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Dispute Settlement Body
28 November 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 28 November 2005

Chairman: Mr. Eirik Glenne (Norway)

Prior to the adoption of the agenda, the following items were removed from the agenda at the request of the United States: (i) "Mexico – Tax Measures on Soft Drinks and Other Beverages: Request by the United States for a decision by the DSB; and (ii) "Mexico – Tax Measures on Soft Drinks and Other Beverages: Report of the Panel".

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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.37)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.37)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.22 – WT/DS234/24/Add.22)

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.12)

(e) United States – Countervailing measures concerning certain products from the European Communities: Status report by the United States (WT/DS212/19)

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 then 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.37)

2. The Chairman drew attention to document WT/DS176/11/Add.37, 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 17 November 2005, in accordance with Article 21.6 of the DSU. As noted in that report, several legislative proposals relating to Section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, both in the US Senate and the US House of Representatives. The US administration was working with the US Congress in order to implement the DSB's recommendations and rulings.

4. The representative of the European Communities noted that Members were now approaching the third anniversary of the original 31 December 2002 deadline that had been granted to the United States to comply with the DSB's ruling and recommendation in this dispute. And, five months had already elapsed since the expiry of the extended implementation period on 30 June 2005. Yet and, once again, the status report of the United States was void of substance. No progress has been made. He noted that effective and non-discriminatory protection of intellectual property rights worldwide was essential for the development of international trade. This objective was shared by the EC and the United States. The respect and improvement of the TRIPS Agreement were essential to this objective. Section 211 was a discriminatory legislation that was driven by specific interest. Its removal by adoption of the repealing bills pending in the US Congress would bring a satisfactory solution to this dispute and conform to this objective.

5. The representative of Cuba said that, with the apparent aim to comply with the DSB's recommendations, the United States had continuously stated in its most recent status reports that several legislative proposals relating to Section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the US Congress. In fact, the US

Congress had not taken any action on the bills presented, nor had the US administration urged the US Congress to comply with the WTO report. The validity of the measure such as Section 211, which had existed for over five years, and which the WTO had found more than three years ago to be in violation of intellectual property rights protected by international conventions and agreements, had led Cuba to question the historic leadership that the US Government had assumed in the defense of intellectual property rights at the heart of the WTO. The process of postponements sought the expiration in 2006 of the period to renew the Havana Club brand in the United States, thus impeding the Cuban-French venture, Havana Club International, to renew its legitimate rights to the US Patent and Trademark Office. That fact would legally establish the theft of this trademark by Bacardi. There was absolutely no legal or moral reason for Section 211 to be in force three years after the DSB had made its decision regarding this matter. As concluded by the Appellate Body in its Report, Section 211 violated basic WTO principles such as national treatment and most-favored-nation treatment, which evidenced the US discriminatory treatment against Cuba. The indefinite postponement of the settlement of this dispute cast doubt on the efficacy and credibility of the DSB and the multilateral trading system and set a dangerous and systemic precedent which might affect other Members in the future, particularly developing countries. His delegation urged, once again, the United States to comply with the obligations assumed as a WTO Member by abolishing Section 211. The abolishment of Section 211 was, undoubtedly, the only feasible solution to this dispute in order to restore the credibility, predictability and confidence that should prevail in multilateral trade relations with regard to intellectual property.

6. The representative of Brazil said that, in light of the systemic importance of the discussions on the matter before the DSB at the present meeting, his delegation wished to reiterate Brazil's position on this issue which was contained in the statement made by Brazil at the 18 October 2005 DSB meeting.

7. The representative of Mexico said that, like on previous occasions, his country noted Cuba's feeling of frustration resulting from the fact that the matter had not been settled within a reasonable period of time. Mexico believed that the ideal situation would be for Cuba not to initiate its own case to pursue this matter, however, Mexico recognized that Cuba's rights under the DSU remained fully valid.

8. The representative of the Bolivarian Republic of Venezuela said that, as stated at the previous DSB meeting, his country fully endorsed Cuba's statement because it considered that Section 211 was WTO-inconsistent. Venezuela urged the United States to find an appropriate solution to this matter in line with the WTO Agreement. Venezuela wished to add to the comments made by Cuba that this type of non-compliance and violation undermined the credibility of the DSB and the DSU provisions. Furthermore, it not only undermined the credibility of the WTO, but also the negotiations because the dispute settlement mechanism was considered to be the jewel in the crown of the WTO. Venezuela would closely monitor how decisions were being implemented and respected before undertaking any further WTO commitments. Therefore, Venezuela once again urged the United States to comply with the WTO ruling.

9. 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.37)

10. The Chairman drew attention to document WT/DS184/15/Add.37, 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.

11. The representative of the United States said that his country had provided a status report in this dispute on 17 November 2005, 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 continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments. The US administration would continue to work with the US Congress to enact legislation to implement the DSB's recommendations and rulings.

12. The representative of Japan said that his country had been waiting to see the passage of bill H.R. 2473 – introduced in the US House of Representatives in May 2005 – which would amend the US anti-dumping statute relevant to this dispute. Japan noted the statement by the United States that the US administration would continue to work with the US Congress to enact this legislation. Prompt implementation of the DSB's recommendations and rulings was essential for the credibility and Members' confidence in the WTO system. Japan believed that this conviction was shared not only by the US administration, but also by the US Congress. Japan, once again, strongly called on the United States to bring itself into compliance with its obligations under the WTO without further delay.

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

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.22 – WT/DS234/24/Add.22)

14. The Chairman drew attention to document WT/DS217/16/Add.22 – WT/DS234/24/Add.22, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

15. The representative of the United States said that his country had provided a status report on 17 November 2005, in accordance with Article 21.6 of the DSU. As noted in that report, budget reconciliation legislation that included repeal of the CDSOA had been approved by the House Committee on Ways and Means on 26 October 2005, and by the House Budget Committee on 3 November 2005. On 18 November 2005, after the United States had provided its status report, the full House had passed that legislation. A conference committee with negotiators from the House and the Senate would now consider the bill. The US administration would continue to work with the US Congress to enact legislation, and to confer with the complaining parties in these disputes, in order to reach mutually satisfactory resolutions of these matters.

16. The representative of the European Communities said that the inclusion of provisions repealing the Byrd Amendment in the Deficit Reduction Act adopted by the House of Representatives on 18 November 2005 was a significant and much welcome step in the implementation of the WTO's rulings and recommendations. This was not the end of it. A House/Senate conference would now have to decide on it since the US Senate had passed a different version of the bill that did not provide for the repeal of the Bird Amendment. But, the House vote was an encouraging sign that this dispute might be heading into the right direction; i.e. compliance and lifting of retaliation. The EC hoped that the US Congress would build on the momentum created by the House vote and complete the legislative process to repeal the Byrd Amendment.

17. The representative of Japan said that his country had noted the latest status report as well as the statement made by the United States at the present meeting, and in particular the fact that on 18 November 2005, the US House of Representatives approved the Reconciliation Bill (H.R. 4241), which contained, among other things, a provision to repeal the CDSOA. Japan welcomed this action

by one of the houses of the US Congress as an important step forward. Japan strongly urged that the US Senate consider this legislation favourably as well so that the repeal of the CDSOA could finally be secured. Japan's countermeasures, as an unhappy last-resort remedy, shall be taken only temporarily until the implementation of the DSB's recommendations and rulings was duly secured. Bearing that point in mind, Japan called on the United States to accelerate its work toward a full compliance with its obligations under the WTO with regard to this dispute.

18. The representative of Brazil said that his country thanked the United States for the status report and noted that on 18 November 2005 the US House of Representatives had approved the repeal of the so-called Byrd Amendment in the context of the discussion on the budget reconciliation bill in the US Congress. Brazil welcomed such development and hoped that the repeal of this illegal measure be expeditiously confirmed in the next steps of the legislative process in the United States, thus concluding an overly long period of non-compliance in a matter that had serious systemic and economic implications.

19. The representative of Canada said that his country had taken note the US latest status report on the Continued Dumping and Subsidy Offset Act of 2000. The report recounted important and encouraging developments in this dispute. On 18 November 2005, the US House of Representatives had adopted its version of the Budget Reconciliation Bill, which included a provision for the repeal of the Byrd Amendment. Canada welcomed this initiative, though it was aware that there was still strong opposition in the US Congress to repeal the Byrd Amendment. There is no doubt that the budget adjustment process afforded the United States an opportunity to revoke the Act and to meet its obligations under the WTO. For several years now, the international community had been calling for an end to this unlawful measure. The Byrd Amendment's harmful effects on international trade were acknowledged when the DSB had determined that the measure contravened the rules of international trade. Moreover, the Byrd Amendment was detrimental to the US economy, as several consumer protection groups in the United States had recognized. For example, the Consuming Industries Trade Action Coalition (CITAC) was pushing for repeal of the Byrd Amendment because it was damaging to the US economy. CITAC and many other stakeholders in the United States had welcomed with enthusiasm the first step taken recently towards the abolition of the Act. Canada had stated many times that trade sanctions were not the approach it preferred, but a measure it deemed necessary in order to protect its interests. And Canada would certainly continue to defend its interests fully. Canada wished to remind the United States of the importance for each one of them of an international trading system founded on the rule of law, and urged the United States to put an end to this dispute by abolishing the Byrd Amendment.

20. The representative of Korea said that, like other co-complainants in this dispute who had taken the floor previously, Korea had noted the status report and the statement made by the United States at the present meeting, and welcomed the fact that a budget reconciliation package that contained repeal of the CDSOA had been approved by the House Committee on Way and Means, the House Budget Committee and the full house in the US Congress since the 18 October 2005 DSB meeting. Korea considered that these recent developments were positive signs for resolving this dispute and, hoped that similar positive developments would take place in the Senate in the near future. It should also be recalled that the implementation regarding this dispute was far behind schedule since almost 2 years had passed since the expiry of the implementation period. In this regard, Korea urged the United States to redouble its efforts to implement the DSB's recommendations and rulings without further delay to end this dispute once and for all.

21. The representative of India said that his country urged the United States to urgently complete its domestic processes leading up to the repeal of the CDSOA. India, of course, reserved all its rights under the DSU, including the right to exercise the authority given by the DSB to India to suspend concessions or other obligations *vis-à-vis* the United States.

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

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.12)

23. The Chairman drew attention to document WT/DS160/24/Add.12, 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.

24. The representative of the United States said that his country had provided a status report in this dispute on 17 November 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration was working closely with the US Congress, and conferring with the EC, in order to reach a mutually satisfactory resolution of this matter.

25. The representative of the European Communities said that, at the previous DSB meeting, the EC had urged the United States to implement the DSB's recommendations and rulings in this dispute and thereby to put an end to a situation of non-compliance that had lasted for more than five years. As a first step, the EC had asked the United States to describe in its status reports the actual initiatives that were being undertaken to comply with the DSB's recommendations and rulings. Unfortunately, the most recent status report submitted by the United States was a mere repetition of previous statements. The EC was concerned about the US attitude, which prevented the DSB from exercising appropriately its surveillance functions. Similarly, the EC was concerned about the lack of progress in the United States to bring its legislation into line with international standards of copyright protection. Nevertheless, the EC still trusted that the United States would act to remedy this unfortunate situation as proof of the seriousness of its commitment towards the respect of the TRIPS Agreement and the protection of intellectual property rights worldwide. The EC had been told that the US Trade Representative, Portman, had serious contacts with the US Congress on this, and the EC encouraged such efforts. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration proceedings related to its request for retaliation.

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

(e) United States – Countervailing measures concerning certain products from the European Communities: Status report by the United States (WT/DS212/19)

27. The Chairman drew attention to document WT/DS212/19, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning countervailing measures on certain products from the European Communities.

28. The representative of the United States said that his country had provided a status report in this dispute on 17 November 2005. As noted in that report, the United States had consulted with relevant Congressional committees with regard to the implementation of the DSB's recommendations and rulings. The United States would continue to take steps to implement the DSB's recommendations and rulings, including a request from the USTR to the Department of Commerce to conduct re-determinations of the Spanish and UK reviews to implement the DSB's recommendations and rulings.

29. The representative of the European Communities said that the EC could not but welcome the US initiative to submit the relevant status report pertaining to the case under consideration. The EC had taken careful note of it. The EC wished to express its disappointment at the fact that the US status report did not actually serve its intended purpose as envisaged in Article 21 of the DSU, namely to allow the DSB and the WTO Members to survey the implementation of the relevant DSB's findings and recommendations. In fact, the US status report was extremely short and provided no information

whatsoever regarding the steps that the United States intended to take to implement the DSB's rulings and recommendations. The EC thus wished to submit a number of questions in this regard, and hoped that it would get responses regarding the US intended course of action. Before doing so, though, the EC wished to express its surprise at the statement in the status report, namely, that the United States had consulted with relevant Congressional committees with regard to the implementation of the DSB's recommendations and rulings. The EC did not see any reason for legislative action in this respect. The new "change-in-ownership" methodology was not challenged in the recent compliance Panel proceedings, thus the EC did not see any need for legislative action and consultations with Congressional committees. The EC would appreciate any US comments and clarifications in this regard.

30. In addition to this point, the EC would like to submit a number of questions and expected to receive replies and clarifications, if possible. These included the following: "(i) How exactly does the United States intend to implement the DSB rulings and recommendations; and in particular those related to the need to make an explicit determination on the nature of the privatizations involved? What are the deadlines envisaged and how does this determination fit with the Section 129 proceedings? (ii) Does the United States – through the DOC – intend to implement the compliance panel findings by revisiting the first sunset review of 2000 in a new Section 129 proceeding? If yes, could the United States indicate the applicable time-tables and deadlines? (iii) If we are not mistaken, all measures involved in this case are due to sunset on 1 December 2005. In this respect, the EC wishes to ask whether the US industry has pursued sunset reviews. If this is the case and indeed sunset reviews are opened, the United States is obliged to examine all relevant evidence in line with Article 21.3 of the SCM Agreement, and in conformity with the recent DSB's recommendations following the compliance panel proceedings. This evidence obviously included evidence that was submitted in the previous Section 129 proceeding and was not examined by the DOC. What is the position of the United States in this respect?".

31. In connection with the above, the EC considered that in any case, all measures covered in those proceedings including alleged subsidies in the French corrosion-resistant case, had all been amortized and there were good and valid reasons for not opening sunset reviews on them. In addition, there were no new subsidy allegations. Consequently, proceeding to affirmative likelihood of subsidization determinations would run counter to all fundamental notions of good faith and fairness. In the upcoming sunset reviews, if any, the EC intended to make substantive submissions to support its position. Nevertheless, the EC would appreciate a preliminary US reaction in this respect. Finally, the EC believed that it was time to end this privatization saga. It served no purpose at all. It was time for the United States to implement fully and faithfully the relevant DSB's recommendations and terminate the measures at issue. This was the appropriate course of action required by both the DSB's ruling and recommendations and the fact that all these measures had been amortized in any case. Thus they should lapse. Any other course of action was doomed to perpetuate a dispute that had run its course.

32. The representative of the United States said that his delegation wished to thank the EC for its statement. The United States noted that the EC had asked a number of questions, and that some of those questions contained some assumptions or other statements. His delegation was unfortunately not in a position, at the present meeting, to answer those questions or address those assumptions and other statements, but it would refer them all to capital for review.

33. The DSB took note of the statements.

2. Brazil – Measures affecting imports of retreaded tyres

(a) Request for the establishment of a panel by the European Communities (WT/DS332/4)

34. The Chairman drew attention to the communication from the European Communities contained in document WT/DS332/4, and invited the representative of the European Communities to speak.

35. The representative of the European Communities said that the EC regretted that it had become necessary to file the present request for the establishment of a panel over Brazil's discriminatory measures against imported retreaded tyres. The import ban, from which only Mercosur imports were exempted, violated some of the most fundamental rules of the GATT 1994. The EC had discussed this matter with the Brazilian authorities over many years and was disappointed that Brazil had not seized the opportunity to avoid the present WTO dispute. Not only did the year-long talks bore no fruit, the situation had even deteriorated. Most recently, the Brazilian government had submitted a draft law to its legislature, which would confirm the import ban on retreaded tyres and an exemption for Mercosur imports in the form of an act of Parliament. In these circumstances, the EC had no other option than to request the establishment of a panel in order to uphold fundamental principles of international trade law. The EC would probably hear at the present meeting from Brazil that its measures were perfectly compatible with WTO disciplines since they were justified notably for the protection of the environment and public health. The EC had to be very clear on this: the EC in no way would challenge any measure that could be justified for environmental concerns. But the present import ban on retreaded tyres did not fall in this category. Banning the importation of retreaded tyres made no contribution to the environmental and health protection objective, and was in any event trade distorting and discriminatory. Also, in the light of some allegations which Brazil had made before the Committee on Trade and Environment, the EC wished to stress that most of these assertions were completely unfounded. Exports of retreaded tyres were not a tool for the EC to reduce the accumulation of waste tyres. The importation of retreaded tyres from other countries to the EC was not only permitted, but also took place. In the light of the existing controversy between Brazil and the EC and the exhaustion of all means to settle the dispute amicably, the EC was presenting its request that a panel be established to rule on the matter.

36. The representative of Brazil said that his country regretted that the EC had decided to request the establishment of a panel in the present dispute. During the informal and formal consultations held on this issue, Brazil had provided abundant information and evidence that the measures the EC was now trying to take to the panel stage were in full compliance with its multilateral obligations. It was Brazil's expectation that the EC would be satisfied with the elaborate and expeditious clarifications given by Brazil.

37. The dispute that the EC had brought against Brazil concerned a very special product. Indeed, tyres were not ordinary products. Designed to be both robust and durable, they contained highly combustible and pollutant materials and, even more importantly, they generated a large quantity of absolutely undesirable wastes at the end of their life cycle. As widely acknowledged, the impact of tyres on the environment and on human health was considerable. This related to their manufacture and use, as well as to the disposal of the wastes they generated. Estimates showed that almost one billion tyres reached the end of their life cycle each year all over the world. The British Environment Agency[1] had helped all to better understand the dimensions of the problem when it had recalled that the volume of waste tyres generated every year in the United Kingdom alone was enough to stretch a line from London to Sydney. The same agency reported that: "millions of tyres remain in stockpiles around the country (i.e. the United Kingdom) and some of these dumps harm the environment. Tyres did not decompose and could be a fire risk affecting the air with toxic fumes, and watercourses, which

[1] Environment Agency - Tyre Watch;
http://www.environment-agency.gov.uk/business/444251/444707/288582/?lang=_e.

fire quench waters could run into. Some landfill tyre fires had been burning for years." The ever-growing generation of rubber wastes was thus a major concern to environmental and health authorities. In many countries the increasing volume of waste tyres had already exceeded the limits of the ordinary waste disposal capacities and techniques.

38. Waste tyres, which had made up for the largest part of the world's rubber waste stream, were definitely the most problematic waste to deal with: they were difficult to collect for geographical, economic and cultural reasons; they were costly to deposit due to their huge volume; they were hard to dispose of since no options for disposal of large quantities of rubber wastes had proved to be thus far, at the same time, environmentally sound and technically and economically viable.

39. Tyres were also a source of significant public health concerns, especially in tropical countries. Tyres were ideal breeding places for mosquitoes transmitting serious diseases such as yellow fever, dengue and malaria. According to the World Health Organization, malaria caused more than 300 million acute illnesses and, at least, one million deaths annually.[2] The WHO had also recalled that dengue was the most important emerging tropical viral disease in the world.[3] Both diseases were present in Brazil. Tyres did play an important role in the spreading of the vectors of these diseases among countries and continents. Other health risks associated with this product resulted of air, ground and water contamination by toxic substances released through burning of tyres. Furthermore, some methods of waste tyres disposal had an impact on human health.

40. For all these reasons, and in order to avoid premature generation of unwanted wastes in their territories, Brazil and several other WTO Members had adopted measures to restrict trade in casings and retreaded tyres.

41. The dispute that the EC had brought against Brazil referred to a specific kind of tyre – retreaded tyres. A retreaded tyre was a previously used tyre which worn tread was replaced with new material. A retreaded tyre was a short lifespan product. While new tyres might potentially be retreaded at least once before becoming wastes, retreaded tyres in most cases could not be retreaded for a second time in light of stringent technical and safety regulations, adopted both in the EC and Brazil. It was only logical then that imports of retreaded tyres increased the volume of waste tyres to be eliminated in the importing country. It was also reasonable to conclude that the benefits deriving from that kind of trade remained largely with the exporting countries, which got rid of the casings used to produce the retread and were paid for that. To the importing country remained the burden to dispose of rubber wastes generated by a product that entered its territory just to perform the final stage of its life cycle.

42. Both Brazil and the EC were perfectly aware of the health and environmental problems resulting from the accumulation of waste tyres in its territory. During the formal and informal consultations held with the EC, Brazil had made clear that it lacked capacity to deal, in an environmentally sound way, with the whole amount of waste tyres generated annually in the country as well as with the millions of units already scattered throughout the national territory. Moreover, Brazil also stressed that it would not cope with a regular and increasing flow of retreaded tyres from the EC.

43. Brazil was of the view that, in the present case, there was a set of serious and legitimate concerns that must inform any consideration of this matter. Brazil believed that, as recognized for instance in the Declaration on TRIPS and Public Health, WTO rules could and should be interpreted and implemented in a manner supportive of WTO Members' right – and in Brazil's case, constitutional obligation – to protect public health and the environment. By requesting the establishment of a panel

[2] http://mosquito.who.int/cmc_upload/0/000/015/372/RBMInfosheet_1.htm.
[3] WHO, Guidelines for Treatment of Dengue Fever/Dengue Haemorrhagic Fever in Small Hospitals, New Delhi, 1999.

at the present meeting, the EC had resorted to the WTO dispute settlement mechanism as an additional step in its strategy to guarantee markets in the developing world to dump a short lifespan product – retreaded tyres – broadly rejected by European consumers. In light of the foregoing, Brazil could not accept that a panel be established as requested by the EC.

44. The representative of the Bolivarian Republic of Venezuela said that since this matter was on the DSB's agenda for the first time, his delegation wished to make a statement. This was a very complex case, which involved not only WTO Agreement, but also various multilateral environmental agreements. Moreover, the issue was linked to quality standards and environmental means. His delegation would convey the information regarding this matter to capital, and wished to be kept informed of any developments regarding this matter.

45. The representative of Cuba said that his country shared Brazil's concerns about the harmful effects on the environment and human health of the increasing generation of waste tyres and considered that Brazil quite properly had taken measures to tackle the problems caused by the growing generation of scrap tyres in its territory. All were aware that tyres discarded in the environment were an ideal breeding ground for mosquitoes that carried diseases such as dengue fever and yellow fever. Trade in tyres, particularly used tyres, was one of the main causes of the spread of viral diseases around the world. Furthermore, tyres contained highly combustible and polluting materials, and fires frequently occurred where tyres were stockpiled, posing a threat to human health from air and soil contamination. The current pace of trade in used and retreaded tyres from the developed to developing countries was a matter of real concern. Many developed countries viewed the exportation of used tyres as a way to reduce the volumes of scrap tyres generated in their territories, and even as a valid option for disposing of waste tyres. They were thus transferring the management of waste tyre disposal and the environmental responsibility to third world countries in view of the shorter life span of such tyres, using other countries as dumps, which was totally unacceptable. Cuba would be following developments regarding this matter with interest.

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

3. Korea – Anti-dumping duties on imports of certain paper from Indonesia

(a) Report of the Panel (WT/DS312/R)

47. The Chairman recalled that at its meeting on 27 September 2004, the DSB had established a panel to examine the complaint by Indonesia pertaining to this matter. The Report of the Panel contained in document WT/DS312/R had been circulated on 28 October 2005 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Indonesia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

48. The representative of Indonesia said that his country wished to thank the Panel and the WTO Secretariat for their time devoted to the dispute under consideration. The matter at hand concerned the imposition by Korea of anti-dumping duties on Indonesian exports of paper. As Indonesia had explained at the time of establishment of the panel, its export paper to the Korean market were substantial and the imposition of the duty had caused serious disruptions to its economy. Indonesia was, therefore, pleased with the overall outcome of the dispute. The Panel had found that Korea's measures violated several provisions of the Anti-Dumping Agreement. It had ruled that Korea failed to make a proper determination of dumping and failed to properly assess injury. The Panel had also ruled that the procedural rights of Indonesia's exporter were not respected and had found that the Korean investigating authority acted inconsistently with the disciplines of the Anti-Dumping Agreement.

49. Indonesia recalled that Article 21.1 of the DSU provided that prompt compliance with the DSB's recommendations or rulings was essential in order to ensure the effective resolution of disputes to the benefit of all Members and for the sake of the credibility of the WTO. Furthermore, Article 21.3 of the DSU provided that immediate compliance was expected unless this was impracticable. The parties to the dispute had discussed proper compliance with the DSB's rulings and recommendations to eliminate the anti-dumping margin and thereby to eliminate the measures. Indonesia was aware that Korea had taken the position during the Panel proceeding that if the Panel were to find that Korea had acted inconsistently with its obligations, Korea would welcome the opportunity to correct its measures, just as Korea would expect other Members to do so with respect to claims against Korean exporters. Indonesia was encouraged by the sentiment behind this position and trusted that Korea would in that spirit implement the Panel's ruling fully, promptly, and without seeking to limit or minimize the ruling in any way. In doing so, Korea's implementation of the Panel would be an example for all Members involved in the trade remedy disputes. Given the nature of the DSB's rules and Korea's excellent record in matters of WTO compliance, Indonesia hoped that the measures would be withdrawn immediately so that further damage to its paper industry be averted. Indonesia, therefore, welcomed the adoption of the Panel Report.

50. The representative of Korea said that his country wished to take this opportunity to express its appreciation for the Panel's efforts in the course of the proceedings. Anti-dumping investigations necessarily involved a comprehensive and complex analysis of detailed information concerning prices in various markets, production costs, and the effect of imports on the domestic industry. As a result, the Panel's review of the substantive issues in anti-dumping determinations necessarily required a careful and searching analysis of the factual record as it related to the relevant legal issues. While Korea did not agree with all aspects of the Panel's decision, it was indisputable that the Panel had reached its decision only after a careful review of the evidence and the submissions of the parties. As a result of the Panel's efforts, Indonesia's claims had received a fair and objective review mandated by the DSU.

51. In Korea's view, the results of the Panel's review represented a vindication of the actions by the Korean Trade Commission (KTC) – the Korean government agency whose determinations in the anti-dumping investigation were the subject of Indonesia's claims. In its request for consultations and its request for the establishment of a panel, Indonesia had identified dozens of issues under the WTO Anti-Dumping Agreement. By contrast, the Panel's final Report had found that the KTC had acted inconsistently with the Anti-Dumping Agreement on only a few relatively minor procedural matters: (i) the adequacy of the KTC's explanation of its choice of the amounts used, as "facts available," to represent general and administrative expenses as well as interest expenses in the calculation of a constructed normal value for two of the respondents; (ii) the adequacy of the description of the steps undertaken by the KTC to corroborate the prices used, as "facts available," to determine the export price and normal value for a third respondent; (iii) the adequacy of the KTC's disclosure of the results of its verification of the Indonesian respondents; (iv) the adequacy of the KTC's explanation of its analysis of the impact of dumped imports on the domestic industry; and (v) the KTC's treatment as confidential information of a submission that was by its nature confidential, without requiring a further demonstration by the submitter that there was "good cause" for confidential treatment.

52. As he had mentioned previously, Korea did not agree with the Panel's conclusions on those procedural issues. Nevertheless, because Korea aspired to provide an example of the conduct of anti-dumping investigations in a manner consistent with the highest standards of procedural and substantive fairness, Korea was prepared to take appropriate action to remedy the flaws that the Panel had identified. Consequently, the KTC would undertake the steps necessary to implement the Report in order to remove any question about the KTC's actions.

53. Finally, Korea believed it was important to note that its experience in this proceeding had identified one area in which the procedures mandated by the DSU, as implemented by the Panel in this proceeding, had proven to be inadequate. During the course of the proceedings before the Panel,

Indonesia had included in its delegation a company employee of certain Indonesian respondents, and allowed that company employee to have access to submissions by the Government of Korea that had been designated as confidential. The Panel had denied Korea's request that that employee be removed from Indonesia's delegation, and had, therefore, allowed the employee to participate in the Panel's meetings in which confidential information had been discussed. In Korea's view, the actions of Indonesia and the Panel with respect to that employee could not be reconciled with the provisions of Article 18.2 of the DSU, which required Members to "treat as confidential information submitted by another Member to the panel." What was at stake, in particular, was the confidentiality of information submitted to the investigating authorities by other competing respondents that had provided their business information to the investigating authorities confidentially, with the understanding that their business secrets would not be revealed to other respondents. If the confidentiality of information submitted to a panel in confidence was not strictly maintained, Members would be forced into a difficult choice between defending their interests vigorously in the Panel's proceedings and avoiding the harm that necessarily arose when the confidentiality of their confidential information was not respected. Korea had to agonize over the possibility that the integrity of its investigating authorities might be jeopardized by having business confidential information of one Indonesian respondent revealed to its rival respondents who had been behind Indonesia's Government's decision to bring an action against the Korean investigating authorities' anti-dumping determination at issue in this case. Korea hoped that future panels would operate consistently with the understanding that the confidentiality requirements of Article 18.2 could not be circumvented by the expedient of designating private company officials as a member of a party's delegation. Finally, he expressed Korea's appreciation for the opportunity to present comments on the Panel Report and looked forward to the adoption of the Report.

54. The representative of the European Communities said that the dispute raised for the first time the issue of whether Article 6.10 of the Anti-Dumping Agreement when requiring to determine an individual margin of dumping for each known exporter or producer obliged to calculate a separate dumping margin for each separate legal entities. Article 6.10 did not define the notion of exporter/producers and several provisions of the Anti-Dumping Agreement confirmed that relationships between legally distinct entities might impact dumping, notably Article 9.5, which excluded the calculation of an individual dumping margin, if the alleged newcomer was related to any of the exporters or producers already subject to the anti-dumping duties. The Panel had, therefore, rightly concluded that Article 6.10 allowed treating as a single exporter subject to a single dumping margin several distinct legal corporations that were related to each others. The Panel's conclusion was also of particular practical importance for the effectiveness of the Anti-Dumping Agreement. Requiring the calculation of individual dumping margins for related corporations would have create the likelihood of manipulation of anti-dumping measures (thus rendering them ineffective) by enabling the related producers to channel their exports to the Community through the affiliate with the lowest dumping margin.

55. The DSB took note of the statements and adopted the Panel Report contained in WT/DS312/R.

4. United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico

(a) Report of the Appellate Body (WT/DS282/AB/R) and Report of the Panel (WT/DS282/R)

56. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS282/8 transmitting the Appellate Body Report pertaining to the dispute: "United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico", which had been circulated on 2 November 2005 in document WT/DS282/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He recalled 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".

57. The representative of Mexico said that the Reports that would be adopted at the present meeting were the latest in a series of cases on the so-called "sunset review" disciplines of the Anti-Dumping Agreement and, more specifically, on the manner in which the US authorities made sunset review determinations. The Panel had found, unequivocally, that the determination of the Department of Commerce (DOC) that dumping was likely to continue or recur was "not supported by reasoned and adequate conclusions based on the facts before it". The United States had evidently agreed that its measure was illegal, as it had not even appealed that finding. Thus, the United States must bring its WTO-inconsistent measure into conformity with its commitments under the Anti-Dumping Agreement. Mexico believed that the only way for the United States to bring its measure into conformity with the Anti-Dumping Agreement was by revoking it. The continuation of the measure in 2001 was illegal, and it was time for this measure, which had been in place now for more than ten years, to be terminated. In addition, a NAFTA panel had declared that measure to be in violation of US law.

58. Although Mexico had won the case, it had not won the appeal. The manner in which the Appellate Body had dismissed Mexico's claims – particularly those related to the Sunset Policy Bulletin (SPB) – should be of strong systemic concern to all WTO Members. Thus far, twice – in the claims brought by Argentina in "US – Oil Country Tubular Goods Sunset Reviews" (Argentina – OCTG), and by Mexico in the present case – panels had found the SPB to be WTO-inconsistent "as such" with Article 11.3 of the Anti-Dumping Agreement. The Panel in the "Argentina – OCTG" case had rightly found that the relevant provisions of the SPB were WTO-inconsistent as such. However, the Appellate Body had reversed that finding. It had ruled that the Panel in that case had failed to conduct a "qualitative analysis" of at least some of the DOC determinations to determine whether the DOC regarded the SPB as determinative or conclusive – and not just indicative – of likely dumping. The Appellate Body had thus found that the Panel had breached its obligation under Article 11 of the DSU. In making that finding, the Appellate Body in the "Argentina – OCTG" case had emphasized its view that the SPB was not necessarily WTO-consistent. Far from it. The Appellate Body had stated that, "[t]he fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews of anti-dumping duty orders where domestic interested parties took part strongly suggests that these scenarios are mechanistically applied." The Appellate Body had added that "in another case", it could be properly concluded that the three scenarios in the SPB were regarded by the Department as "determinative/conclusive of the likelihood of continuation or recurrence of dumping."

59. The "Mexico – OCTG" dispute was precisely that "other case". The Panel in the present case had had all of the DOC sunset review determinations that had been before the "Argentina – OCTG" Panel. Even more, despite Mexico's objections, the Panel in that case had deliberately delayed those proceedings in order to review carefully the Appellate Body's findings. The "Mexico – OCTG" Panel had conducted exactly the kind of "qualitative analysis" that the Appellate Body had found to be lacking in the "Argentina – OCTG" case. Like the earlier Panel, the Panel in the present case had little difficulty concluding that the SPB was indeed WTO-inconsistent as such. It had found that "the SPB scenarios are treated as conclusive or determinative in sunset reviews." In making that finding, the Panel had emphasized that "we are not focusing solely on the outcomes in these sunset reviews, but rather on our qualitative analysis of the determinations....". It had concluded that the DOC "has consistently based its determinations in sunset reviews exclusively on the scenarios, to the disregard of other factors".

60. Nevertheless, the Panel's findings on the WTO-inconsistency of the SPB had been reversed on appeal. Once again, the fault was not with the complaining party, but with the Panel, which in the Appellate Body's view, did not meet the standards of the "qualitative analysis" required under Article 11 of the DSU. For example, the Appellate Body had complained about supposed failure of the Panel's analysis to indicate whether, in the cases that had been raised, the DOC had wrongly relied on the SPB scenarios. The Appellate Body had also stated, among other things, that the Panel had not explained the facts of the cases, or reveal whether other factors should have been taken into account by the DOC. This fact should give all Members pause. WTO Members had been unable to enforce their rights in successive cases on the basis of factors entirely beyond their control, such as the manner in which the Panel described its analysis. Such a factor was also entirely extraneous to what should be the real issue – the violation of the Anti-Dumping Agreement by the United States, not the manner in which the Panel had conducted or explained its analysis.

61. Consequently, the way the issue had been dealt with raised concerns about the security and predictability of WTO dispute settlement system, as well as the enforceability of underlying rights and obligations of Members. The sunset provision of the Anti-Dumping Agreement was becoming the most litigated clause in the WTO Agreement. The SPB had been universally criticized, and it had been definitively condemned by two Panels as inconsistent with Article 11.3. Yet each time the Panels had tried to follow the Appellate Body's guidance, their analysis, or their description of the analysis, had been the basis for reversal by the Appellate Body – not on the merits, but on the failure of the Panels to conduct an elusive and ill-defined "qualitative analysis." In the meantime, the SPB escaped condemnation, and the United States kept rendering sunset decisions based on the presumptions of the SPB. Something was obviously wrong since in 227 out of 227 of the sunset reviews, the DOC had determined that dumping would be likely to continue or recur.

62. As all Members were aware, WTO dispute settlement was a major undertaking, requiring a significant commitment of resources both from the litigating governments as well as the affected private industries. An aggrieved Member would be willing to commit such resources where its rights were violated, and where it was confident that the WTO would provide a remedy. Unfortunately, in at least some cases – those involving the key disciplines of the sunset review provision of the Anti-Dumping Agreement – it was now by no means clear that the WTO could or would provide a remedy. All Members should be seriously concerned that their rights were being denied because of the conduct of Panels. For that reason, all WTO Members – not just Mexico – had lost as a result of this Appellate Body's decision. Article 3.2 of the DSU provided that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements". Unfortunately, the Appellate Body decision in the present case fell far short of that standard, as Mexico's rights under Article 11.3 of the Anti-Dumping Agreement had been denied, not preserved. Mexico invited Members to reflect on the serious implications of the Appellate Body's Report. Mexico hoped that such profound systemic defects would not be repeated by the Appellate Body in future cases.

63. He regretted that time would not permit to discuss all other aspects of the decision, but he would be remiss if he did not also bring to the attention of Members two other very troubling aspects of the Appellate Body's Report. First, the Appellate Body dismissed Mexico's argument that a WTO-consistent finding of likely dumping was a legal predicate to a WTO-consistent finding of likely injury. The Appellate Body had stated that, "the 'review' contemplated in Article 11.3 is a 'distinct' process with a 'different' purpose from the original investigation". Regardless of whether the Article 11.3 review process was really so distinct from the originating investigation – a highly questionable proposition – the Appellate Body had negated one of the key principles of the Anti-Dumping Agreement: i.e. causation. Indeed, the Appellate Body had recognized in the same Report that: "Article VI of GATT 1994 establishes the fundamental principle that there must be a causal link between dumping and injury to a domestic industry, if an anti-dumping duty is to be levied on a dumped product." The Anti-Dumping Agreement – including Article 11.3 – implemented Article VI of GATT 1994. It stretched the bounds of credulity to believe that the drafters of the Agreement intended the "fundamental principle" of causation to be established in the investigation and present

throughout the life of the order, but then had merely assumed to exist at the very point in the process in which Members were obligated to terminate the measure, subject to a limited exception. Even more disturbing was the direction taken by the Appellate Body's decisions relating to that type of review. First, by adopting an extremely literal interpretation of the Anti-Dumping Agreement, the Appellate Body had stated that these reviews were different from Article 5 investigations. Subsequently, the Appellate Body had determined that, despite the clear language of footnote 9 of the Anti-Dumping Agreement, an authority was not obligated to comply with all of the disciplines established in Article 3. Members were told that an authority did not have an obligation to comply with one of the basic principles established in Article VI of GATT 1994 and the Anti-Dumping Agreement: i.e. determination of the existence of a causal relationship between the likely dumping and the likely injury.

64. The facts of the case in question highlighted the systemic problem that resulted from a finding that no such relationship had to be determined. In the case in question, the Panel had found that the determination of likely dumping of Mexican OCTG was illegal, and the United States had not appealed that finding. Nonetheless, the Panel had upheld the ITC's determination of likely injury, which was based on the likely volume, price effect, and impact of the imports that the DOC determined should be likely to be dumped. Mexico asked Members: "How is it possible to confirm the affirmative likely injury determination if the determination of likely dumping was found to be illegal?". Mexico very much concerned that the sunset reviews were beginning to be converted into a simple "extension" of the original investigation, with the continued dilution of the negotiated and explicit obligation to terminate the anti-dumping duties after five years.

65. Second, the Appellate Body had also dismissed Mexico's claim that the Panel had erred in failing to make a specific finding that the United States had no legal basis to continue its anti-dumping measure beyond the five-year period established by Article 11.3. Mexico wished to point out that in "US – Corrosion-Resistant Steel Sunset Review", the Appellate Body had ruled that: "Members are required to terminate an anti-dumping duty within five years of its imposition 'unless' ... in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping..." But, under the Appellate Body's new interpretation in this case, what used to be an obligation to determine likelihood of dumping "in the review" had been changed to a right to "cure" a WTO-inconsistent likelihood determination during a reasonable time for implementation. If the violation of time-bound obligations could be cured ex-post, then WTO Members should wonder what was the value of this type of obligations. Again, Mexico feared that the Appellate Body's ruling on this issue maybe used to diminish the rights and obligations negotiated by Members. The Appellate Body's ruling could be misinterpreted to negate one of the fundamental principles of the Agreement: any dumping order that failed to meet the limited exceptions of Article 11.3 simply could not be extended beyond five years, and it must be terminated. Mexico would pursue that point through the implementation process to ensure that strict adherence to the substantive disciplines of Article 11.3 was required in order to extend the measure beyond five years. This was the substantive obligation and the corresponding right agreed by the Members, and Mexico was committed to ensuring that that right was in no way diminished through the dispute settlement process. With these observations, Mexico wished to join other Members in adopting the Panel and the Appellate Body Reports at the present meeting.

66. The representative of the United States said that his country wished to begin by thanking the Appellate Body and the members of the Panel for their work in this dispute, as well as to thank the Secretariat for their assistance to the Appellate Body and Panel. The United States was pleased that the Appellate Body had upheld the Panel's findings on likelihood of injury and the margin likely to prevail, and that the Appellate Body had reversed the Panel's finding that the SPB was not consistent with US WTO obligations. The United States commended the analyses and findings of both the Appellate Body and the Panel with respect to all injury-related issues. In a well-reasoned analysis, the Appellate Body, like the Panel, had found that there was no requirement that a Member apply the provisions of Article 3 in a sunset review. They also applied the correct standard of review in finding

that the United States had complied with its obligations in determining likelihood of continuation or recurrence of injury. The United States was also pleased that the Appellate Body had reversed the Panel's finding that the SPB was inconsistent with Article 11.3 of the Anti-Dumping Agreement. In contrast to the view expressed by Mexico in its statement at the present meeting, this Appellate Body finding in fact had reinforced certain core principles of the dispute settlement system: namely, the principles that a complaining party must demonstrate its case based on a careful, reasoned analysis supported by evidence, and that Panel's findings must have a solid factual and analytical basis. Mexico had stated at the present meeting that some inferences could be drawn from the US decision not to appeal a part of the Panel Report. In fact, there was no basis for Mexico to attribute any special significance to the US decision not to appeal a narrow panel finding on the particular US determination at issue. The Panel itself had stressed that its finding was a procedural one that might not affect the outcome of the determination. The United States hoped Mexico was not suggesting that parties must in every dispute be compelled to appeal every issue to avoid inferences of any kind.

67. The representative of the European Communities said that the EC welcomed the reiteration by the Panel that the Sunset Policy Bulletin (SPB) was a measure that might be challenged as such within the WTO system and noted, with satisfaction, that this finding was not subject to appeal. However, there were other findings in the dispute which were of concerns to the EC. First, the Appellate Body had reversed the Panel's finding that the SPB had breached *per se* the obligation under Article 11.3 of the Anti-Dumping Agreement to conduct an investigation taking into consideration all relevant facts. The Appellate Body had considered that the Panel had failed to establish that the USDOC applied the pre-established scenarios and presumptions linked to these scenarios of the sunset policy bulletin in every case. For the EC, the question was not whether the SPB mandated a WTO inconsistent behaviour in all cases, but whether the norm was conform to the WTO obligation. Clearly, the SPB directed USDOC to normally consider exclusively past volume of dumped imports and past dumping and apply presumptions without consideration of all the facts and circumstances that might be relevant to assess whether dumping was likely to continue or recur. It was only in limited circumstances and after the interested party had satisfied USDOC that good cause existed that other factors might be considered. This clearly run against the WTO provision that required from the investigating authority to conduct in all circumstances a fully-fledged investigation.

68. Second, the EC had in different disputes defended that the disciplines of the Anti-Dumping Agreement applicable to the application of the anti-dumping measure in the first place should apply *mutatis mutandis* when it came to prolong its life for another five years. This was particularly true for Articles 2 and 3 of the Anti-Dumping Agreements, which contained the provisions defining the two key concepts of dumping and injury. The conclusion that Article 3 did "not normally apply" which had been reached in the "Argentina – OCTG" case and renewed in the dispute in question had added to the earlier finding in Corrosion-resistant steel from Japan that Article 2 did not normally apply either to sunset reviews created legal uncertainties. The absence of clear disciplines applicable to sunset reviews could only weaken the effectiveness of the obligation to terminate anti-dumping measures after five years which had been considered yet as a main achievement of the Uruguay Round.

69. The representative of Hong Kong, China said that the dispute under consideration was the latest of a series of cases brought before the WTO in respect of the conduct of "sunset reviews" of anti-dumping orders. Hong Kong, China appreciated the work of the Panel, the Appellate Body and the Secretariat on this case, but considered that the Panel and the Appellate Body's rulings had also exposed some fundamental difficulties with the sunset review provisions in the Anti-Dumping Agreement. His delegation wished to highlight one particular issue, namely, the issue of causation in a sunset review. The Appellate Body had held that, while Article 11.3 required a nexus between the "expiry of an anti-dumping duty" and the continuation or recurrence of dumping and injury, on its face Article 11.3 did not require investigating authorities to establish the existence of a "causal link" between likely dumping and likely injury. That interpretation caused several difficulties. First, it meant that while the original imposition of an anti-dumping duty required the establishment of

dumping causing injury to the domestic industry, a lower standard was sufficient to justify the continuation of a dumping duty upon "sunset reviews". However, Article 11.1 provided that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract **dumping which is causing injury** *[emphasis added]*", and the Appellate Body stated[4] that "[a] causal link between dumping and injury to the domestic industry is thus fundamental to the imposition **and maintenance** *[emphasis added]* of an anti-dumping duty under the Anti-dumping Agreement". It was thus difficult to reconcile the requirement of Article 11.1 with the interpretation that Article 11.3 did not require establishment of the existence of a causal link between likely dumping and likely injury. Moreover, if the interpretation of Article 11.3 was extended to reviews under Article 11.2 which, on its face, also did not require investigating authorities to establish a causal link between likely dumping and likely injury, this would render Article 11.1 wholly meaningless. Third, that interpretation was also difficult to reconcile with the structure of Article 11.3 under which, in the Appellate Body's own words, "the termination of the anti-dumping duty at the end of five years is the rule and its continuation beyond that period is the "exception".

70. The Panel and the Appellate Body Reports had also exposed the problem with "sunset reviews" that there was very little guidance in Article 11.3 on what needed to be done to assess whether the expiry of an anti-dumping duty would be "likely to lead to continuation or recurrence of dumping and injury". Much room was left for data interpretation and the drawing of conclusions. The lack of certainty in the conduct of sunset reviews had led to a serious problem that, once an anti-dumping order was imposed; the sun never set, despite the original intention of Article 11.3 that an anti-dumping order should, as a rule, expire no later than five years from its imposition. Members would, therefore, have to continue their efforts to find a satisfactory solution to this problem in the current negotiations. With the foregoing observations, Hong Kong, China urged the United States to take prompt action to bring its inconsistent measure into conformity with the Anti-Dumping Agreement.

71. The representative of Argentina said that his country welcomed the adoption of the Panel Report, which affirmed, once again, the inconsistency of a sunset review procedure employed by the United States. In this case, those procedures were also the subject of a complaint by Argentina. As a third party, Argentina had argued strongly that the Appellate Body should maintain the finding made by the Panel on the inconsistency as such of the Sunset Policy Bulletin (SPB). Consequently, Argentina could not hide its deep-seated disappointment, surprise and concern – feelings which would surely be shared by other Members – when faced by a further reversal by the Appellate Body of a finding of inconsistency of the SPB made by a Panel. Argentina's surprise was even greater on account of the grounds on which the Appellate Body had decided to overturn the Panel's finding. Notwithstanding the Panel's decision to follow the line of reasoning suggested by the Appellate Body itself in the case "Argentina – OCTG", the finding of inconsistency had been reversed, not – as occurred in that case – on account of the absence of a "qualitative analysis" by the Panel with regard to some of the over 200 cases presented as proof of the consistent application of the SPB, but because it had been understood that the qualitative analysis undertaken was not sufficiently explicit. And that was so despite the fact that the Appellate Body had expressly recognized that the cases presented as evidence strongly suggested that the three SPB scenarios were applied in a mechanical way. In view of that situation, Argentina could not avoid feeling that the threshold established for a complaining Member to show the inconsistency as such of the SPB with the Anti-Dumping Agreement was not only virtually unattainable – since it largely depended on a factor entirely outside its control as the manner in which the Panel decided to focus its analysis – but also unforeseeable and likely to change. An outcome of this nature cast doubt on the predictability of the dispute settlement system and its capacity to protect the rights and obligations of Members. Argentina hoped that, in the interests of the system, the United States would implement the conclusions of the Reports to be adopted at the present meeting, bringing the measures declared to be WTO-inconsistent in line with its WTO obligations with the speed which the safeguarding of the rights of the complaining Member required.

[4] Paragraph 117 of the AB Report.

72. The representative of Canada noted that it was not just complainants that had rights in dispute settlement, but responding parties as well as they were presumed to be acting consistently with the WTO Agreement unless proven otherwise. Where evidence was only a "strong suggestion" as the EC and Argentina had suggested, it did not amount to proof and a responding Member was entitled to benefit from the presumption of good faith compliance. Panels that could only find "strong suggestion" of a WTO violation might not determine that a WTO violation had been established.

73. The representative of Argentina said that by referring to the Appellate Body's recognition of the fact that the evidence suggested that three SPB scenarios had been applied in a mechanical way, he was not trying to say that this should become proof. He had just mentioned that to highlight that the Appellate Body was setting a standard of proof which was very high, virtually inaccessible, unpredictable and changed constantly.

74. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS282/AB/R and the Panel Report contained in WT/DS282/R, as modified by the Appellate Body Report.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/302)

75. The Chairman drew attention to document WT/DSB/W/302, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he wished to propose that the DSB approve the names contained in document WT/DSB/W/302.

76. The DSB so agreed.

6. European Communities – Customs classification of frozen boneless chicken cuts

(a) Statement by Brazil

77. The representative of Brazil, speaking under "Other Business", said that, on 22 November 2005, her country had circulated a request for arbitration pursuant to Article 21.3(c) of the DSU, in order to determine a reasonable period of time for the implementation of the DSB's decisions in the case: "European Communities – Customs Classification of Frozen Boneless Chicken Cuts" (DS269). At the present meeting, Brazil wished to register its dissatisfaction with the unjustifiable delay of the EC in presenting its proposal on such a reasonable period of time. She recalled that the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, had been adopted on 27 September 2005. On 18 October 2005, the EC had stated its intention to implement the DSB's recommendations and to contact the complainants "in the coming days". However, it was only after several attempts by the complainants to meet with the EC that the EC had finally agreed to hold a meeting to put forward its proposal on a reasonable period of time and on the modalities of implementation. That meeting had taken place on 18 November 2005, one week after the expiration of the 45 day-period laid down in Article 21.3(b) for reaching an agreement on a reasonable period of time; one month after the EC's statement on implementation and almost two months from the adoption of the Reports in October 2005. For reasons of confidentiality, Brazil would not enter into the discussion on terms and the conditions presented by the EC to implement the DSB's recommendations, which left Brazil no other option but to request arbitration under Article 21.3(c) of the DSU.

78. The representative of the European Communities said that the EC was a little bit perplexed to hear Brazil's statement. The EC had been, throughout this case, in very close contact to discuss a reasonable period of time. It was true that some delays had occurred. But such delays were primarily linked to the holidays which traditionally occurred in Brussels around 1 November. His delegation in

Geneva had been in frequent contacts with Brazil's delegation. The EC had met as early as previous Friday and was very likely to meet again in the course of the week, as provided for in Article 21.3 of the DSU. Brazil was not the only complainant in the case under consideration and had not yet received a reply to its initial proposal from the other co-complainant. He noted that the other co-complainant had not yet filed a request for arbitration regarding this issue.

79. The DSB took note of the statements.