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues." Such phrases could lead to unfortunate conclusions regarding the nature of the dispute settlement system, and Chile hoped that this would not become a trend likely to constrain panels in future disputes, and above all, that this would not alter the nature of the rights and obligations negotiated by the Membership. Chile believed that an interim report at the Appellate Body stage would have prevented the phrases in question from appearing in the final Report.

69. The representative of India said that her country welcomed the Appellate Body Report in this dispute and noted the clarifications given by the Appellate Body regarding the Panel's analysis on the issue of WTO-inconsistency of the zeroing practices, and the significance WTO Members attached to the reasoning provided in the adopted Panel and Appellate Body Reports. India believed that the legal interpretations embodied in the adopted Panel and Appellate Body Reports had become part and parcel of the *acquis* of the WTO dispute settlement system. Rejecting this prior jurisprudence by the Panel amounted to undermining the Member's faith that the adopted reports created legitimate expectations for the purpose of consistency and stability in the interpretation of their rights and obligations under the covered Agreements. The Panel in the present dispute, had bypassed and disregarded the conclusions of the Appellate Body in prior disputes that were directly on point.

70. India also welcomed that the Appellate Body had held that US zeroing practices during the reviews were as such inconsistent with Article VI:2 of the GATT 1994, and Article 9.3 of the Anti-Dumping Agreement. India recalled that the issue of clarifying and improving disciplines in respect of zeroing, had also been a major negotiating issue in the current round of WTO Rules negotiations. Several Members, including India, had expressed the view that there should be express provision in the Agreement prohibiting zeroing in any form, including all original investigations and reviews such as changed circumstances, sun-set, administrative and new shipper, so that such disputes could be avoided in future. India had a systemic interest in this issue and, therefore, had been actively supporting the proposals to prohibit zeroing. India believed that the findings of the Appellate Body in this dispute had settled the issues relating to the practice and procedures of zeroing, and should now pave way for an early conclusion on this issue in the Negotiating Group on Rules.

71. The representative of Norway said that her country welcomed the adoption of the Appellate Body Report at the present meeting. Norway was deeply concerned about the misguided approach taken by the Panel when it had chosen to depart from previous jurisprudence. Not just because the Panel had departed from previous decisions by the Appellate Body, but also because the reasoning and the interpretive approach of the Panel had been so flawed. It was, therefore, with great satisfaction that Norway saw the Appellate Body correct the errors of the Panel and the DSB could now adopt the Appellate Body Report.

72. The representative of Colombia said that his country welcomed the Report of the Appellate Body and its finding that the use of zeroing was inconsistent with the Anti-Dumping Agreement. Colombia wished to express its views on the systemic issue as to whether a panel may rely on the findings of previous panel reports that the Appellate Body had reversed, and in particular whether panels were required to follow the Appellate Body's findings. In this connection, Colombia agreed with the reasoning of the Panel that there was no provision in the DSU that required WTO panels to follow the findings of previous panels or of the Appellate Body on the same issues brought before them. In fact, a panel or Appellate Body decision bound only the parties to the relevant dispute. On the other hand, in compliance with the last sentence of Article 3.2 of the DSU: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". While recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence, Colombia wished to

recall that the Ministerial Conference and the General Council alone were empowered to adopt authoritative interpretations.

73. The representative of Mexico said his delegation wished to make additional comments with respect to the Reports submitted for adoption at the present meeting. First of all, the decision of the Appellate Body was consistent with the view expressed by most Members regarding the interpretation of the Anti-Dumping Agreement and Article VI of the GATT 1994. Therefore, it was not a matter of an interpretation that was not shared by the majority of Members, but to the contrary, it was an interpretation that was shared by the majority of Members. At the same time, with respect to the comments regarding the negotiating history, it had been demonstrated that Members had different expectations about the outcome of the Uruguay Round, but such negotiating history was not relevant when the text of the Agreement was clear, as the Appellate Body had confirmed on several occasions. With respect to the issue of zeroing, Mexico would carefully examine the paper circulated by the United States regarding its systemic concerns. However, at this point, Mexico only wished to welcome the adoption of the Panel Report, as modified by the Appellate Body's decision, and hoped that as of now finally resources would not need to be spent to hear the same legal questions over and over again. With regard to certain comments made by some delegations at the present meeting, Mexico pointed out that the decision by the Appellate Body should not be quoted out of its context. Panels must pay attention to the Appellate Body's findings particularly when dealing with the same legal questions. In this regard, Mexico did not share the concerns expressed by some Members at the present meeting. Mexico would have been very concerned if the Appellate Body had accepted a different approach concerning the question of zeroing.

74. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS344/AB/R and the Panel Report contained in WT/DS344/R, as modified by the Appellate Body Report.

4. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/376)

75. The Chairman drew attention to document WT/DSB/W/376, 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. Unless there was any objection, he proposed that the DSB approve the names contained in document WT/DSB/W/376.

76. The DSB so agreed.