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Dispute Settlement Body
1 August 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 August 2008

Chairman: Mr. Mario Matus (Chile)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the case on: "India – Additional and Extra-Additional Duties on Imports from the United States" (WT/DS360/R) was removed from the proposed Agenda, following the decision of the United States to appeal the Report.

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.68)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.68)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.43)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.6 – WT/DS292/31/Add.6 – WT/DS293/31/Add.6)

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.68)

2. The Chairman drew attention to document WT/DS176/11/Add.68, 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 18 July 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 noted that, at the present meeting, the DSB was considering the 68th addendum of the US status report. In fact, it was now more than six years since the United States had been found in breach of the TRIPS Agreement. And, yet again this month, the United States could not report on any progress in the implementation of the DSB's ruling in this dispute. If the United States wanted to give a signal about how it saw the relevance of its commitments under the TRIPS Agreement, that signal was pretty worrying. The EC hoped that the bipartisan bills introduced in the US Congress to repeal Section 211 would finally progress and bring the United States into compliance with its TRIPS obligations.

5. The representative of Cuba said that, as of now, it would be three years since the DSB had received notification of an understanding between the EC and the United States pertaining to this dispute. That understanding was based on the assumption that the United States would continue working towards compliance with its WTO obligations, and that the EC would not request authorization from the DSB to suspend concessions or other obligations under Article 22.2 of the DSU. All were aware what had happened since then. Some of the bipartisan legislative proposals submitted to the US Congress calling for the repeal of Section 211 had not even been considered, while others had been defeated. Nor had the United States made the slightest effort to approve them. Not only had the United States been providing the DSB with the same status reports month after month, year after year, but now it had replied with the same arguments, describing its non-compliance in this case as an isolated incident. It was no longer unusual for the DSB Agenda to contain a number of cases awaiting compliance by the United States. This merely showed a complete disregard for the decisions adopted by all Members. In the dispute at issue, the United States apparently wanted the item to remain on the DSB's Agenda. This dispute had been dragging on for so long that it would seem odd to be demanding that the United States comply with the principle of prompt settlement of disputes set forth in Article 3.3 of the DSU. In fact, what was being asked of the non-complying respondent was that it complied, once and for all, with the rulings and recommendations made more than six years ago. Cuba had a considerable interest in the repeal by the United States of Section 211. There was no need to explain the enormous importance of intellectual property rights.

6. The United States and other powerful WTO Members had insisted on the TRIPS Agreement during the Uruguay Round negotiations. And indeed, one of the alleged advantages of that Round was this perfect dispute settlement system, which would put an end to unilateral actions. The alleged balance between rights and obligations to enable the WTO to function efficiently had been forgotten. The US well-known attempts to acquire Cuban rum brands had been at the origin of more than one dispute. It just happened that in 2002, when the Appellate Body report pertaining to this dispute had been adopted, another dispute had been settled by the WIPO Arbitration and Mediation Centre. The origin of that dispute had been a claim by a company based in Florida against a Cuban owner for registration of 11 trade names that included the Cuban brand name MATUSALEM. The ruling had been in favour of the Cuban owner, and the case had brought to light the obvious bad faith of the applicant, who had been clearly trying to take over all of the trade names that had been duly registered by a Cuban legal person. Cuba urged the parties in this dispute to take action. It had been three years since the understanding between the EC and the United States had been concluded, and more than six years since the Appellate Body Report had been adopted. Section 211 was inconsistent with the TRIPS Agreement, and yet nothing was being done to repeal it. It was paradoxical that such a powerful country, the country that had the most in the way of intangible assets worldwide, should be disregarding an agreement that protected its own interests *par excellence*.

7. The representative of the Bolivarian Republic of Venezuela said that her delegation wished to thank Cuba for its statement, which it fully supported. Cuba's statement provided delegations with an updated picture of the matter at issue. Her delegation also noted the status report submitted by the United States. In spite of the US expressions of goodwill at previous meetings, delegations were, once again, gathered at the present meeting to listen to a repeated status report on the case in question. This situation was not conducive to a prompt conclusion of the matter. The United States had insisted that it had a good record of full compliance with its obligations in the vast majority of the disputes in which it had been involved. In this regard, her delegation would recall the old adage that "it is better to travel hopefully than to arrive". Accordingly, in the interests of maintaining that good record, as the United States had claimed, her country urged the United States to put an end to this long-running dispute by coming up with a solution mutually satisfactory to the parties concerned.

8. The representative of Brazil said that his country thanked the United States for its status report. Brazil wished to renew its concerns about the situation of non-compliance in this dispute, where little or no implementing action seemed to have been taken despite the adoption of the Panel

and the Appellate Body Reports by the DSB several years ago. Brazil, once again, expressed the view that full implementation of the DSB's recommendations in this dispute was necessary for the purposes of the case at hand, and also due to systemic considerations relating to the effectiveness and reliability of the WTO dispute settlement system.

9. The representative of India said that her country thanked the United States for its status report and the statement made at the present meeting. India wished to renew its systemic concerns about the 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 to remain indifferent to the non-compliance of the recommendations and rulings of the DSB by any Member undermined the dispute settlement system, one of the main achievements of the Uruguay Round Negotiations.

10. The representative of China said that his country thanked the United States for its status report. China also supported the statements made by the EC and Cuba. The implementation process in this dispute had been delayed for too long. China hoped that the present 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 undermined the creditability of the WTO dispute settlement system. Therefore, China urged the United States to make an extra effort to bring itself into conformity with the decision of the DSB.

11. The representative of Thailand said that his country thanked 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.

12. The representative of Viet Nam said that the non-compliance with the DSB's rulings undermined the credibility of the system and Members' confidence in that system. Once again, Viet Nam called on the United States to take necessary and urgent steps to comply with its obligations.

13. The representative of Argentina said that his delegation thanked the United States for presenting its status report, but wished to be associated with Cuba's request that the parties to the dispute take the necessary action to ensure prompt implementation. Respecting the prompt compliance requirement under Article 21.1 of the DSU was a matter that was not confined to the consequences of each particular case only, but had obvious systemic implications.

14. The representative of Nicaragua said that various delegations had regularly taken the floor under this Agenda item in order to urge the United States to implement the DSB's recommendations and to express their concerns about the US failure to comply with these recommendations. This situation was of genuine concern to Nicaragua, because just as the claims and rights of the affected parties were being ignored at the present meeting, the rights of other countries might be disregarded in future. There were only two possible explanations for a delay that had lasted for so many years. Either there was no will to comply, or implementation of the rulings in question was beyond the scope of the United States, in which case this raised doubts as to the latter's capacity to comply fully with all the commitments that membership of the WTO implied. Nicaragua was concerned that this situation undermined Members' confidence in the WTO dispute settlement system and raised questions about the effectiveness of the system. In spite of the number of years that had gone by, Nicaragua called on the United States to comply with the DSB's recommendations without delay.

15. The representative of the United States said that his country had taken careful note of the statements made at the present meeting. The United States regretted that the EC had returned to criticizing the US commitment to intellectual property rights and the TRIPS Agreement. Not only were the EC's comments regrettable, its criticisms were completely unfounded. It was, of course, true that the United States had been, and remained, a strong advocate of substantial protections for intellectual property internationally. The EC, and a number of its member States, were well placed to be aware of this. However, it was equally true – and, once again, the EC knew this very well – that the United States was second to no one in providing strong intellectual property protection within its own territory. The United States reiterated that the US administration continued to work with the US Congress to implement the DSB's recommendations and rulings in this dispute.

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.68)

17. The Chairman drew attention to document WT/DS184/15/Add.68, 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 18 July 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 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 its latest status report. In Japan's view, there had been little tangible progress in this long-standing dispute since the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. 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.

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.43)

21. The Chairman drew attention to document WT/DS160/24/Add.43, 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 18 July 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

[1] Article 3.3 of the DSU.

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 before the DSB at the present meeting was an update number 43 of the TRIPS continued non-compliance. The EC regretted that the United States had made no progress. This was highly frustrating for all Members who placed a great deal of importance on the respect of all international obligations, and were spending a great deal of time together looking at respect of intellectual property rights. The EC continued to fail to comprehend why the United States could not do anything to respect its TRIPS obligations and move to bring this long-running dispute to a solution.

24. The representative of the United States said that, once again, the EC's comments about the US commitment to intellectual property rights and to compliance with the recommendations and rulings of the DSB were as unwarranted and unfounded at the present meeting as they had been at previous DSB meetings. Nonetheless, the United States appreciated the EC's more constructive statements during recent DSB meetings that it was prepared to work with the United States to seek a mutually satisfactory solution to this dispute. The United States shared the EC's goal of discussing how such a solution could be achieved.

25. 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.6 – WT/DS292/31/Add.6 – WT/DS293/31/Add.6)

26. The Chairman drew attention to document WT/DS291/37/Add.6 – WT/DS292/31/Add.6 – WT/DS293/31/Add.6, 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.

27. The representative of the European Communities said that the EC was happy to report once more that good faith cooperation between the complainants and the EC had 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 last such technical meeting with the United States had been held on 18 and 19 June, but informal contacts with the United States as well as the other complainants had taken place since then. Progress in the processing of pending applications continued. Sixteen authorizations had been granted since the establishment of the WTO panel, seven in 2007 only. One draft authorization decision on oilseed rape T-45 would be transmitted to the Council after the summer and two more draft authorization decisions (LL25 cotton and A2704-12 soybean) would be soon adopted. In terms of progress on national measures covered by the panel report, the EC had already reported at the previous DSB meeting on the decision adopted by Austria which had lifted its bans on imports and processing of GM maize MON810 and T-25. The EC believed that given the inevitably sensitive nature of biotech issues, dialogue was an appropriate way forward and remained open to continue discussions with the three complainants.

28. The representative of Canada said that his country thanked the EC for its status report. Canada hoped and expected that further progress would be made and, for this reason, had agreed to an extension of the reasonable period of time until 31 December 2008. Canada would continue to watch this progress carefully.

29. The representative of Argentina said that his delegation thanked the EC for submitting its status report. As stated by the EC, the parties continued to work towards the final settlement of this dispute.

30. 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. Unfortunately, however, the United States must note a growing concern with what appeared to be a systemic dysfunction in the EC's approval system for biotech products. The EC had 50 biotech product applications backed up in its approval system. Yet in calendar year 2008, only one product had reached a final decision. And that product application had been filed over 10 years ago, in May 1998. In contrast to the one application that had reached a final decision in 2008, during this same period the EC had sent at least seven applications back to scientific committees for further review. These steps had been taken despite the fact that those seven products had already received positive safety assessments, and despite the fact that no such steps were provided for in the EC's legislation. The United States noted that even the EC's own companies were expressing extreme frustration with the operation of the EC biotech approval system. In particular, the United States would highlight a product developed by an EC-based company especially for use within the EC market. An application for that product had first been filed 12 years ago, in 1996. When the EC member State votes had finally been held during 2007, the votes had been inconclusive. Under the EC's own rules, the Commission had been required to approve the product in 2007. But the Commission had refused to do so. And, it now appeared that no action would be taken by the end of 2008. As a result, on 24 July, the EC-based company had taken the extraordinary step of filing suit in the European Court of First Instance against the EC Commission for a failure to act. In short, the United States had growing concerns with the actions of the EC and its member States regarding the approval of biotech products. The United States continued to urge the EC to take prompt steps to resolve this dispute so that no further proceedings would be required under the DSU.

31. 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

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

33. The representative of the European Communities said that the EC had heard of recent congressional efforts to reinstate the WTO-illegal Byrd Amendment. The EC called on the United States to resist taking such course of action. There was little need to stress how damaging this would be. Reintroducing a bill in full knowledge of its WTO-incompatibility, and in direct contradiction with a DSB ruling condemning it, would show a complete disdain for the rules-based nature of the WTO and for the rights of the other Members. The EC trusted that the United States realized how much this would destroy its credibility as a reliable trading partner. The EC would also like 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, which continued as a result of the transitional provision in the repealing Act. 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.

34. The representative of Japan said that the United States had asserted in the previous DSB meetings that, because the CDSOA had now been repealed, no further actions by the United States were necessary. However, in the beginning of June 2008, the United States had publicly initiated

processes for a new round of distributions of collected anti-dumping and countervailing duties under the CDSOA.[2] This latest action demonstrated that the CDSOA continued to transfer financial resources from the foreign producers/exporters to their US domestic competitors.[3] Thus the CDSOA remained operational with its "essential feature" and "the decisive basis" for the Appellate Body's conclusion[4] still intact. Under these circumstances, Japan failed to understand why the United States considered 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 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 the obligation to provide the DSB with status reports in this dispute "until the issue is resolved".

35. Finally, Japan would like to share concerns expressed by the EC regarding the latest attempt in the US Congress to reinstate the CDSOA. Reviving the already condemned CDSOA would not only jeopardize the progress, albeit incomplete, made thus far by the Untied States in implementing the DSB's recommendations and rulings; such defiant act against the established law by a major partner in the system, if materialized, would also seriously undermine the credibility and effective functioning of the WTO dispute settlement system as a mechanism to "secure a positive solution to a dispute".[5] Japan trusted that the United States would not take such a devastating course of action. Japan reserved all its rights under the DSU in this dispute.

36. The representative of Mexico said that his country was also concerned by the US initiative. The United States seemed to demonstrate little concern for the DSB's recommendations that the measure in question was not compatible with WTO rules.

37. The representative of India said that her country thanked the EC and Japan for maintaining this issue on the DSB's Agenda. India fully shared their concerns. As mentioned by previous speakers this latest action demonstrated that the CDSOA remained operational and the United States was still distributing disbursements under the CDSOA to the US domestic industry. These disbursements made by the United States to its domestic industry under the Byrd Amendment affected the rights of other Members. India was concerned that the non-compliance by the United States in this dispute would lead to a growing lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to cease its WTO-inconsistent disbursement. India supported the view that continued surveillance by the DSB was needed.

38. 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. Canada was also concerned by the efforts of certain parties in the United States to try to reinstate the Byrd Amendment. In 2003, the DSB had ruled against the Byrd Amendment. A WTO Panel had found that the Byrd Amendment was inconsistent with WTO obligations, and this Panel ruling had been upheld by the Appellate Body. Canada was confident that the United States was cognizant of the negative effects that the re-instatement of this measure would have, both in terms of inviting trade retaliation and calling into question the value of a mutually-beneficial WTO rules-based system.

[2] See US Customs and Border Protection's website at:
http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/prelim_report08.ctt/prelim_report08.pdf

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

[4] Ibid. para. 259.

[5] Article 3.7 of the DSU.

39. The representative of Brazil said that his country wished to express its appreciation to Japan and the EC for keeping this matter on the DSB's Agenda. Brazil urged the United States to take necessary actions to discontinue all disbursements made to its domestic industry under the Byrd Amendment, including those relating to duties on entries of goods made and filed before 1 October 2007 that fell within the scope of the "Deficit Reduction Omnibus Reconciliation Act of 2005". As Brazil had stated in previous DSB meetings, the maintenance of disbursements was detrimental to the rights of Members and was in disagreement with the US obligations under the DSU. Therefore, it was Brazil's understanding that the United States should implement the recommendations and rulings of the DSB by ceasing all disbursements carried under the Byrd Amendment. Brazil also urged the United States to resist any attempt to revive the measure.

40. The representative of Chile said that his delegation thanked the EC and Japan for bringing this important issue before the DSB for consideration. Chile had not made statements under this Agenda item for the past few months, but was closely following the process of implementation of the DSB's recommendations by the United States. Chile hoped that these recommendations would be implemented in full and in a timely fashion. However, Chile could not but express concern over the reports received from Washington concerning potential legislative moves to re-establish the Continued Dumping and Subsidy Offset Act of 2000, or a measure with similar effects. Not only did Chile object to that possibility, but also wished to recall that, as a complaining party, Chile had rights and it could avail itself of those rights in the event that the legislation in question were to be re-established.

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.

42. The representative of Thailand said that his country thanked the EC and Japan for bringing this item before the DSB once more. At this time, Thailand would simply like to express its continued disappointment at the United States' persistent maintenance of these WTO-inconsistent disbursements. Thailand thus urged the United States to cease the disbursements, to repeal the Byrd Amendment with immediate practical effect, and to resume providing status reports until such actions had been taken and this matter had been fully resolved.

43. 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 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.

44. With respect to comments regarding further status reports in this matter, as the United States had already explained at previous DSB meetings, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. In this light, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings. Finally, the United States was not aware of any legislative proposals before the Congress that sought to re-introduce the CDSOA, which, as the United States had been explaining, had been repealed by the Deficit Reduction Act of 2005.

45. The DSB took note of the statements.

3. United States – Measures relating to shrimp from Thailand

(a) Report of the Appellate Body (WT/DS343/AB/R) and Report of the Panel (WT/DS343/R)

46. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS343/13 transmitting the Appellate Body Report on: "United States – Measures Relating to Shrimp from Thailand", which had been circulated on 16 July 2008 in document WT/DS343/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".

47. The representative of Thailand said that, at the outset, his country wished to thank the Members of the Panel and the Appellate Body, as well as the Rules Division, the Legal Affairs Division, and the Appellate Body Secretariat, for their work on this dispute. Thailand warmly welcomed the adoption of the Panel and the Appellate Body Reports, finding the two measures at issue to be inconsistent with US obligations under the Anti-Dumping Agreement and the GATT 1994. The two measures were the "Enhanced Continuous Bond Requirement" (EBR) and the use of zeroing to determine the dumping margins for Thai shrimp. He recalled that since 2005, the United States had required importers of Thai subject shrimp not only to pay cash deposits of anti-dumping duties at the time of importation, but also to maintain a continuous bond equivalent to 100 per cent of the estimated anti-dumping duty liability. To obtain these bonds, importers had had to post cash collateral of at least the full value of the bonds. As a result, importers of Thai shrimp were effectively required to pay a double penalty: the cash deposits of estimated anti-dumping duties, inflated by the use of zeroing, and the significant additional costs to obtain the EBR for each year's imports. The bonds on each year's imports may have to be maintained for up to five years before the bonds were released after final liquidation of each year's entries. It was beyond dispute that the application of the EBR was not a supplementary or ancillary action intended simply to ensure that importers paid in full any anti-dumping duties owed on Thai shrimp. Instead, as US courts had also found, the EBR imposed an additional impermissible burden designed to dissuade imports of Thai shrimp. In fact, the costs of the bonds had been estimated at US$75 million per annum in collateral and well over US$20 million to date in fees. Given the "stacking" effect of the EBR, the overall burden on Thai exports currently ranged from US$120 to US$150 million. This was an extremely heavy cost for the Thai shrimp industry, which was a fundamental part of Thailand's rural and impoverished economy.

48. Although Thailand was disappointed at the finding that the right to impose security requirements during the period following the imposition of a US anti-dumping order was found in the Ad Note to Article VI of the GATT 1994 rather than Article XX(d), Thailand appreciated that the Panel and the Appellate Body Reports had articulated clear limits on the types of additional security requirements that may be imposed to secure payment of anti-dumping duty liability. The Reports made clear that such additional security may be required only where existing cash deposits of estimated duties and bonds were not sufficient to cover the liability. The conditions for the imposition of additional security were stringent. They required a proper determination, based on a "rational basis" and "sufficient evidentiary foundation" of: (i) a likelihood of a significant increase in the margin of dumping for the specific products at issue; (ii) a likelihood of risk of default for individual importers; and (iii) the specific magnitude of any liability increase. In addition, as the Appellate Body had made clear, any security requirements that "impose excessive additional costs ... convert the security into an impermissible specific action against dumping".

49. In addition, Thailand welcomed the Appellate Body's rejection of the Panel's interpretation that cash deposits of estimated anti-dumping duties collected by the United States following the imposition of definitive anti-dumping measures were not "duties" subject to the disciplines of Article 9 of the Anti-Dumping Agreement. The Panel's interpretation raised the possibility that the United States could respond to dumping by collecting at the time of importation cash deposits of estimated anti-dumping duties in excess of the previously-determined margin of dumping. Accordingly, all Members with exports subject to US anti-dumping measures should particularly welcome the Appellate Body's statement that it did not share the Panel's view that cash deposits were not anti-dumping duties governed by Article 9.

50. As Members might recall, Thailand was gravely concerned to see that the Panel's interpretation regarding cash deposits and recasting anti-dumping duties as security was included in the Rules Chair's November 2007 draft text for the Rules negotiations even before the Panel Report had been circulated to the Membership in February 2008. Subsequently, in May 2008, Thailand, along with India and Viet Nam, had circulated a paper (TN/RL/GEN/157/Rev.1) proposing to delete this erroneous recasting. Now that the Appellate Body had rejected the Panel's interpretation, Thailand hoped that Members would support its efforts to reject these amendments and to prevent any erosion of the fundamental discipline that action against anti-dumping might never exceed a previously-determined margin of dumping.

51. Thailand noted that it had not argued before the Panel or Appellate Body that it would never be permissible to collect additional bonds to secure payment of anti-dumping duties. Instead, Thailand had argued that the legal basis for such supplemental actions was found in Article XX(d) of the GATT 1994, not in the Ad Note to Article VI of the GATT 1994. In Thailand's view, it was clear that under Article XX(d), the United States might take measures necessary to ensure that all importers of all products paid all duties due. However, nothing in the Anti-Dumping Agreement or the GATT 1994 allowed Members to impose on importers of goods subject to anti-dumping duties security requirements that went beyond those generally applied to importers of other goods and that served to burden dumped goods. It was, therefore, not necessary for the Panel and the Appellate Body to strain the ordinary meaning of the Ad Note to find authority to collect such supplemental general bonds. Thailand was disappointed that the Panel and the Appellate Body Reports had not considered this issue more thoroughly.

52. In addition, some of Thailand's claims regarding the EBR under the GATT 1994 had not been addressed by the Panel on the grounds of judicial economy. Thailand reserved the right to raise these and related claims in any further proceedings under Article 21.5 of the DSU. Finally, Thailand acknowledged the administrative complications caused by this dispute and DS345 dispute: "United States – Customs Bond Directive for Merchandise Subject to AD/CVD duties", which had proceeded simultaneously. Thailand would thus like to thank the United States, India and the third participants for the cooperative manner in which they had participated in those proceedings. Moreover, Thailand looked forward to the United States' prompt implementation of the Panel and the Appellate Body findings in this dispute, and hoped that further proceedings would not become necessary.

53. The representative of the United States said that his country wished to begin by thanking the Panel, the Appellate Body and the Secretariat for their hard work on this dispute. The United States was pleased that the Panel and the Appellate Body Reports had confirmed that, consistent with the Ad Note to GATT 1994 Article VI:2 and 3, a Member might require reasonable security for anti-dumping duties pending final assessment. As the Panel noted, "the ability to require security is an essential element of a retrospective assessment system". The Ad Note authorized the imposition of security requirements during the period following the imposition of an order for payment of duties ultimately owed. With respect to this important threshold issue, both the Panel and the Appellate Body should be commended for their thorough textual analysis of the relevant provisions of the covered

agreements, as well as their careful articulation of the relationship between the GATT 1994 and the Anti-Dumping Agreement.

54. However, the United States regretted that the Appellate Body had affirmed the Panel's finding that the bonding requirement, as applied to importers of shrimp from Thailand and India, was not "reasonable" security. Importers had failed to pay in excess of US$600 million in anti-dumping duties in recent years, and US Customs and Border Protection applied the enhanced bond directive to shrimp to address what it had perceived at the time as a significant risk to the revenue. The United States regretted that the Panel and the Appellate Body had found that the particular evidence before it was not sufficient to support the US position that additional security was reasonable in this case. More generally, however, the United States would expect that customs authorities might require security for anti-dumping duties when evidence available to them at the time the security requirement was imposed regarding the likelihood of additional liability and risk of default supported their decision to do so. Finally, with regard to zeroing in the context of average-to-average comparisons in investigations, the United States would note that the US Department of Commerce had discontinued zeroing in this context as a result of earlier DSB recommendations and rulings.

55. The representative of India said that her country had participated in these proceedings as a third party and fully shared the views expressed by Thailand. India welcomed the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body. As had just been mentioned by Thailand, India was a co-sponsor of the paper regarding the deletion of certain issues mentioned in the Chair's Rules text. India appreciated Members' cooperation and believed that the clarification given by the Appellate Body would facilitate further appropriate actions in the on-going Rules negotiations.

56. The representative of Chile said that, as a third party to this dispute, Chile thanked the Panel, the Appellate Body and the Secretariat for their Reports. Chile supported the adoption of the Reports. Although Chile agreed with the final conclusion that the Enhanced Continuous Bond Requirement was inconsistent with Article 18 of the Anti-Dumping Agreement, it had serious systemic concerns regarding the analysis conducted by the Panel and the Appellate Body. The Ad Note to Article V1.2 of the GATT 1994 referred to measures that might be imposed prior to a final determination of dumping; i.e. provisional measures, which were subsequently referred to in Article 7 of the Anti-Dumping Agreement. The Panel and the Appellate Body had reached a different conclusion, namely, that the Note permitted the taking of additional security, which both regarded as necessary to cover the risk inherent in any retrospective system. Chile was concerned about this conclusion on the following four counts. First, the Appellate Body had relied on terms that were not in the Note, such as "duty assessment", "final liability" or amount of dumping. Had those terms been important for understanding the scope of the Note, the negotiators would have been more specific and would have used the wording such as: "pending final determination of the amount of dumping" instead of "the facts", as stated in the Note. Hence, Chile disagreed with the end of paragraph 221 of the Appellate Body Report. Second, although Chile appreciated the fact that the Appellate Body had reversed the Panel's conclusion that the existence of dumping was only determined in a review for assessment of the importer's final liability, the Appellate Body had made a distinction between dumping and amount of dumping, as though these were two separate matters. Such a distinction had no basis in other provisions of the Anti-Dumping Agreement. All final determinations included a determination of the facts; i.e. dumping, injury, and causal link, as well as the amount or magnitude of dumping. Also, any determination resulting from an administrative review under a retrospective system covered both elements: the existence or the absence as well as the amount or magnitude of dumping. Moreover, pursuant to a determination of dumping under a retrospective system, the importer was required to pay the specified amount, which might be reassessed after a certain period of time. Third, if all final determinations necessarily involved a determination of the existence of dumping (and injury), as the Appellate Body had pointed out, then what was it that was suspected according to the terms of the Note? It could not be the amount, as the Appellate Body had appeared to conclude, since in the case

of dumping a certain sum would always have to be paid (although the amount might change as a result of a review). Moreover, if the negotiators had had suspected payment in mind, they would have so specified in the Note. Chile believed that such an arbitrary distinction might have significant systemic consequences. Finally, the interpretation made by the Appellate Body and the Panel had chiefly relied on the characteristics of a retrospective system and was, therefore, not neutral, despite the Appellate Body's assertion. This unfortunately reflected how an attempt to adapt to one system for the administration of anti-dumping measures led to an interpretation that did not apply to the other systems. In other words, a significant advantage – or rather an important tool – was granted to a single Member on the sole grounds that it used one system rather than another.

57. In spite of the foregoing considerations, Chile welcomed the Appellate Body's confirmation in paragraph 230 of its Report that there was no fourth specific action against dumping. Likewise, Chile agreed with the Appellate Body's interpretation of the term "reasonable" in the Note. Security was reasonable only to the extent that the authority had determined, on the basis of concrete evidence, both the likelihood of a significant future increase in the margin of dumping as a result of an administrative review – the size of the increase would also have to be determined – and the likelihood that the importer might default on payment of the additional liability. Equally important was the Appellate Body's clarification of the elements that might be taken into consideration for the purposes of determining the likelihood of default. The Appellate Body made the further noteworthy statement that the risk of default on payment of minor amounts due in respect of duties determined in a review was inherent in a retrospective system and hence did not justify the security requirement. In short, the Appellate Body had established a precise and proper test to guard against the unwarranted taking of security which was not permissible under the GATT or the Anti-Dumping Agreement and ultimately constituted a double remedy.

58. The representative of Viet Nam said that his country wished to thank the Panel, the Appellate Body, and the Secretariat for their enormous work on this case, and welcomed the findings and conclusions of the Appellate Body Report. Viet Nam had participated in this dispute as a third party and had claimed that the application of the US Enhanced Bond Requirement was inconsistent with the WTO regulations and thus unfairly affected trade. Therefore, Viet Nam appreciated the Appellate Body's findings and conclusions and hoped that the parties concerned would implement the DSB's recommendations and rulings as soon as possible.

59. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS343/AB/R and the Panel Report contained in WT/DS343/R, as modified by the Appellate Body Report.

4. United States – Customs Bond Directive for merchandise subject to anti-dumping/countervailing duties

(a) Report of the Appellate Body (WT/DS345/AB/R) and Report of the Panel (WT/DS345/R)

60. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS345/12 transmitting the Appellate Body Report on: "United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties", which was circulated on 16 July 2008 in document WT/DS345/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".

61. The representative of India said that, at the outset, her country wished to thank the members of the Panel, the Appellate Body and the Secretariat and to express its sincere appreciation for the efforts made by them in this matter. The Panel and the Appellate Body in this case had ruled that the United States had breached its obligations under the Anti-Dumping Agreement and the GATT 1994 when it had applied the "Enhanced Continuous Bond Requirement" (EBR) to imported shrimp from India and Thailand. The central issue in this dispute was the WTO-consistency of the enhanced continuous bond requirement imposed by the United States on importers of frozen warm water shrimp subject to anti-dumping duties from India and certain other countries in addition to the cash deposits of estimated anti-dumping duties from such importers. This EBR had been imposed under certain legal instruments, which were referred to together as the Amended Customs Bond Directive. The amount of the continuous bond required from each importer would be for an amount equal to the total amount of the anti-dumping or countervailing duties that would have been payable on the total value of imports made by each importer during the previous year. Further, this continuous bond would not be released until an assessment review was completed. With each assessment review, concurrent rounds of bonds would have to be given, but previous bonds would not be discharged until the assessment review was complete. This resulted not only in excessive costs, but also in depleting the capital of importers. As the evidence showed, this EBR had been a heavy burden on Indian exporters.

62. India warmly welcomed the Panel and the Appellate Body imposing strict limits on the use of the additional bonds. While upholding the Panel's finding that the additional security requirement resulting from the application of the EBR to subject shrimp was "not reasonable" within the meaning of the Ad Note, the Appellate Body had provided clear criteria on what would constitute "reasonable" security, and laid down a two-step approach to assess the "reasonableness" of a security. Accordingly, the importer must first determine the likelihood of an increase in the dumping margin, which would result in a "significant additional liability" to be secured. This determination needed a "rational basis" and must be supported by "sufficient evidence". The Member then must assess the likelihood of default by the affected individual importer. The Appellate Body had thus categorically mentioned that: "the risk of default of individual importers is an important factor in an analysis of the reasonableness of a security". Hence, the Appellate Body had reversed the legal interpretation made by the Panel that, in the context of the application of the EBR, there was no obligation under the Ad Note to assess the risk of default by individual importers.

63. In addition, India wished to stress another fundamental aspect of the Appellate Body Report, namely, the Appellate Body had upheld India's argument and had reaffirmed that the Anti-Dumping Agreement did not allow a fourth category of specific action against dumping. Although the Appellate Body had found that taking of security was accessory or ancillary to the collection of lawfully established duties, it had unequivocally found that "an impermissible specific action could not be taken in the guise of a "'security". This security must be evaluated "in the light of the nature and characteristics of the security and the particular circumstances in which it was applied (AB Report paras. 230-31). Further, the "security requirements that imposed excessive additional costs on the importers may convert the security into an impermissible specific action against dumping" (AB Report para. 258).

64. Another conclusion reached by the Appellate Body that merited attention was with regard to the Panel's legal characterization of cash deposits. The Appellate Body had categorically disagreed with the Panel's interpretation that cash deposits of estimated duties were a security, not a duty within the meaning of Article 9 of the Anti-Dumping Agreement. This clarification would put an end to the controversy that had arisen due to the Panel's erroneous interpretation. The Panel's approach would have had far reaching consequences, since recasting of anti-dumping duties as security would possibly eliminate any cap on measures that might be imposed on dumped goods at the time of entry, because it would allow authorities to impose measures, based on dumping margins that the imposing Members considered were merely likely to occur. This was in complete opposition to the Anti-Dumping Agreement, which permitted actions against dumping that were limited to duties or price undertakings

that offset dumping based on an actual determined margin of dumping. The Anti-Dumping Agreement did not permit action on the basis of future, and as yet undetermined, dumping margins.

65. India was, however, concerned about the Appellate Body's findings on the "temporal scope" of the Ad Note to Article VI of the GATT 1994. Although the Appellate Body had agreed that Article 7 of the Anti-Dumping Agreement and Article 17 of the SCM Agreement overlapped with the area covered by the Ad Note, the Appellate Body could not appreciate the argument that the Ad Note could not furnish a legal basis for the Members to take security under its retrospective system. The Appellate Body had held that the temporal scope of the Ad Note did extend to the taking of security after the final determination of the existence of dumping. According to the Appellate Body, in the case of retrospective duty assessment system, the magnitude of dumping, or the amount of final liability for the payment of anti-dumping duty, was determined only in assessment reviews. Thus, according to the Appellate Body, dumping remained "suspected" within the meaning of the Ad Note as regards its magnitude. While rejecting the Panel's reasoning of "suspected dumping", the Appellate Body had dissected the "suspected dumping" into existence of dumping and "magnitude" of dumping. The Appellate Body had agreed that the "existence" of dumping was established in the original investigation, however, the Appellate Body had gone on saying that the term "dumping" in the Ad Note could refer to both the existence and magnitude of dumping, that while the existence of dumping was determined in the investigation, dumping may still be suspected with respect to the magnitude of dumping until the completion of an administrative review. The Appellate Body's interpretation of "suspected dumping" that might require reasonable security under the Ad Note raised concerns, since the Appellate Body had held that the fact of existence of dumping was no longer suspected after the imposition of anti-dumping duty order by the Member. The analysis of the Appellate Body in support of suspected dumping as referring to the "magnitude" of dumping was based on a very narrow reasoning in so far as it permitted a measure over and above the prior objective determination of the amount of dumping, driven by the likely increase in dumping analysis.

66. This analysis by the Appellate Body was a matter of systemic concern to Members. In the light of the carefully developed disciplines in the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement) and the SCM Agreement, it was clear that, if Members had intended to confer the right to take security under retrospective duty assessment system, they would have found a place in the Anti-Dumping Agreement and the SCM Agreement. At the same time, Members would themselves have negotiated procedural and substantive restrictions on the right to take security for payment of definitive duties under the retrospective assessment system, as they had done in the provisional measures, price undertakings and definitive duties.

67. With that limited reservation in mind, India warmly welcomed the Appellate Body Report and the Panel Report, as modified by the Appellate Body, expecting prompt and full compliance by the United States with the DSB's recommendations and rulings. In addition, some of India's claims regarding the EBR under the GATT 1994 had not been addressed by the Panel on the grounds of judicial economy. India reserved the right to raise these and related claims in any further proceedings under Article 21.5 of the DSU. Finally, India wished to thank the United States, Thailand and the third participants for their cooperation during the proceedings, especially in the light of administrative complications caused by this proceeding.

68. The representative of the United States said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their hard work on this dispute. The United States would not repeat its comments regarding issues discussed under the previous item, but would like to add a few points regarding certain aspects of the panel and the Appellate Body reports under consideration here. First, the United States commended the Panel and the Appellate Body for rejecting India's request to expand the scope of its complaint to include additional measures that had not been included in its consultations request, merely because they had allegedly provided "authority" for application of the enhanced bond directive. This was an issue with some systemic significance, and the Appellate

Body's analysis had reaffirmed the role of consultations in defining the scope of a dispute, consistent with Articles 4 and 6 of the DSU. The United States was also pleased that the Panel and the Appellate Body had rejected India's "as such" claims regarding the enhanced bond directive. As the Appellate Body had found, a bond was not a "duty" and, therefore, did not fall within the scope of Article 9. Furthermore, the Ad Note permitted "reasonable" security after imposition of an order and, therefore, whether the enhanced bond directive was properly applied in a particular case depended on the facts.

69. Finally, the United States wished to make one last observation. The document being discussed under this item was the same document as the one discussed under the previous item, despite the fact that the items related to two separate appeals of two separate panel reports; the parties and third parties to the two disputes were different; and there were several issues in each dispute that were not present in the other. In the view of the United States, the Appellate Body should have issued two separate reports. In fact, the United States had asked the Appellate Body to do so, and very much regretted that its request had not even been discussed during the oral hearing or in the Report.

70. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS345/AB/R and the Panel Report contained in WT/DS345/R, as modified by the Appellate Body Report.

5. Expression of views under Article 17.14 of the DSU prior to the adoption of an Appellate Body report

(a) Statement by the European Communities

71. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Communities, and he invited the representative of the European Communities to speak.

72. The representative of the European Communities said that delegations would recall the meeting of the DSB during which the Appellate Body report on: "United States – Stainless Steel" (DS344), concerning zeroing, had been adopted. On that occasion, the United States had again requested the circulation of a communication criticizing the Appellate Body's decision.[6] With respect to zeroing, the EC considered that the clarification by the Appellate Body of the Anti-Dumping Agreement necessarily flowed from an objective application of the agreed rules of interpretation. The EC also considered that in this and other zeroing cases, the Appellate Body had correctly restricted its analysis to the particular issues in dispute. However, the purpose of the statement under this Agenda item was not to reiterate selected arguments relating to zeroing, which were set out at length in the relevant pleadings and had fully been dealt with in the reports. Rather, the sole purpose of the statement was to raise the general question of expressions of views in the DSB and the subsequent circulation of documents containing such comments.

73. The EC recalled that the issue of the circulation of documents had first arisen when the DSB had adopted the panel report on: "Japan – Apples" (Article 21.5; DS245). Japan had made a short statement, but it had also had a longer version of that statement, which had been circulated "as a relevant DS document", with the agreement of other WTO Members in that particular case.[7] This approach had been adopted at the same meeting in relation to Korea's statement on the Appellate Body report (DS296) "US – DRAMs".[8] The circulation had subsequently occurred in the WT/DS-series of the disputes in question. Since then, in four cases, the United States had requested and had

[6] WT/DS344/11.
[7] 20 July 2005 DSB, WT/DSB/M/194, paras. 70 to 76; WT/DS245/19 (2 pages).
[8] 20 July 2005 DSB, WT/DSB/M/194, paras. 84 to 85; WT/DS296/9 (11 pages).

obtained the subsequent circulation of such statements.[9] The EC was concerned about the proliferation of these cases and felt compelled to make the following observations. Any Member had the right, at any time, to express its views on any panel and Appellate Body reports. However, Articles 16.4 and 17.14 of the DSU[10] did not create such right, but merely provided that the adoption procedure for panel and Appellate Body reports was "without prejudice" to such right. Members should ideally moderate the length of such statements. Repetition (and subsequent re-translation) of legal arguments already set out in the report before the DSB for adoption was not an efficient use of Members' time and resources. A succinct oral statement should be sufficient. Regarding the content of such statements, the EC understood also from its own experience, that a Member who lost dispute proceedings, might continue to have strongly held views and might wish to express such views. However, nothing in the expression of such views should call into question the losing Member's mandatory and unconditional acceptance of the report. The WTO Agreement was a single undertaking, and the Appellate Body consisted of persons of recognized authority and expertise, whom all Members had appointed, and whose judgment all Members had agreed to accept. The adoption of an Appellate Body report marked the resolution of the dispute. The DSU did not foresee potentially interminable further exchanges, with one or other Member's intent upon having the "last word".

74. However, the main point that the EC wished to make related less to the length and content of such statements, and more to their form. In WTO dispute settlement practice such statements were recorded in the minutes of the DSB meetings, which was logical given that WTO Members made these statements in the course of the DSB meetings. That being so, the EC was of the view that, regardless of whether or not, in any particular case, any Member objected to the subsequent circulation of a longer document, such document should not be designated as a WT/DS document. WT/DS documents related to specific procedural steps occurring on the basis of the DSU, of which the Members needed to be informed in order to know what the law was, or in order to know what was the state of the dispute, or in order to be in a position to exercise their rights under the DSU should they wish to do so. Documents containing a statement of views by one party to the dispute or one Member did not fall into this category, and should not be circulated as a WT/DS document and the number of the dispute in question, any more than any other Member's expression of views, recorded in the DSB minutes, should be so designated and/or subsequently circulated. Clearly, the separate circulation of each and every statement by Members in the DSB, without limitation, would be undesirable, and at odds with the practice. Taking all of these matters into account, and in the light of experience, the EC was considering that, in any particular case in the future, the EC might object at the relevant DSB meeting to any attempt to subsequently circulate a longer statement with the WT/DS designation. The EC would welcome the support and comments of other Members on this matter, either at the present meeting, or at a subsequent one, once Members had had sufficient time for considered reflection.

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[9] AB report in DS294 "US – Zeroing" (EC), 9 May 2006 DSB, WT/DSB/M/211, para. 37; WT/DS294/16 (9 pages) (the DSB minutes merely record the statement by the United States that it intended to request the subsequent circulation as a WT/DS document); AB report in DS322 "US – Zeroing" (Japan), 23 January 2007 DSB, WT/DSB/M/241, paras. 74 and 76; WT/DS322/16 (7 pages) (the DSB minutes merely record the statement by the United States that it intended to request subsequent circulation, but not as a WT/DS document); panel report in DS241 "Turkey – Rice", 22 October 2007 DSB, WT/DSB/M/241, paras. 42 to 45; WT/DS334/9 (2 pages) (the DSB minutes do not record the intended subsequent circulation); AB report in DS344 "US – Stainless Steel", 20 May 2008 DSB, WT/DSB/M/250, para. 49; WT/DS344/11 (13 pages) (the DSB minutes merely record the statement by the United States that it intended to request subsequent circulation, but not as a WT/DS document).

[10] "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 the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

75. The representative of the United States said that it might be useful to begin by recalling the context in which Members had circulated their written statements with respect to certain panel and Appellate Body reports. Members would recall that Rule 23 of the Rules of Procedure for DSB meetings provided as follows: "Representatives shall endeavour, to the extent that a situation permits, to keep their oral statements brief. Representatives wishing to develop their position on a particular matter in fuller detail may circulate a written statement for distribution to Members, the summary of which, at the representative's request, may be reflected in the records of the [DSB]." Members would no doubt also recall that Members often had extensive views on panel and Appellate Body reports. It would appear to the United States that those Members who had circulated statements were mindful of the admonition that they should endeavour to keep their oral statements brief, and so had taken advantage of the procedure foreseen in Rule 23: they had prepared a written statement for circulation by the Secretariat. In this connection, the United States wished to recall that a number of Members had done the same thing. In the Apples dispute, Japan had made a brief statement at a DSB meeting, but had then circulated a longer written statement on 22 July 2005, in document WT/DS245/19. Korea had followed the same procedures in the DRAMs dispute; its longer written statement had been circulated on 28 July 2005, in document WT/DS296/9. A similar situation had arisen in the 1916 Act dispute, when Mexico had circulated a written communication to the DSB setting out its views with respect to a particular issue in the panel report. That communication had been circulated on 26 July 2000, in document WT/DS162/8.

76. With respect to the EC's comments about the relationship between the content of a Member's statements and the Appellate Body reports, the United States recognized the important contribution made by the Appellate Body to the dispute settlement system. It was true that when the Appellate Body issued a report, the parties must unconditionally accept the findings in that dispute, regardless of any views they might have about imperfections in the analysis. Yet, given the importance of the dispute settlement system to the WTO, it would do a disservice to the system in general, and to the Appellate Body in particular, to let such matters go unremarked. Indeed, Article 17.14 of the DSU provided that the Appellate Body report adoption procedure "is without prejudice to the right of Members to express their views on an Appellate Body report". And, of course, it was well known that many Members had taken advantage of their right to make DSB statements criticizing an Appellate Body report or a panel report, or suggesting that the outcome of such a report was wrong. Delegations that had any question in their mind about that may wish to review the minutes of the meetings at which the DSB had adopted the Appellate Body reports in the "Sugar" and "Chicken Cuts" disputes. However, the fact that Members made such statements did not in any way call into question their acceptance of the results in the particular dispute. In addition, one should not overlook the possibility that discussion of such matters may furnish cogent reasons that would ultimately lead to further clarification of the issues in question.

77. In addition, the United States did not really follow the EC's asserted concern about document symbols that the Secretariat assigned to these statements. In the first place, these document symbols did not themselves have any legal effects. Document symbols and document series existed for the purposes of convenience, to allow Members and the Secretariat to group documents in useful ways and to locate them easily. Document symbols could not and did not change Members' rights and obligations. In any case, the EC's suggestion that the Secretariat abandon its current practice of issuing these statements in the relevant WT/DS-series – that is, the document series created for the specific dispute – seemed to make very little sense. Every other document relating to a particular dispute bore a number in that series. It was entirely sensible that a written statement relating to a particular dispute should also carry a number in that series. In conclusion, the United States failed to see how the current practice – which was contemplated by both the DSU and the DSB's Rules of Procedure, and which had been followed for many years – raised any concerns or difficulties.

78. The representative of Japan said that his delegation thanked the EC for its statement. Japan understood that the thrust of the statement was the EC's concern that the authority of adopted Appellate Body reports, and the mandatory nature of unconditional acceptance of reports by the parties, should not be undermined by particular ways or forms in which Members expressed their views on those reports. Japan agreed with this general proposition. Based on Article 17.14 of the DSU that provided: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute ...", the Appellate Body had concluded that its reports adopted by the DSB "must be treated by the parties to a particular dispute as a final resolution to that dispute".[11] Thus the parties must treat an adopted Appellate Body report as final and comply with the findings and rulings in the report in their entirety without any condition, regardless of their views. Japan agreed with the EC that Members had the right to express their views on Appellate Body reports and were free to do so at any time. Japan noted also that nothing in the DSU expressly circumscribed the length or content of views that Members wished to express. The practice of circulating a longer written statement or document as a WT/DS document had been developed as a way to exercise Members' legitimate right. Japan believed that this practice had never been intended or designed to diminish the authority, and mandatory nature of parties' unconditional acceptance of adopted Appellate Body report.

79. That being said, should the WT/DS designation of such longer documents call into question the status of an adopted Appellate Body report as a final resolution to the dispute or unconditional acceptance of the report by parties to the dispute, the practice must be scrutinized by the Membership and any shortcoming must be rectified. In this respect, relevant consideration might include: (i) whether giving the same WT/DS designation to a document in which Members expressed their view as was given to an Appellate Body report would elevate the status of such document and somehow gave legitimacy or credit to its contents to the detriment of the status of adopted report; (ii) whether the designation would give a false impression that party's acceptance of the report was not unconditional; (iii) whether an unilateral expression of views criticizing the Appellate Body's decision could be properly characterized as a step in the process contemplated under the DSU toward the end of resolving the dispute; and (iv) what the alternative way would be, for instance, whether it would be acceptable that a longer document containing Member's view be reflected in the minutes of the meeting as a statement of that Member, or whether there would be any other relevant designations. Since this practice of designating a longer statement as a WT/DS document might have originated from Japan's action when it had circulated a longer version of its statement in the context of the dispute to which Japan had been party, Japan was willing to engage in the discussion with other interested Members to address the issue and concerns raised by the EC.

80. The representative of Norway said that her delegation had listened with interest to the EC's statement. Norway had no fixed position on this yet, but had some preliminary observations. Norway considered that the question before the DSB at the present meeting was not related to the right to express views under Article 17.14 of the DSU, and that the only issue was the appropriate format for recording all such statements and the document symbol when a Member desired to make its observations not only orally at the meeting – but also in writing. The WTO had a long history of Members making interventions at meetings, and then requesting that their statements – including their longer versions – be recorded and circulated to the Membership. Previously, in the DSB, statements by Members had been circulated with a special document symbol. This had been the case with the statements relating in particular to two disputes: (i) "US – Section 211 Omnibus Appropriations Act", and (ii) the Bananas dispute. Statements regarding these two disputes had been circulated in the WT/DSB/COM-series. Other bodies of the WTO had adopted slightly different practices. In the General Council, written statements by Members had either been circulated as annexes to the minutes of the relevant meeting, as could be seen from the minutes in document WT/GC/M/109; or as

[11] Appellate Body Report, "US – Shrimp" (Article 21.5 – Malaysia), para. 97. See also Appellate Body Report, "EC – Bed Linen" (Article 21.5 – India), paras. 90 – 91.

separate documents in the WT/GC series (WT/GC/81). While the WT/GC/COM-series had been prevalent until 1999, that practice had been terminated after 1999 when the WT/GC-series had taken over. In the area of Services, there seemed to be a practice to circulate such statements as JOB-documents (i.e. JOB(07)/214). This very brief, and incomplete list of examples from other WTO bodies demonstrated that there were many tools available to Members, and that there was no uniform practice. However, such statements – it seemed – had never been circulated as addenda to a particular working document treated under the agenda item to which the statement related. When a statement in the General Council related for example to a budgetary matter, such a statement was not circulated with a "BFA-symbol". The relationship created seemed generally to be to the minutes of the meeting where the statement had been delivered. While this was not a final position of Norway on this issue, it would seem that the EC did have a point, and that statements upon the adoption of panels and the Appellate Body reports should have a link to the relevant minutes of the DSB meeting adopting that report – and not be circulated with a document symbol linking it to the particular report. Using WT/DSB – and a number or WT/DSB/COM would seem more appropriate – or simply annexing them to the minutes of the relevant DSB meeting as the General Council had done. Norway looked forward to hearing views of other delegations on this issue, and to working with them in order to find an appropriate solution.

81. The representative of Australia said that her delegation thanked the EC and other delegations who had commented under this Agenda item. Australia noted, as a preliminary matter, that the EC had not circulated its written statement prior to the present meeting and, consequently, other Members, including Australia, had not had an opportunity to consider the issues raised by the EC. Australia's comments were, therefore, necessarily brief and preliminary. However, having listened carefully to the intervention by the EC and others, her delegation would refer to Rule 23 of the Rules of Procedure, which specifically directed Members to develop positions through a written statement. Therefore, Australia found it difficult to understand the criticism being directed at Members who were following the practice set out in Rule 23. Australia wondered whether the EC was proposing to amend that Rule, if it had concerns regarding the circulation of written statements. Australia felt that it was important to distinguish between the right of Members to make comments and the manner in which those comments were subsequently distributed as a document. Australia would find it of concern if the right of Members to make comments on reports was being questioned in any way. Australia did not find convincing the assertion that by making comments critical of the Appellate Body in some way affected the unconditional acceptance of the report, as referred to in Article 17.14 of the DSU. There could not be a legal distinction between a short oral statement that was highly critical of an Appellate Body report, a longer statement that was moderately critical or a written statement circulated in accordance with Rule 23 that took a longer time to make a criticism. Australia found this distinction quite confusing and would welcome reassurance that this was not intended. Australia also did not find convincing the comments by Japan that a status or a document symbol assigned to a written statement circulated to Members under Rule 23 could in some way affect the unconditional acceptance of reports by Members under Article 17.14 of the DSU. It was also of concern to Australia if that was being implied. So her delegation felt that while these were some preliminary comments, it was something that Australia would need to carefully consider. That having been said, her delegation listened with interest to Norway's statement, but admitted that it didn't fully follow everything that had been stated regarding document symbols and that was something that Australia had not fully examined.

82. The representative of Chile said that his country wished to thank the EC for its statement. Chile understood that Members had the right to express their views on the content of panel or Appellate Body reports upon their adoption. It was understood that such views did not affect the obligation to fully implement the DSB's recommendations and rulings. However, Chile considered important that objections or views concerning reports should be circulated a few days prior to the DSB meetings so that other Members would have time to react to them.

83. The representative of Canada said that his country did not yet have a view on how to approach this matter. His delegation had listened carefully to the EC's statement and wished to make some preliminary comments. Canada was not convinced that the content and the length of views on reports was something that Members should seek to limit. Members had a right to make criticisms, if they so wished, on an Appellate Body report. They had the right to state their views. In addition, Members had the right, under Rule 23 of the Rules of Procedure, to make comments in writing, if they so wished. However, even if they made such comments, this did not necessarily mean that the Appellate Body reports were not unconditionally accepted by the DSB and all parties. Canada had not seen an example where a criticism of an Appellate Body report had actually been stated and that party had not unconditionally accepted the report as adopted by the DSB. However, at a later date, Canada might wish to consider the point raised by the EC, namely, the form of these comments and how they should be circulated. In this regard, Norway had suggested a number of examples used by other WTO bodies, and certain Members had expressed views about the form in which criticisms were reported. This was something that Members might wish to consider. Canada was not convinced that what the EC had stated at the present meeting about the circulation of these documents as DS documents somehow gave it a different status that at a later date might actually affect the adoption of an Appellate Body report. However, in order to have a more consistent approach with the circulation of these documents, interested Members could discuss this matter and convey their considered views back to the Secretariat.

84. The representative of Argentina said that his country wished to thank the EC for raising this issue at the present meeting. Argentina's comments would be preliminary, since his delegation did not have an opportunity to see the EC's statement prior to the present meeting. First of all, Argentina was glad to note that none of the delegations who had spoken at the present meeting had contested the right of Members to express their views on the Appellate Body or panel reports under Article 17.14 of the DSU. It was his country's understanding that Article 17.14 of the DSU left no room for doubt as to the definitive and unconditional nature of Appellate Body reports; nor, however, did it leave room for doubt as to the right of Members to express their views on them. It was no coincidence, nor was it irrelevant, that this particular provision was contained in Article 17.14 of the DSU. The problem at hand was related to the question of how to circulate those written statements, but there was no question regarding the unconditional acceptance of Appellate Body reports. Argentina noted in this connection the ideas put forward by Norway and would be looking at them more closely. Finally, regarding symbols under which those documents should be circulated, Argentina noted the importance of ensuring that any such symbols should be closely linked to panel and the Appellate Body reports.

85. The representative of Mexico said that the issue under discussion could be considered in the context of the DSU negotiations. At the present meeting, he would only make some preliminary comments in light of what had just been stated by other delegations, in particular the United States and Norway. First of all, he wished to know whether any Member had ever imposed any condition regarding the acceptance of reports when expressing its views in accordance with Articles 16.4 and 17.14 of the DSU. Perhaps one could look at previous statements circulated in writing after the adoption of reports. He believed that the issue of the link between statements and a specific dispute nomenclature or an attachment to the minutes of the DSB meetings, when such statements were not read out during the meeting, was in the hands of the Secretariat. It was not up to Members to decide on this. The rules and criteria used by the Secretariat determined how documents should be grouped. Perhaps, this issue should rather be looked at by the Secretariat, which could shed some light on the criteria for inclusion of certain documents under relevant symbols. While in other WTO Bodies links between statements and specific nomenclatures did not exist, in the DSB there were specific links to the Rules of Procedure and the text of the DSU. Therefore, it might be correct to include such statements under the nomenclature used in the specific dispute it addressed, which would not change the legal value of such statements. It might, therefore, be useful for Members to reflect on whether a

link to each DS case or to the DSB minutes should be maintained so as to enable delegations to locate documents easily, as mentioned by the United States.

86. The representative of the European Communities said that her delegation wished to react to the interventions that had just been made. She thanked those delegations who had intervened, in particular those who shared the EC's systemic concerns or who had signalled their openness towards finding a more appropriate and acceptable solution to the matter at hand. She would just like to quickly react to the concerns that had been voiced. She wished to make clear that the EC did not call into question, and certainly accepted that any Member could, at any time, express its views on any Appellate Body report. That was best expressed by Chile who had stated that all had recognized that there was unconditional acceptance of reports as stipulated in Article 17.14 of the DSU and, therefore, if one made a statement to express views, this should not affect the integrity of an Appellate Body report. The EC would agree with this. But the EC's concern at the present meeting was related to form and was really the specific issue of the designation of documents as WT/DS-number and some Members had stated that they did not quite understand "what the big deal was about". Therefore, she would wish to explain briefly the EC's view on this. The EC considered that WT/DS documents, which were translated, were those necessary to allow Members to know what the law was or to decide whether or not to exercise their rights under the DSU. The EC believed that unilateral expressions of views by the losing party did not fit into that category and badly fit as a document following the Appellate Body's final ruling and enjoying the same documentary status. The EC was not aware of any other court or tribunal, which had its judgements published, to be followed immediately by a lengthy unilateral statement by the losing party explaining what was wrong with the judgement and the court that had delivered it. And in that regard, the EC did not agree with Mexico's view that it would be up to the Secretariat to decide on the designation of such documents. The EC believed that it was up to the DSB and that this was a decision to be taken by consensus. The point had been made that if it was not a DS designation, the document would not be found anymore. The EC felt that interested Members or persons could easily find the DSB minutes via the date of adoption. That was where one looked up what a Member had to say when a report was adopted. The DSB minutes reflected what all Members, who had spoken, said about the report and not exclusively the statement of one individual Member. The DSB minutes were the place where one looked up if one wanted to read how a particular report had been received by Members. The EC was very grateful for Norway's intervention suggesting alternative solutions and agreed that other options could be considered: i.e. a possibility to annex to the DSB minutes a statement that would be too lengthy or subsequent circulation of WTO documents under, for example as Norway had suggested, a DS/COM-number or a DSB/W-number or a JOB number. The EC was ready to engage in any further discussions on finding a solution to which all WTO Members would agree and believed that this should be possible in light of all available options. At the same time, she would already take stock of the fact that, from now on, the circulation of such statements in the WT/DS document series did not enjoy the DSB consensus.

87. The representative of Mexico said that, in response to the comments made by the EC, he wished to note that he had not stated that it was up to the Secretariat to decide on this issue, but rather that it was up to the Secretariat to assign symbols to documents, and, therefore, the Secretariat should clarify this issue. He was not aware of any rules in this regard. Perhaps the Secretariat could explain the criteria for circulating written statements as DS documents. He would also welcome if the EC could shed some light on this matter.

88. The DSB took note of the statements.

6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/382)

89. The Chairman drew attention to document WT/DSB/W/382, 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 would propose that the DSB approve the names contained in document WT/DSB/W/382.

90. The DSB so agreed.

7. European Communities – Anti-dumping measure on farmed salmon from Norway

(a) Statement by the European Communities

91. The representative of the European Communities, speaking under "Other Business", recalled that at its meeting on 15 January 2008, the DSB had adopted the Panel Report in the dispute between Norway and the EC. As Members recalled the rulings and recommendations of that report had not called for the repeal of the measure. Norway and the EC had managed to arrive at a mutually agreed reasonable period of time and the EC had stated its firm intention to duly implement the recommendations by the expiry of the reasonable period of time. In pursuance of implementation, the EC had already undertaken a number of steps, including a Note Verbale to the Norwegian authorities and questionnaires to the EC producers. Unrelated to the WTO proceedings, and in fact well before the adoption of the panel report, five EC member States, on 20 February 2007, had made a request for an interim partial review of the measure challenged by Norway. This request had been made pursuant to the EC Basic Regulation. The partial interim review had now been concluded and had resulted in the withdrawal of the measure effective 20 July 2008. As the measure challenged by Norway in the panel proceedings before the WTO was no longer in force, there would consequently be no further action required by the EC in terms of compliance.

92. The representative of Norway said that her country appreciated that the EC had now repealed the anti-dumping measures against farmed Norwegian salmon imposed in 2006. Norway had, however, noted with some surprise that the repeal was coupled with a "special surveillance mechanism", and that the Commission had been expressly permitted to "self-initiate" a new investigation as it deemed fit at any time over the next two and a half years. It was difficult for Norway to see the justification for subjecting salmon to such a special mechanism. Norwegian salmon had been the subject of trade restrictive measures in the EC, or threats thereof, for almost 20 years. The repeal of the latest measures, effective 20 July, had the potential of bringing this long-standing dispute to an end. It was, indeed, Norway's hope that this marked the beginning of permanent and normal trading conditions for salmon trade between two good neighbours.

93. The DSB took note of the statements.