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Dispute Settlement Body
17 November 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 November 2008

Chairman: Mr. Mario Matus (Chile)

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.72)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.72)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.47)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.10 – WT/DS292/31/Add.10 – WT/DS293/31/Add.10)

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.72)

2. The Chairman drew attention to document WT/DS176/11/Add.72, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 6 November 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 US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that at the present meeting the United States was presenting its 72nd status report on its lack of progress in the implementation of the DSB's ruling in this dispute. In fact, since the condemnation of Section 211 in February 2002, the United States had failed to take any steps to implement the DSB's ruling. The EC hoped that the next US Congress would finally put the United States into compliance with its TRIPS obligations. She then quoted the President elect: "yes it can".

5. The representative of Cuba said that, on 29 October 2008, with an almost unanimous vote of 185 member countries in favour, the General Assembly of the United Nations had, once again, approved, as it had done each year for the past 17 years, the resolution calling upon the United States to end the economic, commercial and financial blockade which it has maintained against Cuba since 1962. This was an unequivocal message from the international community. The US policy of blockading Cuba, of which Section 211 formed part, had never been so isolated and discredited. That isolation and unreasonable attitude was also reflected in the DSB and this matter had remained on the DSB's Agenda for the past six years. During that period of time the offender had persistently refused to comply with the DSB's ruling. At the October DSB meeting, Cuba had pointed out that none of the legislative proposals which had sought the repeal of Section 211 had succeeded. Section 211, which affected the registration of Cuban intangible assets, had been passed on 21 October 1998 and was still in force, ten years after it had been introduced. Such legislation violated the national and most-

favoured-nation treatment obligations under the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property, as the Appellate Body had confirmed in 2002. The prolonged delay by the offender in the implementation of the Appellate Body's rulings violated the DSU principle of speedy compliance. The current US administration had made no effort whatsoever to show its readiness to comply with the international rule of law, or with the DSB's decisions. Its double standards with regard to intellectual property rights were scandalous. There was no need to go further than to note that in October 2008, when ten years had passed since the introduction of Section 211, the United States, the offending country, had passed new legislation designed to strengthen even more the observance of its intellectual property rights. In other words, the message was clear: what applied for the United States did not apply for the rest of the membership, i.e. "do what I say, but not what I do". On 28 October 2008, the meeting of the TRIPS Council had been held. Much time had been devoted to giving developed Members an opportunity to raise questions and concerns with regard to compliance. The parties to this dispute had shown great concern over these matters and had called on other Members to adopt concrete measures. It was deplorable that, in view of the existence of so many questions that required debate as regards the implementation of this Agreement, delegations had spent a great amount of time to listen to those responsible for the failure to settle this dispute blamed others over matters of enforcement. It was clear that the agreed multilateral framework of principles, rules and disciplines with regard to intellectual property was applicable whoever was the legal subject.

6. The representative of Brazil said that his country thanked the United States for the status report. As on previous occasions, Brazil wished to point out that the DSB had seen no progress in the implementation of the recommendations, nor had the DSB been sufficiently informed of any specific initiatives undertaken by the US administration. The lack of compliance in this dispute was a cause of concern not only for the complainants, but also for the broader Membership that relied on prompt settlement of disputes as one of the core principles of the WTO. Brazil, therefore, urged the United States to implement the DSB's recommendations in this dispute.

7. The representative of India said that her country wished to thank the United States for its status report concerning the surveillance of implementation in this dispute and expressed, once again, its concerns about this case. As stated before, the situation of non-compliance continued in this dispute, despite all endeavours of the US administration in working with the US Congress. India, once again, reiterated the view that full implementation of the DSB's recommendations in this dispute was necessary for the purpose of the case at hand and also due to the systemic considerations relating to the effectiveness and reliability of the WTO dispute settlement system.

8. The representative of Mexico said that the DSU stipulated that "prompt compliance with recommendations or rulings of the DSB" was essential in order to ensure effective resolution of disputes "to the benefit of all Members", as stated in Article 3.3 of the DSU. Mexico, therefore, urged the parties to this dispute to adopt the measures in order to come into compliance with the DSB's recommendations and rulings to the benefit of all Members.

9. The representative of Nicaragua regretted that, thus far, no progress had been made in the implementation of the DSB's rulings in this dispute. Nicaragua maintained its systemic concerns at this lack of compliance. At no point either in the course of 2008 had there been any clear sign of a willingness to comply with the DSB's recommendations. Nicaragua hoped that the new US administration would be able to improve the US record of compliance in this matter, and urged the United States to bring its legislation swiftly into conformity as a means of ensuring satisfaction for the parties and the orderly conduct of multilateral trade and its dispute settlement mechanism.

10. The representative of Thailand said that his country thanked the United States for its status report. Like previous speakers, Thailand remained concerned about the systemic implications of this dispute. Non-implementation of the DSB's rulings and recommendations undermined the integrity of

the rules-based multilateral trading system. Therefore, Thailand urged the United States to take all necessary steps to comply with its obligations under the TRIPS Agreement as soon as possible.

11. The representative of China said that his country thanked the United States for its status report but, once again, that report did not show any progress in implementation. China hoped that the new 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 was undermining the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. Therefore, China again wished to support the statements made by the EC and Cuba and urged the United States to make an extra effort to bring itself into conformity with the decision of the DSB as soon as possible.

12. The representative of the Bolivarian Republic of Venezuela said that her country had taken note of the status report submitted by the United States and fully associated itself with the views expressed by Cuba. Her country noted that the status report by the United States failed to report on progress in this dispute, and regretted the US failure to comply with the recommendations, which had been adopted by the DSB on this matter more than six years ago. Venezuela reiterated that the integrated dispute settlement system, which prohibited unilateral determinations, was being seriously undermined when Members disregarded their obligations. Venezuela, along with other Members, had repeatedly expressed its concerns about the systemic implications of such cases. The fact that the complaints – both by the parties concerned and by the other Members – were being ignored undermined confidence in the effectiveness of the system. Venezuela, therefore, once again urged the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

13. The representative of Bolivia said that her delegation wished to express, once again, its concern regarding the status of this case and the failure to comply with the WTO obligations. Bolivia reiterated, once again, that the failure to achieve progress had a negative impact on the credibility of the multilateral trading system and on the DSB, and altered the balance between the rights and obligations established under the WTO Agreements. Once again, Bolivia urged the United States to comply with the DSB's rulings and recommendations and to make an effort to ensure that its authorities remove the restrictions imposed under Section 211.

14. The representative of the United States said that his delegation wished to react very quickly in response to Members' "systemic concerns". The United States again wished to set out the facts. The record on the US compliance record was clear: the United States had come into compliance fully and promptly in a vast majority of its disputes, and as for the remaining few instances such as this one where the US efforts to do so had not yet been entirely successful, the United States continued to work actively towards compliance.

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.72)

16. The Chairman drew attention to document WT/DS184/15/Add.72, 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 6 November 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 continue to work with the US Congress with respect to the recommendations and rulings of the DSB that had not been already addressed by the US authorities by 23 November 2002.

18. The representative of Japan said that his country thanked the United States for its statement and latest status report. Since the United States had taken certain measures to implement part of the DSB's recommendations in November 2002, as reported by the United States, there had been little tangible progress in this long-standing dispute regarding the remaining part of the DSB's recommendations and rulings. A 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".[1] Japan wished to call on the United States to redouble its effort to this end.

19. 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.47)

20. The Chairman drew attention to document WT/DS160/24/Add.47, 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 6 November 2008, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter.

22. The representative of the European Communities noted that this was the forty-seventh time the US reported continued non-compliance without offering any concrete means to bring itself into compliance. The EC continued to think that that spoke for itself.

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 Communities (WT/DS291/37/Add.10 – WT/DS292/31/Add.10 – WT/DS293/31/Add.10)

24. The Chairman drew attention to document WT/DS291/37/Add.10 – WT/DS292/31/Add.10 – WT/DS293/31/Add.10, 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.

25. The representative of the European Communities said that her delegation was happy 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. The seventh technical meeting between the EC and the United States had taken place on 22 and 23 October in a very constructive atmosphere. Progress in the processing of pending applications and on national measures continued. Eighteen authorizations had been granted since the establishment of the WTO Panel, seven in 2007

[1] Article 3.3 of the DSU.

only. Three authorizations had been granted in 2008, most recently on 29 October (LL25 cotton). Two draft authorization decisions (oilseed rape T-45 and Roundup Ready 2 soybean) had been transmitted to the Council. These applications could be authorized by the end of the year or early 2009 at the latest. Following the clarification by EFSA on concerns related to the relevant antibiotic marker gene, expected by mid-December, the EC might be in the position to authorize four more GM events (one GM potato and three maize hybrids) in early 2009. This would mean six more authorizations in the months to come. The EC believed that given the inevitably sensitive nature of biotech issues, dialogue was the appropriate way forward and remained open to continue discussions with the three complainants.

26. The representative of the United States said that, as his country had noted at prior meetings of the DSB, the United States had serious concerns with the current operation of the system established by the EC for the purpose of reviewing and approving new biotech products. The backlog of approximately 50 biotech product applications was even greater than the backlog that existed at the beginning of the reasonable period of time for compliance in November 2006. This backlog resulted in continuous and serious trade harm to US grain producers. At the present meeting, the United States would like to comment on certain statements that the EC made at the October DSB meeting. First, the EC asserted that the DSB should not be discussing issues involving the backlog or the operation of the EC's approval system. The EC's assertion was, frankly, astonishing. The rulings and recommendations adopted by the DSB included over 250 pages addressed solely to the operation of the EC approval system.[2] As a result of that exhaustive examination, the DSB had found that the manner in which the EC was operating – or, one might say, failing to operate – its approval system resulted in "undue delay" in breach of the EC's obligations under the SPS Agreement. There was no basis for the suggestion that the operation of the EC's approval system should escape discussion by Members in the DSB.

27. Second, the EC claimed that certain of the EC member State measures found by the DSB to be in breach of the EC's SPS obligations "have become obsolete". The United States did not understand the meaning or relevance of this assertion. The DSB had recommended that the EC bring the member States' measures into conformity with the EC's obligations under the SPS Agreement. The EC must do so, regardless of whether the EC unilaterally characterized such measures as "obsolete". Finally, in its statement made at the present meeting, the EC noted that in late October, it had finally made its third biotech approval in calendar year 2008. Regrettably, this recent approval only served to highlight the US concerns with the EC approval system. The variety in question received a final, positive safety assessment in April 2007 and yet it took the EC an additional 18 months to issue an approval in accordance with its own assessment. The United States thanked the DSB for its attention to this matter, and continued to urge the EC to take the steps necessary to allow the parties to make progress towards resolving this dispute.

28. The representative of Argentina said that his country was grateful for the status report that had just been presented, and acknowledged that there had been a certain amount of progress, as mentioned by the EC. However, there remained a number of concerns with respect to the process of approval of GMO events within the EC, particularly as regards time-limits. Another source of concern was the attitude shown by certain EC member States as well as the prohibitions that were still in force. Argentina would continue to work together with the parties to this dispute, in particular the EC, with a view to ensuring the definitive implementation of the recommendations.

29. The representative of Canada said that his country thanked the EC for its statement. As previously mentioned, Canada had agreed to an extension of the reasonable period of time for the EC to bring itself into compliance with the DSB's findings until 31 December 2008. Canada had done so as it valued the constructive dialogue it had had to date with the EC. However, also as previously

[2] Panel Report: "EC – Measures Affecting the Approval and Marketing of Biotech Products", WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, Section VII.D, pages 427-692.

mentioned, Canada had significant ongoing concerns. There were, for example, still member State bans in place on the cultivation and marketing of approved biotech products. Further, Canada was very concerned that undue delays seem to be reappearing in the EC approval system for biotech products: delays of the sort that had prompted Canada to request this DSB process in the first place. As an example, Canada wished to cite the length of time taken – from 14 July to 30 October – for a product dossier to be forwarded for consideration to the Council of Agriculture Ministers following an inconclusive vote on approval by the Standing Committee on the Food Chain and Animal Health. It was Canada's understanding that this should be a simple administrative process, requiring no more than three weeks. No explanation had as yet been given as to why over three months were necessary to complete the process in this case. Canada would continue to monitor the situation closely.

30. The representative of the European Communities said that in response to the US comments on the EC intervention of 21 October, the EC was puzzled about the US remarks. The EC wished to ask the United States to confirm that, in this case, the United States had challenged 27 specific product applications; that the Panel had ruled on these 27 specific product applications; and that the Report also explicitly stated that the United States had not challenged the approval system as set out in legislation. The EC, therefore, failed to see how one could argue that the report covered the operation of the system as such. As regards national safeguard, the EC had stated that these measures had become obsolete because the market authorizations for the products in question had expired, i.e. did not exist anymore, and the holders of the authorizations, the companies in question, had not asked for a renewal of the market authorization. It was obvious, therefore, that the safeguard measures in question had become obsolete or, if it was any clearer in French, they had become "sans object".

31. The representative of the United States said that the US statement spoke for itself. He noted that copies of that statement would be available after the meeting for the EC to consult. If the EC required further clarification, perhaps the United States could supply that in future statements or in another forum.

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

2. Mexico – Definitive countervailing measures on olive oil from the European Communities

(a) Implementation of the recommendations of the DSB

33. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the Panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 21 October 2008, the DSB had adopted the Panel Report in the case on "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities". He invited the representative of Mexico to inform the DSB of Mexico's intentions in respect of implementation of the DSB's recommendations.

34. The representative of Mexico said that on 21 October 2008 the DSB had adopted the Panel Report on: "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities" (WT/DS341). In compliance with the provisions of Article 21.3 of the DSU, Mexico had requested the inclusion of this item on the Agenda of the present meeting in order to inform the DSB of its intention to implement the recommendations and rulings of the DSB in this dispute in a manner which respected its WTO obligations. Mexico was already working to this end, and was sure

that it shall be able to reach an agreement with the EC with a view to establishing a reasonable period of time in accordance with Article 21.3(b) of the DSU.

35. The representative of the European Communities said that the EC welcomed Mexico's statement of intentions, and hoped that Mexico would proceed to remove the measures found to be inconsistent with the SCM Agreement as soon as possible. Given the violations identified in the Mexican measure, swift withdrawal was the only possible action.

36. The DSB took note of the statements, and of the information provided by Mexico regarding its intentions in respect of implementation of the DSB's recommendations.

3. 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

37. 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.

38. The representative of Japan said that the latest distribution process for 2008 fiscal year under the CDSOA appeared to be well underway[3] and was expected to be completed soon. The CDSOA remained operational and, in the words of the US Customs, "the distribution process will continue for an undetermined period".[4] Japan 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.

39. The representative of the European Communities said that along the lines as Japan had just stated, the EC wanted to recall that on 1 October, the United States had started the distribution of the anti-dumping and countervailing duties collected in the latest fiscal year on imports made prior to 1 October 2007. This was the eighth distribution under the Continued Dumping and Subsidy Offset Act. Such illegal distributions would continue for an undetermined number of years as the transitional clause preserved the distribution of duties collected on imports made prior to 1 October 2007 and such duties were progressively collected. Therefore, the EC wished to ask again the United States if and what steps it intended to take to stop the transfer of those anti-dumping and countervailing duties to its industry and finally to put an end to the condemned measure. 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 status reports in this dispute.

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

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

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[3] See the US Customs' publication of the list of the claims by the US domestic producers for FY 2008 distributions, available at US Customs and Border Protection's website at:
http://www cbp gov/xp/cgov/trade/priority trade/add cvd/coot dump/cdsoa 08/

[4] *Idem*, http://www cbp gov/xp/cgov/trade/priority trade/add cvd/cont dump/cont dump fag.xm1

42. The representative of Brazil said that, as pointed out on several occasions, compliance in this dispute would not be achieved until disbursements under the Byrd Amendment were completely stopped, regardless of the period in which the duties had been collected. Brazil stressed the need for the United States to take the necessary actions in order to fully implement the DSB's recommendations and rulings in this dispute.

43. The representative of Thailand said that her country thanked the EC and Japan for bringing this item before the DSB. As her delegation had previously stated, Thailand was disappointed at the United States' maintenance of these WTO-inconsistent disbursements. Thailand urged the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume providing status reports until such actions were taken and this matter was fully resolved.

44. The representative of India said that her country wished to join the previous speakers in thanking the EC and Japan for bringing this item before the DSB at the present meeting. India shared their concerns. India wished to state that the disbursement made by the United States to its domestic industry under the Byrd Amendment continued to be in force affecting the rights of other WTO Members. India reiterated that full implementation of the DSB's recommendations and rulings had not yet been achieved.

45. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled furthermore that Members, including the EC and Japan, had previously acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EC and Japan had inscribed this item on the Agenda of the present meeting.

46. With respect to comments regarding further DSB surveillance on this matter, 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. Finally, the United States had noted in some past meetings that, at this point, it appeared clear that there was a disagreement between several complaining parties and the United States on the meaning and consistency of a US measure taken to comply. In this regard, it might be worth recalling the concerns expressed by several Members, including the United States, at the 14 November DSB meeting, on the view expressed by the Appellate Body in its recent Hormones reports in relation to Article 21.5 of the DSU – specifically, that an original complainant or respondent must initiate compliance proceedings without delay once a disagreement arose. The United States wondered whether the eight complaining parties currently authorized to suspend concessions considered themselves to be in breach of their obligations under the DSU by not having initiated Article 21.5 proceedings. The United States suspected that they did not.

47. The representative of the European Communities said that, in response to the US comments on the Hormones report, as the United States had rightly stated, the Appellate Body had recently clarified the DSU as permitting the continuation of sanctions until such time as neither party brought a compliance dispute under Article 21.5 of the DSU and this review resulted in the conclusion that the implementing Member had indeed achieved WTO compliance. The United States was welcome to bring such a dispute, but the EC understood that the United States might not be eager to do so, as the United States would loose such a dispute under the present circumstances of continued non-implementation. Furthermore, it might be worth quoting again the exact wording of the US implementing legislation: "All duties on entries of goods made and filed before 1 October 2007 ...

shall be distributed as if Section 754 of the Tariff Act of 1930 (that is Byrd Amendment) had not been repealed ....".

48. The representative of the United States said that his intervention would be brief. As his country had stated previously, it was clear that there was a disagreement between the parties.

49. The DSB took note of the statements.

4. Thailand – Customs and fiscal measures on cigarettes from the Philippines

(a) Request for the establishment of a panel by the Philippines (WT/DS371/3)

50. The Chairman recalled that the DSB had considered this matter at its meeting on 21 October 2008, and had agreed to revert to it. At the present meeting he wished to draw attention to the communication from the Philippines contained in document WT/DS371/3, and invited the representative of the Philippines to speak.

51. The representative of the Philippines said that at the 21 October DSB meeting, the Philippines had requested the establishment of a panel to address its concerns with regard to certain measures imposed by Thailand on imports of cigarettes from the Philippines. As at that meeting, his delegation did not intend to repeat now the claims being made by the Philippines because these were already clearly detailed in WT/DS371/3. He wished to re-state for the record that the Philippines had continuously engaged with Thailand in a constructive spirit and with genuine efforts to find a solution to their concerns. The Philippines had noted Thailand's statement at the 21 October meeting of the DSB that it had been working hard to resolve this dispute on a bilateral basis in the spirit of ASEAN cooperation. It was thus regrettable that bilateral discussions on the specific matters described in the panel request had not yet resulted in a mutually agreeable solution to the Philippines' concerns, and hence, the Philippines was constrained to request anew at the present meeting that a panel be established to examine the matters set forth in the Philippines' panel request with standard terms of reference.

52. The representative of Thailand said that her country regretted that the Philippines had made its second request to establish a panel on this matter. Thailand maintained its view that as ASEAN partners a bilateral solution was the most effective way to conclude this matter. As a result, Thailand wished to reiterate that it remained open to further discussions with the Philippines. Despite its disappointment, Thailand acknowledged the establishment of the Panel at this time. Thailand was, however, carefully considering whether the Philippines' panel request satisfied the requirements set forth in Article 6.2 of the DSU, particularly as certain issues contained in the Philippines' panel request were not contained in its request for consultations. Thailand, therefore, reserved the right to bring claims regarding those deficiencies to the attention of the Panel as necessary.

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

54. The representatives of Australia, the European Communities, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

5. India – Additional and extra-additional duties on imports from the United States

(a) Report of the Appellate Body (WT/DS360/AB/R) and Report of the Panel (WT/DS360/R)

55. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS360/11 transmitting the Appellate Body Report on: "India – Additional and Extra-Additional Duties on Imports from the United States", which had been circulated on 30 October 2008

in document WT/DS360/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".

56. The representative of the United States said that his country was pleased to propose the adoption of the Panel and the Appellate Body Reports in this dispute. The Appellate Body Report was a solid, well-reasoned report that had undone a number of troubling Panel findings. In particular, the Appellate Body had correctly overturned the Panel's finding that Article II:1(b) of the GATT 1994 only addressed ordinary customs duties and other duties or charges that inherently discriminated against imports. This finding by the Panel risked undermining the fundamental WTO rule that Members may not impose ordinary customs duties or other duties or charges on imports in excess of tariff commitments. The Appellate Body had found that there was no textual or other basis for the Panel's finding and emphasized that Article II:1(b) covered ordinary customs duties and all duties or charges of any kind imposed on or in connection with importation, including those that did not inherently discriminate against imports. In this regard, the Appellate Body had correctly found that tariffs – whether inherently discriminatory or not – were "permissible under Article II:1(b) so long as they did not exceed a Member's bound rates". The Appellate Body's finding had upheld a fundamental WTO rule which was particularly important at a time when Members were negotiating new tariff commitments.

57. The Appellate Body had also properly reversed the Panel's erroneous interpretation of Article II:2 of the GATT 1994. Article II:2(a) permitted charges on imports – in excess of bound rates – provided such charges were equivalent to internal taxes imposed consistently with Article III:2 of the GATT 1994. The Panel had found that a charge may fall within the scope of Article II:2(a) regardless of whether it exceeded the internal taxes to which it was designed to be equivalent. This erroneous interpretation would have allowed Members to impose border charges on imports that exceeded both the Member's bound rates and the internal taxes that the duties were designed to offset. The Appellate Body was correct to reverse that Panel finding and to find that for a charge to be justified under Article II:2(a), it must not result in charges on imports that exceeded the internal taxes that it was designed to offset.

58. With respect to the duties at issue in this dispute, the Panel's findings were particularly troubling because the internal taxes that India had claimed the extra-additional duty "offset" (for example, state value-added taxes) applied not only to domestic products but imported products as well. Moreover, during the proceeding India had acknowledged that the additional duty may subject wine and spirit imports to charges that were higher than the internal taxes imposed on Indian wine and spirits. In light of this evidence, the United States was disappointed that the Appellate Body had not completed the analysis to find that the additional and extra-additional duties inconsistent with India's WTO obligations, particularly after having correctly overturned the Panel's finding that the United States had failed to establish that the duties were inconsistent with India's obligations. The Appellate Body's decision not to complete the analysis appeared to be a consequence of the Panel's fundamentally flawed legal interpretations, coupled with India's refusal to identify the internal taxes the additional duty allegedly offset, including in response to specific questioning from the Panel about them. The Appellate Body had, however, considered that insofar as the additional and extra-additional duties resulted in charges on imports in excess of internal taxes on like domestic products, they would not be justified under Article II:2(a) and, therefore, would be inconsistent with India's obligations under Article II:1(b). Thus, the Appellate Body's Report provided clear guidance that India could not impose the additional and extra-additional duties to discriminate against US or other imports.

59. The United States noted that during the course of the proceedings, India had announced that it was withdrawing the additional duty and modifying the extra-additional duty to provide for a refund mechanism. The United States was pleased with those developments, but still had significant concerns about the treatment that India afforded to US imports of wine, spirits and other products. In particular, when India had withdrawn the additional duty, it had announced that it was doing so in lieu of Indian state taxes on imported wine and spirits. The EC had already requested WTO consultations with respect to its concerns that Indian state taxes discriminated against wine and spirits imports in breach of Article III. It was very unfortunate that India had rejected the US request to join those consultations.

60. The United States would be very concerned to find that, just when India had withdrawn the additional duty on wine and spirits, its states might be imposing internal taxes that continued to discriminate against US wines and spirits. The United States believed the guidance in the Appellate Body Report was clear: India could not impose charges on imports that exceeded internal taxes on like domestic products, and the United States would be watching the situation in India very closely to ensure that it did not do so.

61. The representative India said that, at the outset, her country wished to thank the Panel, the Appellate Body and the Secretariat and expressed its sincere appreciation for the efforts made by them in this matter. The central issue in this dispute related to the appropriate characterization of two of India's duties – the Additional Duty (AD) on alcoholic beverages and the Extra-Additional Duty (EAD) levied by India on Identified Products, which were imposed to counter-balance internal taxes on like domestic products. The United States had argued before the Panel and the Appellate Body that the AD and the EAD were either "ordinary customs duties" or "other duties and charges" and, under either definition, were inconsistent with India's obligations under Article II:1(b) of the GATT 1994. India had throughout contended that AD and EAD were charges equivalent to internal charges imposed consistently with Article III:2 in respect of like domestic products and as such, fell within the scope of Article II:2(a). In considering these claims, both the Panel and the Appellate Body had reaffirmed the existing legal position that under Article II:2(a), Members were allowed to impose a charge on imported products equivalent to internal taxes on like domestic products. The Appellate Body had clearly restated that if a border measure satisfied the conditions of Article II:2(a), there would be no violation of Article II:1(b).

62. India noted that the Appellate Body had concluded that the "Panel did not err in considering that the United States was required to show that the Additional Duty and Extra-Additional Duty are not justified under Article II:2(a)". The Appellate Body had essentially reiterated the notion that the burden was on the complaining party to show that the measures in question were inconsistent with India's GATT obligations. India welcomed the Reports in this regard.

63. India wished to state before the DSB certain concerns arising from the language adopted by the Appellate Body in paragraph 231(e) and (f) of its Report. In response to a request to "complete the analysis" with respect to the United States' claims under Article II:1(b), the Appellate Body had made the unusual finding in these paragraphs stating that it considered that India's Additional Duty and Extra-Additional Duty would not be justified under Article II:2(a) of GATT 1994 insofar as they resulted in the imposition of charges on imports in excess of the excise duties applied on like domestic products, and consequently this would render the AD and EAD inconsistent with Article II:1(b) to the extent that it resulted in the imposition of duties in excess of those set forth in India's Schedule of Concessions. India failed to understand the basis for this approach by the Appellate Body. If there was inadequate evidence to complete the analysis, as it was clear in this case, the Appellate Body should so conclude and, if it was not able to make findings, it may not issue advisory opinions.

64. The first sentence of Article II:1(b) prohibited ordinary customs in excess of the Member's bound rate. The second sentence prohibited all other duties and charges on bound items not imposed under mandatory legislation on the date of this Agreement, irrespective of whether they entailed an

imposition of duties in excess of those set forth in the Schedule of the Member concerned. Consequently, a duty or charge imposed under mandatory legislation on the date of this Agreement may result in an imposition of duties on imports that exceeded the binding; conversely, a duty or charge that was not imposed under mandatory legislation on the date of this Agreement was inconsistent with the second sentence even if it did not result in an imposition of duties in excess of the binding. The main function of the first sentence of Article II:1(b) was to ensure that ordinary customs duties did not exceed the bound rate; the main function of the second sentence was to ensure that imports of bound items were not subjected to any additional duties and charges other than those required under pre-existing mandatory legislation. A completely different understanding of Article II:1(b) was reflected in paragraph 231(e) and (f) of the Appellate Body Report, which stated that: "the Extra-Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes or charges that India alleges are equivalent to the Extra-Additional Duty; and, consequently, that *this would render the Extra-Additional Duty inconsistent with Article II:1(b) to the extent that it results in the imposition of duties in excess of those set forth in India's Schedule of Concession." (emphasis added).*

65. As drafted, this paragraph implied that Article II:1(b) prohibited other duties and charges only to the extent that that they did not exceed the bound rates set forth in a Member's Schedule of Concessions. It also suggested that the bound rates set a ceiling on the level of other duties and charges that Members were permitted to impose. India noted that there was no reasoning in either Report to suggest that either the Panel or the Appellate Body intended to interpret the second sentence of Article II:1(b) in this manner. Against this background, paragraph 231(e) and (f) may be considered to be an inadvertent misstatement rather than a considered ruling. India urged the Appellate Body and future panels not to base their rulings on Article II:1(b) on the statement in paragraph 231(e) and (f) and invited Members not to conclude from this statement that their obligations under Article II:1(b) had changed.

66. Finally, India appreciated that neither the Panel nor the Appellate Body had found that India had acted inconsistently with its obligations under the GATT 1994. As the Panel Report made clear, since this dispute had begun, India had made changes to some of the measures at issue to address the concerns of its trading partners. Her delegation wished to emphasize that India, as a responsible Member of the WTO, was fully aware of its rights and obligations under the WTO Agreements and reiterated its commitment to addressing any concerns of its trading partners relating to how India fulfilled those obligations.

67. The representative of the European Communities said that, as the United States had pointed out, the EC had a broader interest in this dispute, as it had also brought a challenge against the Additional Duty and the Extra-Additional Duty, and had now entered into consultations with India on measures at state level. The EC was grateful to the Appellate Body and its Secretariat for their work and for having reversed the Panel's controversial findings on Article II of the GATT 1994. The EC particularly welcomed the fact that the Appellate Body had reassessed the Panel's restrictive finding on the term "equivalent" and broadened it to include also a qualitative comparison of the relevant border charge with the corresponding internal tax. The EC also welcomed the clarification on the burden of proof in such challenges, but regretted India's lack of cooperation in providing the Panel with facts. The EC remained convinced that the Additional Duty and the Extra-Additional Duty were WTO-incompatible for the reasons explained by the Appellate Body, and welcomed India's wise decision to stop applying them.

68. The representative of Chile said that, as a third party in this dispute, his country wished to thank the Appellate Body and the Secretariat for the Report to be adopted at the present meeting. Chile welcomed the Appellate Body Report, inasmuch as it had rectified the errors committed by the Panel with regard to the interpretation of Articles II:1(b) and II:2(a) of the GATT 1994. As was well-

known, Article II of the GATT contained one of the basic obligations of the law of the WTO and of the multilateral system and, therefore, the introduction of erroneous views regarding the characterization of the fees and charges that Members applied may give rise to serious obstacles in the correct application of that obligation. The Appellate Body had correctly reaffirmed the principle that tariffs were legitimate instruments for attaining certain objectives of trade policy or of another policy, such as the generation of tax income, and that they were the preferred instrument of trade policy, while quantitative restrictions were prohibited in principle. Whatever may be the objective they sought, tariffs were permitted under Article II:1(b) so long as they did not exceed the bound rates of the Member in question. In short, their characterization as intrinsically discriminatory duties was not supported.

69. Similarly, with regard to Article II:2, the Appellate Body had rectified the Panel's conclusion that the fees and charges mentioned in that paragraph were not discriminatory, a situation that was not consistent with the nature of the countervailing duties, anti-dumping duties and the charges imposed exclusively on imports, as listed in that paragraph of Article II. As for the interpretation of the terms "equivalent" and "consistently with the provisions of paragraph 2 of Article III", contained in Article II:2, Chile believed the Appellate Body's approach to be correct, in that both concepts must be interpreted jointly. The determination of whether a charge was applied consistently with the provisions of paragraph 2 of Article III necessarily entailed the comparison of a border charge with an internal tax so as to determine whether the former exceeded the latter.

70. With regard to the burden of proof, in its analysis the Appellate Body had partially rectified the Panel's errors in laying the responsibility for providing proof on the complaining party, which could give rise to serious problems for the application of the provisions of Article II when the provisions of paragraph 2(a) of that Article were invoked as a defence. Chile would have liked a more conclusive ruling by the Appellate Body in this connection, but welcomed the spirit of cooperation and good faith between the parties, which was behind its analysis. Finally, Chile expressed its satisfaction at the Appellate Body's findings that the additional and extra-additional customs duties applied by India were incompatible with the relevant provisions of the GATT 1994.

71. The representative of India said that her delegation wished to make a comment with respect to the assertions made by the United States and the EC to the effect that India had not cooperated throughout the proceedings. All these issues had been thoroughly considered and examined by the Appellate Body, and the Appellate Body had made it very clear that the there was *a prima facie* a burden of proof on the complaining Member to establish that the allegations made by India did not fall under Article II:2(a) of the GATT 1994.

72. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS360/AB/R and the Panel Report contained in WT/DS360/R, as reversed by the Appellate Body Report.

6. Adoption of the 2008 draft Annual Report of the DSB (WT/DSB/W/389 and Add.1)

73. The Chairman said that, in pursuance of the procedures for an annual overview of WTO activities and for reporting under the WTO contained in document WT/L/105, he was submitting for adoption the draft text of the 2008 Annual Report of the DSB contained in document WT/DSB/W/389 and Add.1. This report covered the work of the DSB since the previous Annual Report contained in document WT/DSB/43 and Add.1. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2008, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He proposed that after the adoption of the Annual Report at the present meeting, the Secretariat be authorized to update this Report under its own responsibility in order to include actions taken by the DSB at the present meeting as well as the actions taken at the special DSB meeting held on 14 November. The updated

Annual Report of the DSB would then be submitted for consideration by the General Council at its meeting to be held on 18 and 19 December.

74. The DSB took note of the statement and adopted the draft Annual Report of the DSB contained in WT/DSB/W/389 and Add.1 on the understanding that it would be further updated by the Secretariat.[5]

7. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/391)

75. The Chairman drew attention to document WT/DSB/W/391, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/391.

The DSB so agreed.

[5] The Annual Report was subsequently circulated in document WT/DSB/47 and Add.1.