WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/211
12 June 2006

(06-2791)

Dispute Settlement Body
9 May 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 9 May 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

Subjects discussed: Page

1. European Communities and certain member States – Measures affecting trade in large civil aircraft

(a) Request by the United States for a decision of the DSB (WT/DS316/5)

(b) Request for the establishment of a panel by the United States (WT/DS316/6)

1. The Chairman proposed that the two sub-items to which he had referred be considered separately. He recalled that the DSB had considered this matter at its meeting on 21 April 2006. In this connection, he drew attention to the communication from the United States contained in document WT/DS316/5 and invited the representative of the United States to speak.

2. The representative of the United States said that as discussed at the 21 April DSB meeting, the first sub-item concerned the request by the United States for a decision of the DSB, which had been circulated to Members in document WT/DS316/5. At the 21 April DSB meeting, the United States had explained the reasons why it was seeking this decision. The United States had further elaborated on its reasons in a document that had been circulated on 4 May as a JOB document.[1] That

[1] Subsequently circulated in document WT/DS316/8.

document responded to the questions that Brazil had raised at the 21 April DSB meeting. The United States wished to thank the delegation of Brazil for providing an opportunity to engage in a discussion of the issues that the US request presented. The US written request and its answers to Brazil's questions set out the reasons why the United States was seeking this decision at the present meeting. Therefore, the US representative would not repeat them. However, he wished to address the objections to the US request that the EC had raised at the 21 April DSB meeting. The EC had first objected that the Panel in DS316; i.e. the July 2005 Panel, had already been composed and had established its working procedures. But this was precisely one reason why the United States was seeking to have the second US panel request referred to the July 2005 Panel. It had taken a substantial investment of time and resources to compose the July 2005 Panel and to establish its working procedures. The United States saw no good reason to discard that work and to start over again from the beginning.

3. The EC's second objection was that the July 2005 Panel had taken four procedural decisions. None of those decisions provided a reason to reject the US request. The first decision that the EC had cited was the establishment of working procedures for the July 2005 Panel. As he had stated a moment ago, this was a reason to agree to the US request, not to reject it. The second decision that the EC had cited was the Panel's establishment of a deadline for the United States to respond to the EC's request for preliminary rulings. Granting the US request at the present meeting would have no effect on that decision. It would, however, eliminate the majority of the issues in the EC's request and would simplify matters for the Panel.

4. The third decision that the EC had cited was a 29 November letter from the Panel to the parties. In actuality, the letter was not a procedural decision. Rather, it was an invitation to the United States to respond to the EC's request to change the title of the dispute. The United States had filed a letter responding to the Panel's invitation, and the Panel had taken no further actions.

5. The final decision that the EC had cited was the Panel's decision of 1 March 2006 to suspend its timetable. It was remarkable that the EC would cite that decision as a reason to reject the US request. As the EC was aware, the entire purpose for requesting the July 2005 Panels in this dispute and in DS317 to suspend their timetables was to provide time for addressing the procedural issues present both in this dispute and in DS317, and thereby facilitate the efficient functioning of the dispute settlement system. The EC had also objected to the US request on the grounds that an Annex V procedure had already been carried out under the July 2005 Panel, and the EC had asserted that some of the measures in the second US panel request were – to use the EC's words – "not subject to" that Annex V procedure. The United States did not share the EC's point of view. The Annex V facilitator had asked the EC to answer questions about nearly all of the measures in the second US panel request; the EC had simply refused to answer those questions. That choice by the EC had nothing to do with the proposed decision.

6. Next, the EC had objected to the US request on the grounds that the second US panel request was substantially broader in scope than the original request. But in fact, as the United States had explained in its answers to Brazil's questions, there was overlap in the vast majority of the subject matter of the two requests. The second US request simply supplemented and provided additional details about that first request.

7. Finally, the EC had asserted that granting the US request would "severely violate the EC's due process rights" because it would allow the United States to "pick and choose the measure and the relevant market situation" and deny the EC the "clarity as to which claim and data it needs to respond to". Frankly, the United States did not understand the EC's point. The panel requests were clear and straightforward, and they set out in considerable detail the measures and claims at issue. In the view of the United States, granting the US request would enhance clarity and simplify the dispute, not complicate it. The United States assumed that the EC had accepted that the United States had a right

to both panel requests, just as the EC asserted a right to both panel requests in DS317. The only question was how the subject matter of these panel requests would best be considered in the Panel process. In sum, the purpose of the US request was to facilitate the efficient functioning of the dispute settlement system by having the matter contained in the second US panel request considered by the 20 July Panel. Once again, the United States hoped that the Members of the DSB would be able to agree to it. It thanked Members in advance for their support.

8. The representative of the European Communities said that the United States had put its unusual request before the DSB again. Essentially, the United States had requested that the terms of reference of the Panel as established on 20 July 2005 be modified to be those cited in documents WT/DS316/2 and WT/DS316/6. The EC continued to reject the US request for the same reasons as explained at the previous DSB meeting. None of the arguments raised by the United States at that meeting or at the present meeting had led the EC to reverse its position. The United States had argued that the existing Panel had done "nothing that could be affected by a modification of its terms of references". The EC disagreed. The United States had proposed to modify *ex post* the terms of reference of a Panel although the procedure had been advanced. In particular: (i) the Panel had already been composed; (ii) it had adopted its working procedures (now suspended); (iii) it had taken a number of procedural decisions[2]; and (iv) an Annex V procedure had been carried out and the report by the facilitator had been submitted to the Panel on 24 February 2006.

9. Furthermore, despite considerable overlap, the terms of reference of the two Panels differed significantly. In essence, the second Panel was significantly broader in scope and the United States was seeking to add further legal claims in this new proceeding. Most of the above measures had not been subject to the Annex V procedure in this case. Moreover, the Annex V procedure in the old case covered now outdated facts concerning markets and prices. The United States had proposed a merger of the terms of reference in a way that would severely violate the EC's due process rights in a serious prejudice case. If the United States had its way, it could arbitrarily pick and choose the measure and the relevant market situation. The EC would never obtain clarity as to which claim and data it needed to respond to.

10. Finally, but most importantly, there was no legal basis in the DSU for the DSB to take a decision to merge two Panels in the circumstances as described above. Even if there were, it would require consensus. The United States had referred to Article 9.1 of the DSU and had invoked the "US – Steel" case precedent. However, Article 9.1 of the DSU concerned an entirely different situation of multiple complaints by "more than one Member" regarding "the same matter". In such situations a "single Panel should be established". Hence, Article 9.1 of the DSU envisaged situations where multiple complaints by at least two WTO Members were brought relating to the same matter. Moreover, it was not "mandatory"; i.e. complainants did not have an automatic right to the merger. Thus, in the "US – Steel" precedent referred to by the US eight complainants had attacked one and the same measure. The Panel had not been composed and no other procedural steps had been taken in these cases before they had been merged. Moreover, the United States as a defendant had to give its agreement.

11. The case "Indonesia – Cars", which had been cited by the United States at the previous DSB meeting, had again confirmed the EC's position. It was a situation of multiple complainants where the United States had asked for the establishment of a panel and had asked that the panel previously established by the DSB to examine the complaints of the EC and Japan would also examine its complaint. Furthermore, as with the Steel case and indeed all other cases, the minutes of the DSB

[2] Letter by the Chairman of the Panel concerning time-table and Working Procedures, dated 9 November 2005; Letter by the Chairman of the Panel concerning preliminary rulings, dated 9 November 2005; Letter by the Chairman of the Panel concerning the case name of 29 November 2005; Communication by the Chairman of the Panel, dated 1 March 2006, concerning suspension.

meeting of 30 June 1997 indicated that Indonesia had given its approval before the DSB had taken that decision.

12. For all the above reasons as well as the reasons stated during the previous meeting, the EC still could not agree to the US request. The EC could agree, however, to the argument that only one panel should proceed in this dispute and that the same approach on this procedural aspect should be taken in both Aircraft disputes. The EC had been trying to engage in negotiations on this issue with the United States for a very long time, but the United States had not been prepared to discuss a solution which would safeguard the rights of both parties concerned. In the absence of an agreed solution, a much cleaner and simpler solution than that proposed by the United States would be to pursue the case on the basis of the April 2006 terms of reference. Otherwise, the dispute would continue to suffer from birth defects as described above. Indeed, the EC approach was also legally correct, while the US request for a decision to merge the two cases had no basis in the DSU and WTO practice. The EC however remained open to discuss how to resolve any practical issues and the EC was willing to find a pragmatic solution, but a solution which safeguarded the rights of all parties concerned.

13. The representative of Brazil said that his country had no comments on the substance of this debate between the United States and the EC at the present meeting, but wished to thank the US delegation for its time and efforts devoted to responding to Brazil's questions. Brazil might revert with comments on the substance of those answers in due course.

14. The DSB took note of the statements.

15. The Chairman said that since the DSB was not able to agree to the request by the United States contained in document WT/DS316/5, he wished to propose to take up sub-item b under this agenda item. He recalled that the DSB had considered this matter on 21 April 2006 and had agreed to revert to it. He wished to draw attention to the communication from the United States contained in document WT/DS316/6 and invited the representative of the United States to speak.

16. The representative of the United States said that, once again, his country was very disappointed that the EC was unable to permit the DSB to take the decision that the United States was seeking under the previous sub-item. The United States had hoped that its explanations and responses to the questions of other Members would allow the EC to reconsider its position. In any event, in light of the EC's decision to prevent referral of the matter in the US panel request to the existing panel in DS316, the United States was obliged to pursue establishment of a panel in the ordinary way. At the meeting on 21 April, the United States had discussed in brief the reasons why it had brought this matter to dispute settlement, and did not wish to repeat those points at the present meeting. The United States requested that the DSB establish a new panel with respect to the matter contained in the US panel request, pursuant to Articles 6 and 7 of the DSU.

17. The representative of the European Communities said that the EC had taken note of the second US request for the establishment of a panel in this dispute and did not object to its establishment. As regards the substance of the US request, needless to say it was the prerogative of the United States to seek to pursue its rights under the WTO Agreements. However, this did not entail a right for the United States to use the dispute settlement system for purely speculative claims. Indeed, in the recent "Upland Cotton" dispute, the United States itself had protested vigorously and had prevailed against the inclusion of a measure that did not exist at the time the panel request had been made and considered by the DSB.

18. Regrettably, that was precisely what the United States itself continued to attempt to do as regards alleged measures relating to the Airbus A350 aircraft. As would be well understood by all, neither the DSU nor the SCM Agreement allowed WTO Members to use it against a perceived threat

of subsidization. A measure subject to WTO dispute settlement must be subject to consultations and must also exist at the time of the panel request. No such alleged support existed for the A350, neither at the time the United States had asked for additional consultations on this matter, nor now. No commitment had been taken on whether or not EC member States wished to invest in this project. The EC, therefore, strongly objected to the inclusion of this non-existing measure in the panel request. The EC reserved its right to raise this and any other objections later before the Panel. The United States was once again seeking the establishment of a panel against the EC and certain member States. He noted that the EC continued to be the proper and correct respondent, also for the acts of its individual member States.[3] The member States co-operated closely with the EC, which was the sole and proper respondent for all measures challenged by the United States. Indeed, it was entirely false to claim that the EC "represents" its member States in this dispute or that these member States had the status of respondents. The violations that were alleged by the United States all related to matters for which the EC bore responsibility in the WTO and the EC was, therefore, the only proper respondent. Finally, he emphasized that the EC was fully determined to defend its legitimate interests and ensure that conditions of fair competition prevailed in the production of civil aircraft.

19. The representative of the United States said that there were a couple of points that the EC had referred to which his delegation wished to make comments. First, with respect to who the proper respondents were, it was his recollection that the United States had responded to essentially the same point at the previous DSB meeting and, therefore, he wished to refer Members to what had been stated at that time. With respect to the EC's comments about the A350, he thought that it would be appropriate for him to simply make clear for the record that in fact all four Airbus governments had committed to provide launch aid for the A350 and that Airbus had confirmed that those commitments were legally binding.

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

21. The representatives of Australia, Brazil, Canada, China, Japan and Korea reserved their third-party rights to participate in the Panel's proceedings.

2. United States – Investigation of the International Trade Commission in softwood lumber from Canada: Recourse to Article 21.5 of the DSU by Canada

(a) Report of the Appellate Body (WT/DS277/AB/RW) and Report of the Panel (WT/DS277/RW)

22. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS277/18 transmitting the Appellate Body Report on: "United States – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada", which had been circulated on 13 April 2006 in document WT/DS277/AB/RW, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He noted that 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."

23. The representative of Canada said that his country thanked the Panel, the Appellate Body, and the respective Secretariats for their work on the dispute between Canada and the United States in the

[3] EC – LAN; EC – Shipbuilding

softwood lumber injury case. Canada welcomed the findings of the Appellate Body in respect of the standard of review to be applied by panels in trade remedy cases. In particular, the Appellate Body had set out in considerable detail the nature of the review and the types of steps that a panel was required, under the terms of the DSU, to engage in and to take to ensure that investigating authorities of Members had met the obligations set out in the Anti-Dumping and the SCM Agreements.

24. In that respect, he referred Members to paragraph 93 of the Appellate Body Report. As the Appellate Body had noted, a panel may neither conduct a *de novo* review of, nor defer completely to, the conclusions of investigating authorities. Rather, "[a] panel's examination of those conclusions must be critical and searching ...". Both agreements, the Appellate Body had found, required that a panel examine "whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate". A panel must determine whether "the reasoning of the authority is coherent and internally consistent". It must examine whether the explanations provided by the investigating authority take proper account of the "complexities of the data before it".

25. And specifically in respect of the substantive provisions at issue, the Appellate Body had made the following finding, which in Canada's view neatly captured the essence of a panel's obligations in threat of injury disputes: "These provisions enjoin a panel to scrutinize carefully the inferences and explanations of the investigating authority in order to ensure that any projections or assumptions made by it, as to likely future occurrences, are adequately explained and supported by positive evidence on the record." These were the findings of the Appellate Body. However, in light of the fact that the Panel Report had not contained such a "searching" review, the Appellate Body could not proceed to complete the analysis. This underlined yet again the importance of a panel's careful scrutiny of the conclusions of an investigating authority. Canada continued to consider the revised ITC determination to be inconsistent with US WTO obligations under the SCM and the Anti-Dumping Agreements. Canada requested that the DSB adopt the Panel and the Appellate Body Reports in this matter.

26. The representative of the United States said that his country wished to thank the members of the Panel, the Appellate Body and the Secretariat for their hard work. In particular, the United States wished to convey special thanks to the members of the Panel, who had made themselves available to work on this dispute a second time by agreeing to serve in this Article 21.5 proceeding. As had been widely reported, on 27 April 2006, the United States and Canada had reached an agreement on the basic terms for settling their decades-old differences over softwood lumber trade. This was a welcome development, which should bring to an end the present dispute and the other related lumber disputes. Of course, the United States was disappointed that the Appellate Body had not been able to affirm the Panel's findings in this proceeding. As the United States had explained in its submissions to the Panel and the Appellate Body, the International Trade Commission had faithfully implemented the recommendations and rulings from the original dispute. In view of the 27 April agreement on the basic terms of a settlement, the United States looked forward to working with Canada to terminate the various disputes that remained pending before the WTO, as well as in other fora.

27. The representative of the European Communities said that in the present dispute, the EC had intervened before the Appellate Body in support of Canada's claims that the Panel had applied an improper standard when reviewing the WTO compatibility of the US measure taken to implement the earlier DSB's ruling. In the present case, the Panel had appeared to only require the investigating authority to reach a conclusion which was not "unreasonable" or "demonstrably unreasonable". In the EC's view, this was an extremely deferential standard of review which fell short of inquiring into whether the investigating authority had reached a conclusion which was unbiased, objective and fully supported by the evidence on the record. The EC, therefore, welcomed the Appellate Body's finding that the Panel had not shown a sufficient degree of scrutiny to objectively assess, as required by Article 11 of the DSU, whether the United States had brought its injury determination into conformity with its WTO obligations. The EC wished to commend the Appellate Body for having drawn general

guidelines to define more precisely what was expected from a panel to perform its duty under Article 11 of the DSU. The standard of review to be applied by a panel was a key legal issue. It was well established that panels were, on the one hand, prohibited from conducting a *de novo* review. On the other hand, panels could not simply defer to the conclusions of the investigating authority. But, striking the right balance between these two extremes might be a difficult exercise. The clarification brought by the Appellate Body was, therefore, very much welcome. Finally, this case illustrated again the need to introduce appropriate remand process. Whether the United States had brought or not its determination in conformity with its WTO obligations remained an open question as the Appellate Body could not complete the analysis in the absence of sufficient uncontested facts. The present dispute settlement provisions left no other solution than to restart a procedure under Article 21.5 of the DSU. This created an unnecessary burden on Members and on the dispute settlement process and was contrary to the principle of prompt settlement of disputes.

28. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS277/AB/RW and the Panel Report contained in WT/DS277/RW, as reversed by the Appellate Body Report.

3. United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing")

(a) Report of the Appellate Body (WT/DS294/AB/R) and Report of the Panel (WT/DS294/R)

29. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS294/15 transmitting the Appellate Body Report on: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')", which had been circulated on 18 April 2006 in document WT/DS294/AB/R, in accordance with Article 17.5 of the DSU. He wished to remind delegations that the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He noted that 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."

30. The representative of the European Communities said that first of all, the EC wished to thank the members of the Panel and the Appellate Body and the Secretariat for the time and the efforts dedicated to resolving the present dispute. At first sight, the issue of "zeroing" seemed only concerned with highly technical and detailed calculation rules, but actually behind this dry concept of "zeroing" lay the fundamental issue of how to define and establish one of the key concepts of the Anti-Dumping Agreement; i.e. the "margin of dumping". The EC warmly welcomed the finding of the Appellate Body which had clarified that a "margin of dumping" was (i) in relation to a product under investigation as a whole, and (ii) for an exporter or a foreign producer. Article VI:I of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement made clear that there was no such thing as a margin of dumping for certain models, or for individual importers or for specific transactions. Any calculation method which did not aggregate all "intermediate values" when multiple comparisons had been used in a first stage had necessarily failed to measure the level of dumping practiced at the level of the product and of the exporter. This meant, in turn, that the definition of "margin of dumping" prohibited "zeroing" methods whether used in original investigations or in duty assessment procedures as rightly decided by the Appellate Body.

31. The EC also wished to stress another fundamental aspect of the Appellate Body Report, namely, its conclusion that a challenge might be brought in the WTO against an unwritten measure. This was fully consistent with the DSU and previous DSB rulings: the form could not prevail over the substance. As in the present dispute, there were clearly cases where a Member maintained a norm

which violated its WTO obligations without having expressed that norm into a written document. Rejecting the possibility to challenge such norms would lead to an endless loop of litigation thus preventing the prompt settlement of disputes and security and predictability of the multilateral trading system, which was at the heart of the dispute settlement system.

32. It was not just the conclusion reached by the Appellate Body which merited attention, but also the clear criteria set for bringing an "as such" challenge against an unwritten measure. The standards of evidence were high and the burden of proof heavy. But in the EC's view, this was justified as, unlike with a written measure, the existence itself of the measure might be uncertain. The only reservation that the EC would make related to the Appellate Body's conclusion that it could not examine whether the "zeroing" methodology as used in US administrative reviews was a measure that could be challenged as such, and this because of the absence of factual findings by the Panel or undisputed facts in the Panel record.

33. The Panel record had for administrative reviews exactly the same evidence as that found sufficient in respect of original investigations and the United States had not contested the veracity of the facts advanced by the EC. Actually, it seemed that the Appellate Body had only searched the Panel Report for such evidence. The EC was concerned about the implication that such an approach could have if followed in other cases. This would indeed mean that the Appellate Body would never be in a position to complete the analysis and decide on a claim whenever a panel declined to rule on a claim and thus made no factual findings. The EC noted that in the "US – Softwood Lumber VI", which was also on the agenda of the present meeting, the Appellate Body had established what factual findings would be necessary to complete the analysis, had searched both the Panel Report and record for those facts and had finally concluded that they were contested between the parties before declining to complete the analysis. In the EC's opinion, this was a more appropriate way to decide on whether the Appellate Body might or might not complete the analysis.

34. With this limited reservation in mind, the EC was pleased to support the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body and expected that prompt and full compliance would follow. The United States would have to revise its specific determinations in the 15 original investigations and 16 administrative reviews challenged by the EC, but also to abandon the use of its "zeroing" methodology in original investigations, thus ceasing the practice of "zeroing". Common sense dictated that the United States, in order to avoid an endless loop of litigation and to spare the WTO from further disputes, should also declare that it would cease to use "zeroing" in administrative reviews. The EC was prepared to work constructively with the United States with a view to prompt implementation.

35. In this respect, the EC wished to welcome the initiative of the US Department of Commerce, which, on 6 March 2006, had announced its intention to cease the practice of "zeroing". The EC, however, noted that this initiative was very limited in scope. It only concerned "zeroing" in weighted-average-to-weighted-average comparison in original investigations. This was certainly a first welcome gesture, but it was clearly insufficient to solve all issues raised by the use of "zeroing" in the United States. The EC also called on the United States to follow its example when faced with similar circumstances. After the condemnation of its anti-dumping duty on bed-linen from India, the EC had drawn the inevitable conclusion from the DSB's ruling and stopped the practice of "zeroing".

36. The Appellate Body's findings in the present dispute had likewise clear far reaching consequences on which the United States could not turn a blind eye. The definition of "margin of dumping" was applicable through the whole Anti-Dumping Agreement. It was applicable in duty assessment proceedings, in new-comer reviews and in changed circumstances reviews. It was also applicable in sunset reviews whenever a dumping margin was calculated or relied on as already decided by the Appellate Body in "US – Corrosion Resistant Steel Sunset Review" (DS 244). It was equally applicable whether the comparison of export prices and normal values was made on a

weighted-average-to-weighted-average basis, or on a transaction-to-transaction basis. The United States should, therefore, stop "zeroing" in all three reviews, not just duty assessment proceedings, and also when comparison was conducted on a transaction-to-transaction basis. Any other attitude would only lead to a multiplication of disputes and undermine support for the anti-dumping instrument.

37. The representative of the United States said that his country found the Report of the Appellate Body deeply troubling. Indeed, the United States was so troubled by this Report that it had taken what was, for the United States, the unusual step of setting out its views at length in a written document, which currently was being distributed in the meeting room. The United States had also requested that this document be circulated to all Members as a DS document.[4] He assured delegations that he did not intend to read this document at the present meeting. Instead, he would simply summarize those aspects of the Report that should cause Members concern. He said he would make four points and a brief concluding remark. First, in finding against the use of "zeroing" in the post-investigation phases of an anti-dumping proceeding, the Appellate Body had relied upon the rationale that the term "margin of dumping" always referred to "the product as whole". This rationale was much broader than the rationale that the Appellate Body used in the "Bed Linens" and "Lumber" disputes. In those disputes, the Appellate Body had found that the use of "zeroing" in investigations involving the average-to-average comparison method was inconsistent with the specific requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. By contrast, the Appellate Body's new rationale ultimately was based upon GATT Article VI and Article 2.1 of the Antidumping Agreement. This new rationale had serious implications for other provisions of the Anti-Dumping Agreement and the manner in which Members had administered their anti-dumping regimes. He would not discuss these implications in detail here; they had been addressed in the US written document. In brief, however, it appeared that the Appellate Body's reasoning rendered inutile the targeted dumping provision of Article 2.4.2. It would also require dramatic changes to the operation of prospective normal value systems and the use of constructed value.

38. A second troubling aspect of the Report was related to the first; namely, that even though the implications of the "product as a whole" rationale had been pointed out to the Appellate Body, it had not even discussed them in its Report. By contrast, both the Panel in this dispute and the panel in the "Lumber Anti-Dumping" Article 21.5 proceeding had discussed the implications of the "product as a whole" rationale in a thorough and rigorous manner. Indeed, the brevity of the Appellate Body's analysis was difficult to square with the standards that it had established for panels let alone those it had established for Members' domestic authorities in trade remedy matters.

39. Third, there was the Appellate Body's treatment of the Panel's "as such" finding regarding "zeroing" as a "methodology". The United States did not disagree with the analytical framework set out by the Appellate Body regarding written or unwritten measures. The problem was that instead of examining whether the Panel had properly applied this framework, the Appellate Body had embarked upon its own *de novo* analysis regarding the so-called "norm of zeroing". The Appellate Body had made its own findings based upon its own consideration of evidence concerning which the Panel had made no factual findings or that the parties contested. In so doing, the Appellate Body had departed from its own "rigorous" standard for "as such" claims, and the United States still did not know the identity of the measure of general and prospective application that allegedly caused the US Department of Commerce to zero.

40. Finally, the Appellate Body had failed to address the US legal arguments regarding the mandatory/discretionary distinction. Inexplicably, the Appellate Body had repackaged the US legal arguments as ones relating to the Panel's handling of the facts under Article 11 of the DSU. As a result, in a break from previous GATT and WTO reports, there was a finding of an "as such" breach without a corresponding finding that the so-called "measure" actually caused the Member in question

[4] Subsequently circulated in document WT/DS294/16.

to breach its obligations. Based on what the United States had heard and had read thus far, the Appellate Body Report was being applauded in some quarters because it had gone beyond what negotiators could have achieved. However, that was just another way of saying that the Report had added to or diminished rights and obligations actually agreed to by Members, notwithstanding Articles 3.2 and 19.2 of the DSU. To the extent that this perception was widely held, the credibility of the WTO dispute settlement system was undermined. To conclude, the United States considered the issues presented by this Report to be important, and welcomed a discussion of them with Members.

41. The representative of Japan said that his country welcomed the findings and reasoning of the Appellate Body set forth in its Report in the case under consideration. As a third participant, Japan had actively participated in, and had made a substantive contribution to, the Appellate Body's review proceedings in this case. Japan was also challenging the US "zeroing" methodology in separate dispute settlement proceedings that was currently underway (DS322). Japan also appreciated that the Appellate Body had affirmed the arguments advanced by Japan both in this case (DS294) and its own dispute (DS322). In particular, the Appellate Body Report was significant in the following two ways. First, the Appellate Body had upheld the Panel's finding that the "zeroing" methodology used by the United States in W-to-W comparisons in original investigations constituted a rule of general and prospective application that could be challenged "as such" in WTO dispute settlement.[5]

42. Second, the Appellate Body had held that the US application of the "zeroing" methodology in weighted-average-to-transaction comparisons in certain administrative reviews was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Significantly, the Appellate Body's reasoning stemmed from the definition of "dumping" contained in Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 that "applies to the entire Agreement".[6] Thus the Appellate Body had confirmed that "under the Anti-Dumping Agreement and Article VI of the GATT 1994, 'dumping' and 'margins of dumping' must be determined for the product as a whole" for exporters or foreign producers, not individual transactions, and that all multiple comparison results must, therefore, be taken fully into account in the dumping determination.[7]

43. The Appellate Body had continued that, because Article 9.3 referred to Article 2, under Article 9.3, "the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established 'for the product as a whole' ".[8] In consequence, the Appellate Body had found that, because the USDOC "systematically disregards" the negative comparison results, the "zeroing" methodology in the periodic reviews necessarily resulted "in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994".[9]

44. Japan considered that these and other findings and reasoning contained in the Appellate Body Report were compelling, well-founded and fully consistent with the precedents it had established in the previous cases. Japan, therefore, strongly supported the adoption by the DSB of this Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

45. The representative of Korea said that, at the outset, as a third party participant in this dispute, Korea wished to express its sincere appreciation for the efforts made by the Appellate Body, the Panel, and the Secretariat in this matter. Korea welcomed the Appellate Body's finding that an investigating authority's calculation of "the margin of dumping" for purposes of the Anti-Dumping

[5] Appellate Body Report, paras. 204 and 205.
[6] Appellate Body Report, para. 125.
[7] Appellate Body Report, para. 126. See also paras. 128-129.
[8] Appellate Body Report, para. 126.
[9] Appellate Body Report, US – "Zeroing" (EC), para. 133.

Agreement must "aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value," and that an investigating authority "is not allowed to take into account the results of only some multiple comparisons, while disregarding others".[10] As the Appellate Body had found, the practice of "zeroing" employed by the US Department of Commerce in administrative reviews could not be reconciled with that requirement. Indeed, no practice of "zeroing" – whether based on an average-to-average, transaction-to-transaction, or transaction-to-average-methodology can be consistent with the requirement that the calculation of "the margin of dumping" aggregate the results of all of the multiple comparisons. Korea looked forward to the swift implementation of the Appellate Body's finding in the practice of all Members.

46. Korea appreciated the logic of the Appellate Body's reasoning, and welcomed the Appellate Body's correction of the earlier report by the Panel based on a detailed analysis of the language of the Anti-Dumping Agreement. However, Korea believed there was an even more fundamental justification for this result: "zeroing" was simply not consistent with the obligation contained in the first sentence of Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison" between the export price and normal value. As Korea had explained during the Panel and Appellate Body proceedings, the "fair comparison" requirement of Article 2.4 was an overarching and independent obligation that prevented Members from achieving unfair results through unbalanced or biased methodologies, such as the practice of "zeroing" that had been addressed in this dispute. While the Appellate Body Report might spell the end of the particular problem of "zeroing", there would, undoubtedly, be many other unbalanced or biased methodologies that would need to be addressed in the future under Article 2.4's "fair comparison" requirement.

47. As a separate matter, Korea also welcomed the Appellate Body's clarification concerning the types of measures that might be challenged "as such" in dispute settlement proceedings, and the evidentiary requirements for such challenges.

48. Finally, Korea noted the Appellate Body's inability to "complete the analysis" on a number of issues on which it had rejected the Panel's reasoning. Fortunately, these issues did not appear to have been critical to the resolution of the dispute. Nevertheless, they highlighted the need for improvement of the WTO's dispute settlement procedures to enable the DSB to reach a resolution of all material issues. As Members were all well aware, the issue of "zeroing" had been the subject of discussion in the negotiations for the improvement and clarification of the Anti-Dumping rules as part of the Doha Development Agenda. Discussions on this issue had also been underway in the Special Session of the DSB with a view to further improving the current text of the DSU. There was, of course, a difference between a decision on the application of the current rules in a specific dispute, and the process of negotiating the rules for future application. Nevertheless, the Appellate Body's findings in this dispute should provide negotiators with a clearer picture of the rights and obligations of Members under the current rules, as well as an indication of areas where further improvement would be needed.

49. The representative of Mexico said that his country had participated as a third party in the case under consideration and was grateful to the Panel and the Appellate Body for having allowed Mexico to express its views in the respective proceedings. Mexico was pleased with the Appellate Body's ruling as it represented a positive step toward eliminating the use of "zeroing" by WTO Members. More specifically, Mexico was of the view that the Appellate Body was right in reversing the Panel's finding by determining that there was indeed an "as applied" violation on the part of the United States in its use of the "zeroing" methodology for administrative reviews. Mexico reiterated its view that the practice of "zeroing" was inconsistent with the Anti-Dumping Agreement when applied to original investigations, administrative reviews or any other type of investigation envisaged under the Anti-Dumping Agreement, as well as to any of the various methods for comparing normal value and export price. Mexico believed that as a consequence of the Appellate Body's ruling, the United States should

[10] WT/DS294/AB/R, para. 127.

put an end, *erga omnes*, to "zeroing" in all ongoing anti-dumping investigations and administrative reviews.

50. The representative of Hong Kong, China said that her delegation wished to thank the Appellate Body, the Panel and the Secretariat for their work on this case, which concerned a long-standing and important issue in the area of anti-dumping, namely the practice of "zeroing" in anti-dumping proceedings. Hong Kong, China maintained a keen interest in this case and had participated actively in the dispute settlement process as a third party. The "zeroing" methodology was, in her delegation's view, inconsistent with the provisions of the Anti-Dumping Agreement, whether used in the original investigations or in reviews, and irrespective of whether the anti-dumping duty was assessed on a retrospective or a prospective basis.

51. Her delegation welcomed the Appellate Body's findings as instructive and helpful in clarifying that the use of "zeroing" in administrative reviews was a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. While it would have been desirable if the Appellate Body had made further clarifications and had further elaborated its analysis in a number of areas, her delegation believed that the Appellate Body's rulings, as they were, already sufficed in addressing conclusively the question of WTO-consistency of the "zeroing" methodology. Hong Kong, China believed this decision would enhance the predictability of the trade, and would help reduce any future attempt to produce inflated dumping margins. This preserved the rights and obligations of Members under the Anti-Dumping Agreement. With these observations, Hong Kong, China supported the adoption of the Report of the Appellate Body and the Report of the Panel as modified by the Appellate Body, and urged the United States to implement the DSB's rulings and recommendations forthwith. Hong Kong, China wished to invite other WTO Members to examine their present rules and practices on dumping margin calculations and to eliminate the use of "zeroing".

52. The representative of Brazil said that, in view of its systemic interests, Brazil had participated as a third party to this dispute. Brazil wished to thank the Appellate Body, the Panel and the Secretariat for their work in the case. During these proceedings, Brazil had stated that this dispute had given the dispute settlement mechanism an appropriate opportunity to clarify the issue of "zeroing" in a way that would curb a potential never-ending cycle of litigation. Brazil was pleased to note that the findings of the Appellate Body corroborated its assessment. With reference to both the EC's "as applied" and "as such" claims, the Appellate Body had given clear indications that trade remedies investigating authorities must treat export prices for what they really were, both in original investigations and reviews, and regardless of the type of comparison used. Although the Appellate Body Report formally concerned only "zeroing" in "weighted-average-to-weighted-average" comparisons in original investigations and "zeroing" in "weighted-average-to-transaction" comparisons in administrative reviews, it contained an unequivocal statement that the intrinsic unfairness of "zeroing" was effectively the same whether using the average-to-average, average-to-transaction, or transaction-to-transaction methodology. In all of these kinds of comparison, if "zeroing" was used, export prices were treated as less than what they really were, and the margins of dumping would not be established for the product as a whole. In line with its previous decisions in the trade remedies area, the Appellate Body had sent again the important message that, while the WTO Agreements conferred a great flexibility on the investigating authority in terms of methodologies to perform its task, such flexibility did not allow for abuse or manipulation of the available data. Brazil expected that the United States would fully implement the DSB's recommendations in this case in the shortest period possible. Brazil was also hopeful that in the context of the implementation process and for the benefit of the whole Membership, the United States would abandon the use of "zeroing" in all trade remedies domestic proceedings.

53. The representative of Argentina said that, like previous speakers, his country wished to express its systemic concern with regard to the delays in implementing the DSB's recommendations and rulings. Prompt compliance with the DSB's recommendations and rulings was a critical element

of the WTO dispute settlement system, and there was no doubt that long delays in implementation adversely affected the credibility of the system to the detriment of all Members. Argentina, therefore, urged the United States to redouble its efforts to ensure immediate compliance with the DSB's recommendations and rulings in this dispute.

54. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS294/AB/R and the Panel Report contained in WT/DS294/R, as modified by the Appellate Body Report.