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Dispute Settlement Body
21 October 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 October 2008

Chairman: Mr. Mario Matus (Chile)

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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.71)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.71)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.46)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.9 – WT/DS292/31/Add.9 – WT/DS293/31/Add.9)

(e) Turkey – Measures affecting the importation of rice: Status report by Turkey (WT/DS334/14)

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 five 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.71)

2. The Chairman drew attention to document WT/DS176/11/Add.71, 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 9 October 2008, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US administration continued to work with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, at the present meeting, the United States was presenting its seventy-first status report on its progress in the implementation of the DSB's rulings in this dispute. And, the EC must unfortunately, once again, note that this report showed no progress. Except for the date, it was identical to the previous report submitted in September and to every other report submitted since March 2007. In fact, since the condemnation of Section 211 in February 2002, the United States had failed to take any steps to implement the DSB's ruling. As already stated on several occasions, the EC sincerely hoped that the current US Congress or the next one would finally progress and bring the United States into compliance with its TRIPS obligations.

5. The representative of Cuba said that his country had examined the status report submitted by the United States in relation to this dispute, dated 10 October 2008. Bearing in mind that a status report should inform the DSB of progress in the implementation of recommendations or rulings, Members should be asking themselves what was the point of the US document. Month after month, for more than six years, the US Government had repeated exactly the same words, with no intention

whatsoever of coming close to the truth. Section 211 remained in effect, and legislative proposals to repeal it had been unsuccessful. Cuba, which, as everyone knew, had a significant interest in this dispute, had provided regular updates at the DSB meetings on the bipartisan legislative proposals. In 2007, five proposals, based on known bills, had been submitted in relation to Section 211. Of these five, only three had proposed the repeal of Section 211. None of them had yet been approved by the US Congress, and the United States had been unable to provide any facts or evidence to demonstrate otherwise. It was astonishing that Cuba should have to remind the United States of the importance of complying with an agreement that safeguarded intellectual property rights. These were private rights, the main beneficiaries of which were companies in the United States and in other developed countries, since they were the holders of the vast majority of trademarks and patents.

6. Over the last few days, in the midst of the crisis currently affecting the financial markets, the US media had reflected the fact that the protection of intellectual property rights was vital (although this was pure rhetoric when it came to the intellectual property rights of others). Despite this, the United States continued to implement legislation that was inconsistent with the Agreement providing the ultimate protection for these rights at the multilateral level. Section 211 not only undermined the rights of holders of Cuban trademarks, but it also made it possible for the well-known company Bacardi to sell products with names such as the HAVANA CLUB. This encouraged trade in fraudulent goods, creating a negative precedent, above all for trading parties that were very serious about combating counterfeiting. Finally, all Members should, once again, consider the effectiveness of the current dispute settlement mechanism, which was in urgent need of considerable reform. Section 211 was one of several unresolved cases that had been on the DSB's Agenda for years now, contravening WTO Agreements that were legally binding for all Members. All were responsible for this situation of impunity. The DSB's inability to enforce its decisions and the legitimate rights of holders, in particular when the non-complying party was a Member of the exclusive club of developed countries, had been demonstrated. Such prolonged non-compliance would undermine the credibility of, and the confidence in, the DSB, the WTO Agreements, and the multilateral trading system. It was Members' collective responsibility to preserve the objectives and institutions that had taken so much time and effort to develop. Members also had the collective obligation to demand the unconditional and immediate implementation of the provisions of the WTO Agreements and the DSB's rulings which were relevant to this case.

7. The representative of the Bolivarian Republic of Venezuela said that her delegation noted the status report submitted by the United States and thanked Cuba for its statement. Her delegation wished to be fully associated with Cuba's statement. She said that the WTO dispute settlement mechanism was one of the most important elements of a rules-based multilateral trading system. That mechanism had been devised by Members to ensure compliance with the WTO Agreements, and to guarantee integrity and fairness in the WTO's adjudicative process. Cuba had repeatedly highlighted the US prolonged non-compliance with the DSB's recommendations pertaining to the Reports adopted by the DSB more than six years ago. Venezuela considered the prompt settlement of this dispute to be vital in order to continue providing security and ensuring the enforcement of Members' substantive rights and obligations within the WTO framework. The main reason that the DSB had worked reasonably well was due to WTO Members themselves – both through their active participation in the system, and through their respect for the decisions adopted by the WTO's adjudicating bodies. This was why her country, once again, urged the United States to take the necessary measures to bring itself into compliance with its WTO obligations.

8. The representative of India said that her country thanked the United States for the status report and the statement made at the present meeting concerning the surveillance of implementation in this dispute and wished to express, once again, before the DSB its systemic concerns. As mentioned on earlier occasions, the principle of prompt compliance was missing in this dispute, despite all the endeavours of the US administration in working together with the US Congress. India, therefore, urged the United States to fully implement the DSB's recommendations.

9. The representative of China said that his country thanked the United States for its status report. China, once again, wished to register its support for 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 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 DSB's decision.

10. The representative of Thailand said that his country thanked the United States for its status report. Like previous speakers, Thailand remained concerned about the systemic implications of this dispute. The integrity of the rules-based multilateral trading system was undermined by non-implementation of the DSB's rulings and recommendations. Therefore, Thailand urged the United States to take all necessary steps to comply with its obligations under the TRIPS Agreement as soon as possible.

11. The representative of Brazil said that his country thanked the United States for its status report. As on previous occasions, Brazil urged the United States to implement the DSB's recommendations in this dispute.

12. The representative of Viet Nam said that his country thanked the United States for the status report. Like other Members, Viet Nam wished to express its concern about the implementation of the DSB's rulings and recommendations in this dispute. Viet Nam urged the United States to comply with the DSB's rulings and recommendations as soon as possible in order to contribute to the strengthening of the effectiveness of the WTO dispute settlement mechanism.

13. The representative of Nicaragua said that her country wished to thank the United States for its status report and Cuba for its statement made at the present meeting. Nicaragua agreed with previous speakers who expressed their concerns about the non-compliance with the DSB's decisions in this dispute. Nicaragua wished to reiterate its systemic concerns regarding the functioning of the dispute settlement mechanism and requested that the United States take steps to implement the DSB's rulings.

14. The representative of Bolivia said that her country wished, once again, to express its concern with regard to the status of implementation in this case and the indifference towards implementing the WTO decisions. Once again, there was no progress towards lifting of restrictions under Section 211. This lack of compliance had a negative impact on the credibility of the multilateral trading system as well as on the credibility of the DSB, and could alter the balance between the rights and obligations of Members. Once again, Bolivia asked the United States to comply with the DSB's rulings and to renew its efforts towards lifting the restrictions under Section 211.

15. The representative of the United States said that, in response to the systemic concerns expressed at the present meeting, his delegation wished to reiterate that the record was clear: the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where the US efforts to do so had not yet been entirely successful, the United States continued to work actively towards compliance. In that regard, this item remained on the DSB's Agenda precisely because of the US commitment to implement the DSB's recommendations and rulings and to report to the DSB its efforts to do so.

16. The representative of Cuba said that under Item 1 of the Agenda of the present meeting, three sub-items concerned the implementation by the United States. No resolution had yet been reached regarding those matters since the United States had not yet complied with the DSB's recommendations and rulings. Therefore, the expressions of concern by other Members about systemic problems were entirely justified. Although it was true that, in some cases, the United States

had complied with a number of recommendations, but there had been over 70 statements in the past six years regarding this dispute and the case had not yet been settled.

17. 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.71)

18. The Chairman drew attention to document WT/DS184/15/Add.71, 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.

19. The representative of the United States said that his country had provided a status report in this dispute on 9 October 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 DSB's recommendations and rulings that had not already been addressed by the US authorities by 23 November 2002.

20. The representative of Japan said that his country thanked the United States for its statement and the most recent status report. Since the United States had taken certain measures to implement part of the DSB recommendations in November 2002, as reported by the United States, there had been little tangible progress in this long-standing dispute regarding the remaining part of the DSB's recommendations and rulings. A full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[1] Japan wished to call on the United States to redouble its effort to this end.

21. 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.46)

22. The Chairman drew attention to document WT/DS160/24/Add.46, 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.

23. The representative of the United States said that his country had provided a status report in this dispute on 9 October 2008, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter.

24. The representative of the European Communities said that this was the forty-sixth time the United States had reported continued non-compliance without offering any concrete means to bring itself into compliance with its obligations. The EC thought that spoke for itself.

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

[1] Article 3.3 of the DSU.

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.9 – WT/DS292/31/Add.9 – WT/DS293/31/Add.9)

26. The Chairman drew attention to document WT/DS291/37/Add.9 – WT/DS292/31/Add.9 – WT/DS293/31/Add.9, 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 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 next (seventh) technical meeting between the EC and the United States would take place on 22 and 23 October. Progress in the processing of pending applications and on national measures continued. Seventeen authorizations had been granted since the establishment of the WTO panel, seven in 2007 only. Two authorizations had been granted in 2008 (that referred to GM maize GA21 and A2704-12 soybean), and another one was expected in the coming days (LL25 cotton). Two draft authorization decisions (oilseed rape T-45 and Roundup Ready 2 soybean) would be transmitted to the Council. Following the clarification by EFSA on concerns related to the relevant antibiotic marker gene, expected by mid-December, the EC might be in a position to authorize four more GM events (one GM potato and three maize hybrids) before the end of the year or in early 2009. The EC believed that given the inevitably sensitive nature of biotech issues, dialogue was the appropriate way forward and the EC remained open to continue discussions with the three complainants.

28. The representative of the United States said that his country thanked the EC for its status report as well as for its statement made at the present meeting. As the United States had noted at prior DSB meetings, approximately 50 biotech product applications were backed up in the EC's approval system. The EC's continuing refrain was that some decisions on pending applications were to be expected in the coming months. Regrettably, however, the facts spoke for themselves. The situation was not promising. To date in this calendar year, the EC had only made decisions on two pending biotech applications. Both of those products had originally been submitted for approval over 10 years ago – in 1998. At the rate of just two products per year, the EC would not reach decisions on the 50 pending applications for a quarter of a century, or until the year 2033. Moreover, delays in making decisions on pending applications represented more than just problems in the operation of the EC's approval system for biotech products. These delays had real-world implications, resulting in US grain producers continuing to be shut out of major markets in the EC. The United States continued to urge the EC to take the steps necessary to make timely decisions on pending applications, and thus to allow the parties to make progress towards resolving this dispute.

29. The representative of Canada said that her country thanked the EC for its statement. As previously mentioned, Canada had agreed to an extension of the reasonable period of time for the EC to bring itself into compliance with the DSB's findings until 31 December 2008. Canada had done so as it valued the constructive dialogue it had had to date with the EC. However, while it believed that progress had been made, Canada had significant ongoing concerns. First, on the subject of member State bans on the cultivation and marketing of approved biotech products, Canada was concerned that not only had all the original bans not been removed, new ones had been put in place. In particular, Canada wished to mention Austria's July 2008 ban on the marketing of the oilseed rape lines Ms8, Rf3, and Ms8xRs3. Second, while Canada was initially very pleased with what seemed to be an improvement in the timeliness of the EC approval system for biotech products, it noted that undue delays in the process appeared to be reappearing. Canada would continue to monitor the situation closely.

30. The representative of Argentina said that his country welcomed the status report submitted by the EC and recognized that certain progress had been made. However, a number of concerns still remained with regard to the approval process for GMO events within the EC, in particular concerning time-frames. The attitude of some EC member States was another matter of concern, as were the bans which were still in force. Argentina would continue to work with the parties to this dispute, in particular the EC, with a view to achieving the final implementation of the DSB's recommendations.

31. The representative of the European Communities said that the GMO regulatory regime was not the subject of the original Panel's findings, and neither its "operation" nor the status of specific applications not dealt with in the original Panel, were covered by this Agenda item. In any event, the GMO regulatory regime was working normally. Its functioning should not be rigidly assessed purely quantitatively and in abstract, in terms of number of authorization per year, since this was dependent on various product and case specific elements and, in particular, on the quality of applications and on the time needed by applicants to answer requests from EFSA on additional scientific information. Currently, only 38 complete applications were pending assessment by EFSA (four of them submitted very recently). The EC estimated that the 2008 yearly rate of authorization was roughly the same as in 2007. The EC had acted upon all the various national measures covered by the WTO Panel's ruling. All those measures had become obsolete, with the only exception being the Austrian measures on GM maize MON810 and T-25. Concerning the Austrian measures, Austria had lifted the bans on import and processing of GM maize MON810 and T25 (decisions of 27 May, published on 30 May). EFSA had been requested to issue an opinion on the scientific information provided by Austria on cultivation of these GMO events. An opinion would be issued following a meeting between EFSA's experts and Austrian scientists. These measures were not related to the implementation of the WTO Panel Report, as they were not covered by it. If the United States had questions on these measures, the DSB was not the appropriate forum. The Austrian safeguard measure on Ms8 Rf3 and MON863 had been notified to the Commission on 10 July and 16 July, respectively. The Commission had already requested EFSA to review these measures.

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

(e) Turkey – Measures affecting the importation of rice: Status report by Turkey (WT/DS334/14)

33. The Chairman drew attention to document WT/DS334/14, which contained the status report by Turkey on progress in the implementation of the DSB's recommendations in the case concerning Turkey's measures affecting the importation of rice.

34. The representative of Turkey said that, on 22 October 2007, the DSB had adopted the recommendations and rulings in this dispute. In a communication, dated 20 November 2007, Turkey had informed the DSB of its intention to implement the DSB's recommendations and rulings. On 9 April 2008, Turkey and the United States informed the DSB that, pursuant to Article 21.3(b) of the DSU, they had agreed that the reasonable period of time for Turkey's implementation of the DSB's recommendations and rulings would be six months, expiring on 22 April 2008. By communication of 7 May 2008, Turkey and the United States had informed the DSB about the agreement between the parties regarding the procedures under Articles 21 and 22 of the DSU. He said that Turkey had complied with the DSB's recommendations. Therefore, this was the only status report that Turkey would present on this dispute. The importation of rice was thoroughly unfettered now with no exceptions. Constructive discussions aimed at concluding a Memorandum of Understanding with the United States were still in progress. In that regard, a technical meeting had been held on 20 October and the parties were engaged to continue those discussions.

35. The representative of the United States said that his country thanked Turkey for providing its report on the status of Turkey's implementation of the recommendations adopted by the DSB in this

dispute. The United States noted Turkey's statement in its status report, and at the present meeting, that it had already complied with the DSB's recommendations. The United States was not in a position to share that assessment at this time. Instead, as Turkey noted in its report, the United States was currently involved with Turkey in discussions about those issues. The United States looked forward to further constructive engagement by Turkey in those discussions, and hoped that the parties would come to a successful conclusion promptly.

36. The DSB took note of the statements.

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

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

38. The representative of Japan said that the distribution process for the fiscal year of 2008 under the CDSOA appeared to be well underway, as shown most recently by the US Customs' publication of the list of the claims by the US domestic producers for the fiscal year of 2008 distributions.[2] Thus the CDSOA remained operational or, in the words of the US Customs, "the distribution process will continue for an undetermined period".[3] Japan urged the United States to immediately terminate the illegal distributions and repeal the CDSOA not just in form but in substance so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance with its obligations.

39. The representative of the European Communities said that on 1 October, the United States had started the distribution of the anti-dumping and countervailing duties collected in the latest fiscal year on imports made prior to 1 October 2007. This would be the eighth distribution under the Continued Dumping and Subsidy Offset Act. Such illegal distributions would continue for an undetermined number of years as the transitional clause preserved the distribution of duties collected on imports made prior to 1 October 2007 and such duties were progressively collected. Therefore, the EC would like to ask again the United States if, and what steps, it intended to take in order to stop the transfer of those anti-dumping and countervailing duties to its industry and finally put an end to the condemned measure. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports in this dispute.

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

41. The representative of India said that her country wished to thank the EC and Japan for bringing, once again, this issue before the DSB. India wished to reiterate that the disbursements made by the United States under the Byrd Amendment continued to be in force affecting the rights of other

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[2] See US Customs and Border Protection's website at:
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/
[3] *Idem*
http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml

WTO Members. It was India's concern that non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to cease its WTO-inconsistent disbursements. India agreed with previous speakers that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

42. The representative of Canada said that her 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.

43. The representative of Brazil said that his country wished to thank Japan and the EC for bringing, once again, this issue to the attention of the DSB. As Brazil had repeatedly pointed out, the disbursements made by the United States to its domestic industry under the Byrd Amendment continued to affect the rights of WTO Members. Moreover, attempts at reintroducing this legislation were a cause of serious concern. Brazil reiterated the need for the United States to bring this situation to an end and thus to fully implement the DSB's recommendations and rulings.

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

45. The representative of the United States said that, as his country had already explained at prior DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States welcomed Members' recognition that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. As stated at previous meetings, the United States therefore did not understand the purpose for which the EC and Japan had yet again inscribed this item on the DSB's Agenda. 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 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, with respect to one comment on the re-introduction of the CDSOA, the United States was not aware of any legislative proposals before the US Congress that sought to re-introduce the CDSOA, which, as the United States had explained, was repealed by the Deficit Reduction Act.

46. The DSB took note of the statements.

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

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

47. The Chairman drew attention to the communication from the Philippines contained in document WT/DS371/3, and invited the representative of the Philippines to speak.

48. The representative of the Philippines said that, on 7 February 2008, the Philippines had requested consultations with Thailand with regard to certain measures imposed on imports of cigarettes from the Philippines. The Philippines had held consultations with Thailand under Article 4 of the DSU on 23 April 2008 and on 9 September 2008. The Philippines had approached these consultations in a constructive spirit and with genuine efforts to find a solution. The Philippines wished to take this opportunity to express its appreciation for the open and constructive manner with which the dialogue with the Thai delegation had been conducted during these consultations. Regrettably, despite extra efforts lasting more than six months beyond the 60-day deadline required

by Article 4 of the DSU, the consultations had failed to bring about a satisfactory solution. Consequently, on 29 September 2008, the Philippines had submitted a request to establish a panel to examine the WTO-consistency of Thailand's measures, which had been circulated as document WT/DS371/3, in order to see its concerns addressed, and to safeguard the benefits to which it was entitled under the WTO Agreement. He did not intend to repeat at the present meeting the claims being made by the Philippines because these were already clearly detailed in WT/DS371/3. He simply wished to make two points. First, the Philippines would like to highlight what was not at issue in this dispute. The Philippines did not, in the least, question Thailand's sovereign prerogative to regulate its tobacco market. The Philippines also did not, in the least, question Thailand's prerogative to lay down the public health policies it deemed fit. What the Philippines sought was very simple: that within whatever regulatory framework Thailand chose for itself, imported cigarettes be treated fairly, both at the border and in the internal market, and in a non-discriminatory and transparent manner. Currently, these basic requirements were not fulfilled because the playing field on which imported and domestic cigarettes competed was uneven. Second, notwithstanding the request it was making at the present meeting, the Philippines remained ready to continue all efforts to resolve its differences with Thailand – an important ASEAN partner – in a fair and mutually acceptable way. This was, after all, the primary objective of the DSU. To conclude, the Philippines requested that a Panel be established at the present meeting to address the matter with standard terms of reference.

49. The representative of Thailand said that his country was deeply disappointed at the Philippines' request to establish a panel on this matter. Thailand and the Philippines were ASEAN partners, and Thai authorities had been working hard to resolve this dispute on a bilateral basis in the spirit of ASEAN cooperation. To that end, the parties had held several rounds of consultations both in Geneva and Bangkok. Thailand appreciated the Philippines' acknowledgement of its efforts in this regard. Thailand believed that Thai customs and fiscal laws were fully consistent with Thailand's obligations. Thailand also believed that this matter could be resolved bilaterally and remained open to further consultations with the Philippines. Therefore, in Thailand's view, establishing a panel at the present meeting would be premature, and as a result, it was not able to agree to the establishment of a panel at this time.

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

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

(a) Report of the Panel (WT/DS341/R)

51. The Chairman recalled that at its meeting on 23 January 2007, the DSB had established a panel to examine the complaint by the EC pertaining to this matter. The Report of the Panel, contained in document WT/DS341/R had been circulated on 4 September 2008 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Mexico and the EC. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

52. The representative of the European Communities said that the EC had started this dispute because it had serious concerns about the WTO-compatibility of Mexico's CVD investigation on imports of olive oil from the EC. The EC welcomed the Panel Report, which had confirmed that Mexico breached several of its obligations under the SCM Agreement. The Panel had found that Mexico's choice of the injury period could not allow an objective examination of the facts, in breach of Article 15.1 of the SCM Agreement: indeed, Mexico had excluded from its injury analysis the only periods in which olive oil, a seasonal commodity, was normally produced. The Panel had also confirmed the EC's claim on the lack of sufficient disclosure of confidential information: blanking out numbers and long sections of confidential documents without providing any summary did not

satisfy the requirements of Article 12.4 of the SCM Agreement. The Panel had also confirmed that Mexico breached its obligations by taking more than 25 months for concluding its investigation, while Article 11.11 of the SCM Agreement stated that investigations should normally be concluded within one year, and that "in no case" an investigation could last more than 18 months, in order to provide some degree of certainty to the parties. That rule made profound sense also if one considered that CVDs investigations were based on the analysis of a situation that preceded the time at which the investigation had been carried out: this meant that, by its own nature, the Mexican investigation was based on old data. By creating an "absolute" deadline of 18 months, the drafters of this Agreement wanted to ensure that the situation analysed in the investigation was not too remote from the duties it should justify. The EC considered that the violations identified by the Panel were so serious that Mexico should comply as soon as possible by repealing the measure. As explained, the EC considered that the Panel Report was sufficient to ensure a prompt settlement of this dispute. The EC was, however, concerned with the systemic implications of certain findings made by the Panel. The EC had decided not to appeal these findings because of the very special factual circumstances of the Mexican investigation, but as a general matter the EC would not consider such practices to be consistent with the obligations of an objective investigating authority.

53. One finding that the EC was particularly concerned with was the very literal interpretation given by the Panel to the provisions on pre-initiation consultations (Article 13.1 of the SCM Agreement). That Article stated that exporting Members "shall be invited for consultations" "before the initiation of any investigation". In this case, the Mexican Minister had signed the notice of initiation, the notice had been sent for publication in the official journal and, after the Minister's signature and before the notice of initiation had been published in the official journal, the investigating authority had sent a letter to the EC inviting it to consultations. While the Panel had considered that in this case this conduct was not in breach of Article 13.1, because "initiation" had taken place with the publication in the official journal, the EC was deeply concerned that the Panel's interpretation, if applied to other situations, would render the provisions of Article 13.1 meaningless. In the EC's experience, pre-initiation consultations were extremely useful in clarifying the situation, and very often resulted in a CVD investigation with a scope narrower than initially intended. Sometimes they had even resulted in no initiation at all. The EC's reading of Article 13.1, as put in practice by the EC, was that, in inviting the exporting Member, the investigating authority should also grant a good faith, reasonable opportunity to hold consultations. Sending out a letter of invitation a few days before initiation, when it was already irrevocably decided that the authority would open an investigation, was not a good-faith implementation of the Agreement, and it was difficult to reconcile that interpretation with the other provisions on consultations. For example, Article 13.2 talked about the continuation of consultations after initiation – how could one continue something that had never started? Unfortunately, the Panel had not addressed this issue.

54. Another finding that the EC had found particularly worrying was the Panel's definition of "domestic industry" of Article 16 of the SCM Agreement as not requiring actual production "around the date of filing of an application" or during the period of investigation for subsidy. The EC was mindful of the very special circumstances of this case, where the domestic industry was supposedly composed of a single producer, which did produce some output in what should have been an appropriate period of investigation for injury. However, the EC could not see how it was possible to perform a standing test under Article 11 of the SCM Agreement, or an objective injury analysis under Article 15 of the SCM Agreement, in the absence not only of production, but also of sales, stocks, employment, or any other relevant injury factor. Neither had the Panel, probably, since it had not addressed those issues in its findings on Articles 11 and 15 of the SCM Agreement.

55. Finally, the EC wished to express its disappointment with this Panel, which in the EC's view could have done a better job in assisting the DSB on several fronts. First of all, in terms of timing: the Panel had taken 16 months from its composition to issue its interim report, 18 months for the final report to the parties, 19 months for circulation to all Members. While the EC understood that certain disputes required more time than the six months and nine months foreseen by Article 12.8 and 12.9 of

the DSU, in this case Mexico and the EC had had to wait three times the normal deadline for a panel report of 90 pages that dealt with relatively simple questions (e.g. whether 25 months is longer than 18 months) but shied away from complex systemic issues (i.e. the relation between output requirements under the definition of domestic industry, and its practical application under Articles 11 and 15 of the SCM Agreement). Second, the Panel's legal and factual analysis was very superficial, was limited to a very cursory reading of the evidence and on an exceedingly literal interpretation of the SCM Agreement provisions under dispute, without taking any account of the reality of the SCM Agreement investigations. An example of the Panel's less than rigorous approach can be found in its analysis of the issue of whether or not there were producers other than the applicant:[4] the Panel listed several letters included in the record, described how these letters referred to olive oil producers other than the applicant, sometimes even specifying production capacity, but then one paragraph later the Panel, without explanation, concluded that there was no indication in the record that there were other producers. All were rather surprised to find that footnote 407 in the final Report, which had been distributed to the Parties, contained pictures of cartoon characters – notably Ms. Olive Oyl, girlfriend of Popeye the Sailor Man. To conclude, the EC welcomed the Panel's condemnation of the Mexican duties, urged Mexico to withdraw them as soon as possible, and hoped that future panel reports would be of a better quality and issued without undue delays.

56. The representative of Mexico noted that the EC had made a long statement at the present meeting and wondered if the EC considered that it was appropriate to reflect such a long statement in the minutes of the meeting. He recalled that, at previous meetings, the EC had questioned the methodology of circulating long statements, such as the one made by the EC at the present meeting, as DS documents. He said that, at the present meeting, his delegation would make a much shorter statement regarding the Panel Report before the DSB. He said that his country accepted the DSB's decision to adopt the Panel Report in the dispute between the EC and Mexico concerning olive oil. In general terms, Mexico agreed with the Panel's rulings and recommendations. Mexico considered the Report to be an important precedent, in terms of both the aspects examined and the quality of the Panel's findings. As examples of this, Mexico noted the following: The Panel had correctly found that even where there was an arms-length transaction between unrelated companies, it might be necessary to conduct a pass-through analysis. The Panel had also clarified that the bases for the obligation to conduct a pass-through analysis were Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement, and not Articles 1 and 14 of the SCM Agreement, as alleged by the EC. Furthermore, the Panel had found that, in this specific case, the applicant could be considered a domestic producer, even though it was not engaged in production at the time of initiation of the investigation, since the information gathered by the Mexican authority properly supported the Panel's determination that the applicant was a domestic producer. That information included details of the olive oil production history of the applicant (and its predecessor), three year's worth of monthly data on its economic indicators, information on the state of its production facilities, details of its business plan for resuming operations, as well the applicant's notification to the authority that it had resumed olive oil production after the imposition of provisional measures, all of which had been confirmed by the on-the-spot investigation conducted by the Mexican authority. Furthermore, the applicant had halted production for only one production season and had produced olive oil in two of the three years under examination for the determination of injury, maintaining its olive groves and production facilities during all this time and creating a new brand name and label, in addition to preparing its application for the initiation of the investigation.

57. The reasoning set forth in the Report provided valuable guidance on issues that were important for the multilateral system. It was also clear that despite the complexity of a subsidization system such as that of the EC, the outcome of this dispute provided important guidelines for the proper application of countervailing duties. In Mexico's view, all of this benefited both the Members' mechanisms to counter unfair international trade practices and the WTO dispute settlement system.

[4] Panel Report, paras. 7.245-247.

The EC had argued that the Mexican investigating authority's resolution was inconsistent with certain provisions of the SCM and Agriculture Agreements. In its report, however, the Panel had established that Mexico had acted in a manner consistent with the WTO Agreements in respect of nine of the 12 claims made. Moreover, the Panel's conclusions in respect of these claims constituted the substantive part of the dispute. These conclusions included the following: (i) Mexico had complied with Article 13.1 of the SCM Agreement by inviting the EC for consultations prior to the initiation of the investigation; (ii) due restraint had been shown in the initiation of the investigation, in accordance with Article 13 of the Agreement on Agriculture; (iii) the "essential facts" had been reported, as required under Article 12.8 of the SCM Agreement; (iv) a pass-through analysis had not been necessary; (v) the domestic olive oil industry had been properly defined and material injury determined in a manner consistent with the SCM Agreement, and the investigation had been requested by or on behalf of the domestic industry; and (vi) the other known factors were not those that were causing injury to the domestic industry.

58. With regard to the aspects concerning which the Panel had found that Mexico had acted in a manner inconsistent with the SCM Agreement, Mexico only wished to state its disagreement with the conclusion relating to it having used 9-month periods of each year in its injury examination. The Panel had erred in its findings of fact, because the injury analysis covered all the months of the three years examined, as had been explained at the substantive meetings and in Mexico's replies to Panel questions 78 and 84. Mexico did not dispute, and had decided not to appeal, the Panel's other conclusions, for the benefit of the WTO dispute settlement system. Mexico stated that it would comply with the DSB's recommendations and would bring its measure into conformity with the relevant provisions of the SCM Agreement.

59. The representative of the European Communities said that she wished to reply to Mexico's question regarding the EC's statement made at the present meeting. She recalled that the EC's statement made at the 1 August DSB meeting was about the right of Members to express their views under Article 17.14 of the DSU. The EC had never contested this right, quite to the contrary. The EC's statement was about the importance of putting such expressions of views in the official and appropriate record; i.e. in the minutes of the DSB. That was the reason why all Members had to listen to a rather lengthy statement of the EC at the present meeting. What the EC objected to was the circulation of such statements as documents, instead of making them orally at a DSB meeting, and in addition to circulate them under a DS number to be part of the record of the case.

60. The representative of Canada said that her country wished to thank the Panel and the Secretariat for their work in these proceedings. Canada had been a third party in this matter as it had a systemic concern with the legal interpretations of various provisions of the SCM Agreement that had been considered in this case. Therefore, Canada took this opportunity to comment on a couple of the issues that the Panel had considered in this case. First, with respect to the Panel's analysis concerning the necessity for a Member to demonstrate the pass-through of a subsidy, Canada welcomed the Panel's acknowledgement that the Appellate Body's decision in Softwood Lumber IV required such an analysis under certain circumstances. As indicated by the Panel, the Appellate Body had found in Softwood Lumber IV that a pass-through analysis was required where a subsidy was provided in respect of a product that was an input into the processed, imported product that was the subject of the countervail obligation and the producer of the input product and the producer of the imported product subject to the countervail investigation were unrelated. However, Canada found incomplete the Panel's explanation as to how the Appellate Body's decision in Softwood Lumber IV supported the remainder of the Panel's analysis as to the extent of the obligation to conduct a pass-through analysis. Second, with respect to the obligation found in Article 13.1 of the SCM Agreement, Canada disagreed with the Panel's statement that this Article did not require a Member considering whether to initiate an investigation to allow a sufficient time interval between its invitation to consultations was issued and the initiation of investigation, so that consultations could be held. Canada considered that the obligation to "invite" interested Members for consultations in Article 13.1 of the SCM Agreement referred to an invitation that was sent sufficiently early to afford a reasonable opportunity for

meaningful consultations between the exporting Members and the importing Member before the investigation was formally initiated.

61. The DSB took note of the statements and adopted the Panel Report contained in WT/DS341/R.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists

62. The Chairman drew attention to document WT/DSB/W/387, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/387.

63. The DSB so agreed.