WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/180
1 February 2005

(05-0415)

Dispute Settlement Body
17 December 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 December 2004

Chairperson: Ms Amina Mohamed (Kenya)

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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.26)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.26)

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(e) United States – Final countervailing duty determination with respect to certain softwood lumber from Canada: Status report by the United States (WT/DS257/14/Add.1)

(f) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9)

1. The Chairperson 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". She proposed that the six sub-items to which she 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.26)

2. The Chairperson drew attention to document WT/DS176/11/Add.26, 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 her country had provided a status report in this dispute on 6 December 2004, in accordance with Article 21.6 of the DSU. As noted in the report, the US Congress was considering a number of legislative proposals to amend or repeal Section 211 during this past congressional session, and the Senate had held hearings on those proposals in July. The US Congress had completed its work for the calendar year. A new Congress would convene in January 2005, and the US administration would work with that Congress with respect to appropriate statutory measures to resolve this matter. In this connection, the United States recalled the statement made by the EC at the 24 November 2004 DSB meeting. The EC had been emphatic that the US administration should support the complete repeal of Section 211 as the "appropriate solution to this dispute". The United States sought clarification from the EC on this point. It appeared to be the EC's position that Members implementing adverse national treatment and MFN findings should completely repeal the measure at issue, at least in the TRIPS context. The United States wished to know whether that was correct.

4. The representative of the European Communities said that the period for implementing the DSB's recommendations in this dispute would expire at the end of the year. Considering that action by the US Congress was required and that Congress had now adjourned, it appeared that the United States would not be in position to bring its legislation into compliance with the WTO rules within the required deadline. The EC would have to consider what next steps to take. As to the question just asked by the United States, the EC would revert to that question in due course.

5. The representative of Cuba said that since this was the last DSB meeting in 2004, it was also the last opportunity for the United States to provide information as to what action it had taken towards revoking Section 211 Omnibus Appropriations Act of 1998. However, there had been no news nor indication that the United States was ready to do so. Month after month, Cuba had continued to witness the repeated non-compliance by the United States with the DSB's recommendations in different disputes as well as the growing scepticism of WTO Members as the United States had failed to make any headway in implementing the DSB's rulings. This undermined the efficiency and credibility of the WTO dispute settlement mechanism. In that context, she recalled that at its meeting on 24/26 November 2004, the DSB had authorized seven Members to suspend the application of tariff concessions *vis-à-vis* the United States in the Byrd Amendment dispute due to the US failure to comply with the DSB's recommendations. These authorizations had been added to the list of many other cases in which such authorizations had already been granted against the United States as a result of its non-compliance with the DSB's recommendation and rulings. Cuba wished to remind Members that the WTO dispute settlement mechanism had been created to achieve, among other things, the prompt and satisfactory resolution of situations in which the rights of Members were nullified or impaired. Consequently, Cuba had to recall the true reason surrounding the Section 211 dispute, which had nothing to do with any misgivings concerning the nationalization process carried out by the Cuban government. The trade mark "Havana Club", which had been registered in the United States in accordance with the relevant legislation by a Cuban company in 1974, was not the subject of any opposition or cancellation proceedings by its original owner. It was not until foreign business partners, together with Cuban entities, had expressed interest in exploiting the reputation earned by the Cuban rum sold under that mark when the original owner and the company Bacardi had suddenly become interested in recovering a right, which they had waived from the start. This was why Cuba wished to denounce, once again, the lack of political will on the part of the United States to repeal Section 211, which was in violation of the US own trademark legislation, not to mention the international practice in that area. As Members were aware, the registration of a trademark that had been abandoned by its original owner did not require the original owner's consent. Any bill to amend Section 211 that did not involve the elimination of this legal aberration could be construed as a display of arrogance and provocation running counter to international rules that were scrupulously and reciprocally respected.

6. 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.26)

7. The Chairperson drew attention to document WT/DS184/15/Add.26, 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.

8. The representative of the United States said that her country had provided a status report in this dispute on 6 December 2004, in accordance with Article 21.6 of the DSU. The US Congress had completed its work for the calendar year. A new Congress would convene in January 2005, and the US administration would work with that Congress with respect to the recommendations and rulings of the DSB that had not been already addressed by the US authorities by 23 November 2002.

9. The representative of Japan said that since the DSB had adopted the Reports of the Panel and the Appellate Body in this proceeding in August 2001, the reasonable period of time had already been extended three times, and Japan was yet to see the US implementation of the DSB's recommendations and rulings. Japan's concern was mounting over the continued lack of implementation, especially over the fact that no single bill had been introduced to the US Congress to address the matter. Prompt and secure implementation was indispensable for the credibility of the dispute settlement mechanism. In July 2004, Japan had agreed to yet another extension of the reasonable period of time on the

premise that the United States would fully implement the DSB's recommendations and rulings during that period, at long last. Japan, therefore, urged the United States to make every effort toward the fully-fledged implementation by 31 July 2005. He added that if the United States fell short of implementation by that date, Japan would be entitled to the recourse provided for under the DSU provisions in order to safeguard its rights and interest.

10. 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.11 – WT/DS234/24/Add.11)

11. The Chairperson drew attention to document WT/DS217/16/Add.11 – WT/DS234/24/Add.11, 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.

12. The representative of the United States said that her country had provided a status report on 6 December 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003, legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with US WTO obligations had been introduced in the US Senate (S. 1299). On 10 March 2004, legislation repealing the CDSOA had been introduced in the US House of Representatives (H.R. 3933). In addition, on 2 February 2004, the US administration had, once again, proposed repeal of the CDSOA in its budget proposal for fiscal year 2005. The US Congress had completed its work for the calendar year. A new Congress would convene in January, and the US administration would work with that Congress to resolve this matter.

13. The representative of the European Communities said that almost one year had elapsed since the expiry of the implementation period. The adjournment of the US Congress meant that the bills mentioned in the status report were now void and the process of implementation would have to start again from the very beginning when the new Congress would meet in January 2005. The EC hoped that the new Congress would treat implementation of the WTO ruling as its first priority. In the absence of prompt action, the EC would have no other option than to exercise its retaliation rights.

14. The representative of Canada said that his country, once again, noted the status report of the United States and its continued failure to comply with its WTO obligations in regard to the Byrd Amendment. Members were aware that on 23 November 2004, Canada had launched a public consultation process with Canadians on its retaliatory options as a result of the US continued non-compliance in this dispute. The public consultation would end on Monday, 20 December 2004, after which Canada would carefully assess all submissions and take decisions on its retaliatory options. In January 2005, two years would have passed since the DSB had adopted the Appellate Body decision, finding the Byrd Amendment inconsistent with US trade obligations. Canada's position was clear: the path to avoiding retaliation was to repeal the Byrd Amendment. Canada again called upon the United States to end this dispute and repeal the Byrd Amendment.

15. The representative of Japan said that in ten days, one year would lapse since the expiry of the reasonable period of time in this proceeding on 27 December 2003. During the past 12 months, Japan had been calling on the United States for a prompt repeal of the WTO-inconsistent CDSOA. The continued lack of implementation on the part of the United States, however, made it imperative for the eight complaining parties to seek the redress under Article 22.7 of the DSU. By the decision of the DSB on 26 November 2004, Japan and other six complaining parties had now been authorized to suspend concessions or other obligations *vis-à-vis* the United States. To the detriment of the integrity of the WTO dispute settlement mechanism, the most recent status report by the United States again contained no tangible progress toward the implementation of the DSB's recommendations and rulings. That continued to be a very serious situation which Japan and the whole membership could not

overlook. Japan strongly hoped that the United States, especially the US Congress, would take Japan's decision seriously and that it would make every effort to have the CDSOA repealed as soon as possible.

16. The representative of Hong Kong, China said that her delegation had participated as a third party in this dispute. Although Hong Kong, China was not among those Members requesting authorization from the DSB to retaliate, it was greatly disappointed with the persistent failure by the United States to bring its measures, found to be inconsistent with WTO rules, into prompt compliance with DSB's rulings, not only in the present case but also in other instances. To state that that undermined the credibility of the WTO dispute settlement system, would be an understatement. The present dispute settlement system was the result of the concerted efforts made by the negotiators in the Uruguay Round to strengthen GATT dispute settlement into an effective, multilateral, rules-based system. It underwrote the rights and benefits secured by Members under the WTO Agreements, and was fundamental to the multilateral trading system. As negotiations under the current round step up, it was especially important that the dispute settlement system should have the support of all WTO Members. Hong Kong, China would, therefore, urge the United States to immediately bring its inconsistent measures into compliance with the dispute settlement rulings, thereby clearly demonstrating its commitment to stand by negotiated rules and its credibility as a negotiator.

17. 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.1)

18. The Chairperson drew attention to document WT/DS160/24/Add.1, 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.

19. The representative of the United States said that her country had provided a status report in this dispute on 6 December 2004, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration had been consulting with the US Congress on this matter. The US Congress had completed its work for the calendar year. A new Congress would convene in January 2005, and the US administration would work with that Congress and confer with the EC in order to reach a mutually satisfactory resolution of the matter.

20. The representative of the European Communities said that, once again, the United States had presented a status report that showed no progress whatsoever in the implementation of the DSB's recommendations and rulings. There was even an ironic reference to the willingness of the United States to continue to confer with the EC with a view to finding a mutually satisfactory solution. This was ironic since the EC had consistently received the opposite message from the United States. The inability of the United States to abide by its obligations in this dispute was extremely damaging for the WTO system. He recalled that the Panel Report in relation to the US Copyright Act had been adopted in July 2001, and, thus far, the United States had apparently decided to ignore the DSB's rulings. It seemed clear that the US interest in the protection of intellectual property did not extend to its own territory, to the dismay of other WTO Members and, above all, of creators of musical works who were penalized by the TRIPS-inconsistent provisions of the US Copyright Act. Every day that had gone by, the United States was losing a bit more of its credit with regard to the fight against counterfeiting and piracy – a credit that very soon would be over if the United States did not remedy a legislative situation, which amounted in effect to institutionalized music piracy.

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

(e) United States – Final Countervailing duty determination with respect to certain softwood lumber from Canada: Status report by the United States (WT/DS257/14/Add.1)

22. The Chairperson drew attention to document WT/DS257/14/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning final countervailing duty determination with respect to certain softwood lumber from Canada.

23. The representative of the United States said that her country had provided a status report on 6 December 2004, in accordance with Article 21.6 of the DSU. The United States was pleased to report that, subsequent to that status report, the US Department of Commerce had issued a determination in the Canadian softwood lumber countervailing duty investigation that had implemented the recommendations and rulings of the DSB, and that a public notice of the determination had been signed on 10 December 2004. In the determination, the US Commerce had conducted a pass-through analysis, had found that certain subsidies did not pass through and had revised the subsidy rate accordingly.

24. The representative of Canada said that at its meeting on 17 February 2004, the DSB had adopted the Reports of the Panel and the Appellate Body in the case: "United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada". The DSB had ruled that the United States was in violation of its WTO obligations in respect of the alleged "pass-through" of subsidies and had recommended that the United States bring its measures into conformity with its obligations under the SCM Agreement. Canada was currently reviewing the results of the US implementation and was aware of the time-lines going forward in that case. Canada would inform the DSB of its response to the US statement that the United States had implemented the DSB's rulings and recommendations in due course.

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

(f) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9)

26. The Chairperson drew attention to document WT/DS204/9, which contained the status report by Mexico on progress in the implementation of the DSB's recommendations in the case concerning Mexico's measures affecting telecommunications services.

27. The representative of Mexico said that on 6 December 2004, in accordance with Article 21.6 of the DSU, Mexico had submitted its first status report regarding implementation in the case "Mexico - Measures Affecting Telecommunications Services" (WT/DS204). In that status report, Mexico provided information regarding the notification of an agreement on implementation between Mexico and the United States. Pursuant to that agreement a reasonable period of time of 13 months had been granted to Mexico for implementation, which would expire in July 2005. Mexico had complied with the first phase of the agreement by publishing, on 11 August 2004, its new international telecommunication rules. These rules had eliminated the uniform settlement rate system, the proportional return system and the right of the carrier with the greatest proportion of outgoing traffic to negotiate the settlement rates. The new system would enable all Mexico's long-distance carriers to negotiate their rates freely, not only with US carriers, but with carriers worldwide. This would undoubtedly make the Mexican telecommunications market even more competitive. Mexico was also drafting regulations for the establishment of commercial agencies. Once that process was completed, Mexico would fully comply with the DSB's recommendations and rulings.

28. The representative of the United States said that her country appreciated Mexico's status report to the DSB and looked forward to continuing consultations with Mexico as it worked to complete its implementation of the DSB's recommendations.

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

2. United States – Continued Dumping and Subsidy Offset Act of 2000

(a) Recourse to Article 22.7 of the DSU by Chile (WT/DS217/43)

30. The Chairperson said that this item was on the agenda of today's meeting at the request of Chile and drew attention to the communication from Chile contained in document WT/DS217/43. She then invited the representative of Chile to speak.

31. The representative of Chile noted that the present meeting of the DSB was one of the last formal WTO meetings before the holiday break. After looking at the agenda of the present meeting, he had realized that, once again, all items but one were disputes in which the United States was the defending party, and what was most troubling was that in most cases the United States had not implemented the DSB's recommendations. That caused serious concern, especially for small countries like Chile. It undermined the security and predictability of the multilateral trading system of which the dispute settlement mechanism was a central element. In that scenario, Chile could not but ask the DSB to authorize it to make use of its rights under the DSU. The continuing lack of implementation by the United States had important systemic consequences as well as direct trade effects for Chilean exporters. Despite the good intentions signalled by the US administration, almost two years had passed since the adoption of the Panel and Appellate Body Reports and almost one year from the end of the reasonable period of time, and still the US Congress had taken no meaningful action. On the contrary, a majority of Senators had strongly rejected the decision of the Appellate Body. In addition, the Senate Appropriations Committee had included language in the Omnibus Appropriations Legislation for Fiscal Year 2005 that directed US trade negotiators to seek acceptance by the WTO of the principle underlying the "CDSOA". Notwithstanding that a concrete proposal had already been introduced in the rules negotiations to discuss schemes like the Byrd Amendment and to recognize the rights of Members to do exactly what the Panel and the Appellate Body had concluded was against the WTO. Finally, a US Senator had recently introduced a bill to make things even worse, requiring a direct transfer of Federal funds to a single industry while the AD/CVD collected were still in an escrow account waiting the final outcome of the determination. Chile was requesting authorization from the DSB to impose additional duties on certain US exports up to a total value of trade equivalent to the level of nullification or impairment in a particular year as determined by the Decision by the Arbitrator. Chile hoped that in the new year with a new Congress and renewed spirit, the repeal of the Byrd Amendment would allow Chile to avoid the need to use the rights to be granted to it at the present meeting. If that was not the case, Chile shall notify to the DSB the products subject to the additional tariff and the rate of the additional tariff.

32. The representative of Japan said that his country welcomed Chile's request. With Chile joining other complaining parties in the Byrd Amendment dispute, Japan wished to renew its call on the United States to comply with the DSB's recommendations and rulings. Japan hoped that the DSB would endorse Chile's right to suspend concessions and other obligations *vis-à-vis* the United States, as it had done so on 26 November 2004 in relation to similar requests by seven other Members, including Japan.

33. The representative of the United States said that her country wished to reiterate that it intended to comply with the DSB's recommendations and rulings in this dispute. Thus, while the United States understood that the DSB would, at the present meeting, be authorizing the suspension of concessions or other obligations, it did not believe it would be necessary for Chile to exercise that

authorization. The United States would also like to thank the Arbitrator and the Secretariat for their hard work in these proceedings. The United States had commented on the other Article 22.6 arbitrations on the CDSOA at the 24/26 November DSB meeting. Most of those comments also applied to the arbitration between Chile and the United States, and her delegation would not repeat them at the present meeting. As stated previously, a new Congress would convene in January 2005, and the US administration would work with that Congress to resolve this matter.

34. The representative of the European Communities said that the EC welcomed Chile's request. He recalled that at the 24/26 November meeting, the DSB had already authorized seven Members, including the EC to suspend the application of concessions and other obligations to the United States. All together the WTO Members that could now retaliate at any time against the United States represented 71 per cent of total US exports and 64 per cent of total US imports. That evidenced the widespread concerns raised by a legislation, which benefited only a handful of companies. The EC renewed its calls on the United States to respond without further delay to those concerns.

35. The DSB took note of the statements and, pursuant to the request by Chile under Article 22.7 of the DSU contained in document WT/DS217/43, agreed to grant authorization to suspend the application to the United States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS217/ARB/CHL.

3. United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina

(a) Report of the Appellate Body (WT/DS268/AB/R) and Report of the Panel (WT/DS268/R and Corr.1)

36. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS268/7 transmitting the Appellate Body Report on "United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina" which had been circulated on 29 November 2004 in document WT/DS268/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report". She then invited the representatives of the parties to the dispute to present their views on the Reports before the DSB.

37. The representative of Argentina expressed his country's gratitude to the Appellate Body, the Panel and the Secretariat for their work in this dispute. Four years ago, Argentina had witnessed impairment of its rights under the WTO Agreement when the United States had decided, after five years, to renew the anti-dumping measures on oil country tubular goods (OCTG) from Argentina for another five years. Thereafter, Argentina had had to invest considerable human and material resources in asserting its rights in the WTO dispute settlement system. That was why his country welcomed the Report of the Appellate Body, which had taken into consideration a substantial number of Argentina's claims and had confirmed that the US sunset reviews were not consistent with the US obligations under the WTO. He noted that this assertion had been shared by several WTO Members, which had not only participated in the dispute initiated by Argentina as third parties, but had also brought their own separate proceedings under the DSU in this regard.

38. Throughout the two phases of the proceedings, Argentina had held that a determination of recurrence or continuation of dumping consistent with Article 11.3 of the Anti-Dumping Agreement

could be the outcome of what the Appellate Body described as "... a rigorous process ... involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities".[1] Consequently, such a determination could not be based on presumptions nor on conclusions predetermined by the law or any other legal or administrative instrument. Both the Panel and the Appellate Body had shared Argentina's view on this matter. In the case of the OCTG from Argentina specifically, the Panel had found that the determination of dumping made by the US Department of Commerce (USDOC) not only lacked a proper factual basis[2], but was also invalid because the deemed waivers provisions had been applied to exporters other than Siderca[3], the only Argentine company to be party to the original investigation. The Panel had, therefore, found the determination to be inconsistent with Articles 11.3 and 6.2 of the Anti-Dumping Agreement.[4] The United States had not challenged that conclusion.

39. Because it had been found that one of the two elements that had to exist in order for anti-dumping duties to be imposed or maintained was lacking, the anti-dumping duties maintained pursuant to the sunset reviews concerning OCTG from Argentina, were not based on a determination of dumping shown to be warranted, and must, therefore, be revoked. This was exactly what Argentina had held since the November 2002 consultations. The United States had refrained from challenging this point. Therefore, Argentina hoped that the United States would now meet its obligations in good faith and revoke the anti-dumping duties found to be inconsistent, thus sparing the Argentine exporters further costly procedures. Argentina also welcomed the fact that the Appellate Body had upheld the finding that some of the waiver provisions in US laws and regulations were inconsistent "as such" with Articles 6.1, 6.2 and 11.3 of the Anti-Dumping Agreement. These provisions could, potentially, affect all anti-dumping investigations carried out by the United States.

40. With regard to the claims pertaining to the Sunset Policy Bulletin (SPB), Argentina deeply regretted that the Appellate Body had reversed the Panel's finding of inconsistency of the virtually irrefutable presumptions of continuation or recurrence of dumping that the USDOC had made in all sunset reviews on the basis of automatic application of the three scenarios established in Section II.A.3 of the SPB. In particular, Argentina regretted what in its view was a somewhat ambiguous conclusion. On the one hand, the Appellate Body had found that although the three scenarios of the SPB were relied on consistently, as had clearly emerged from the information submitted by Argentina in the proceedings, this was not sufficient to uphold the finding of inconsistency of the USDOC's determinations in the sunset reviews. At the same time, the Appellate Body shared Argentina's view in its assertion 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".[5] Despite that ambiguity, Argentina was aware that the Appellate Body had based its reversal of the Panel's finding solely on the fact that the Panel's analysis was not a safe basis for concluding that the USDOC's determination was WTO-inconsistent. As the Appellate Body had emphasized, the reversal had not implied that Section II.A.3 of the SPB was consistent with WTO rules, so there was a possibility that it might be found inconsistent in future proceedings. Such a possibility was the more plausible as the Appellate Body had appropriately considered the SPB to be a measure which "as such, is subject to WTO dispute settlement".[6]

41. Finally, Argentina also regretted that neither the Panel nor the Appellate Body had endorsed the claim that the injury determination made by the US International Trade Commission (USITC) was WTO-inconsistent in this case. Nor had they accepted Argentina's argument that the USITC had failed

[1] WT/DS244/AB/R, paragraph 113.
[2] WT/DS268/R, paragraph 7.221.
[3] *Idem*. paragraph 7.222.
[4] *Idem*. paragraph 8.1(d)(i).
[5] WT/DS268/AB/R, paragraph 212.
[6] *Idem*. paragraph 187.

to apply the "likelihood" standard properly, as probability not possibility, in the determination on recurrence or continuation of injury. It would have been relevant for all WTO Members to have confirmation, in the form of a specific case, that probability was the standard that must be applied. As indicated above, only duties that had been established and/or maintained pursuant to dumping and injury determinations that were made in a manner consistent with the provisions of the Anti-Dumping Agreement might be maintained as a result of sunset reviews. In this case, although one of the two elements was lacking, the United States had maintained anti-dumping duties on these products from Argentina for nine and a half years. Consequently, in Argentina's view, the only way to implement properly the conclusions and recommendations of the Reports of the Appellate Body and the Panel, was to terminate immediately the anti-dumping duties and to make the necessary amendments to the legislation which had been found WTO-inconsistent and had allowed such a situation to arise.

42. The representative of the United States said that while her country was disappointed that the Panel and the Appellate Body had not found all aspects of the measures at issue to be consistent with the Anti-Dumping Agreement, the United States was pleased that they had concluded that many were. 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 had also correctly found that the US statutory provisions related to the determination of likelihood of continuation or recurrence of injury were not inconsistent with US WTO obligations. Further, they 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 in this review.

43. The United States was also pleased that the Appellate Body had reversed the Panel's finding that the Sunset Policy Bulletin was inconsistent with Article 11.3 of the Anti-Dumping Agreement. This was an important finding. It reinforced the bedrock principle that complaining parties had to demonstrate their case, based on material and relevant facts. It was not sufficient merely to draw conclusions without also providing sufficient facts and analysis to support those conclusions. Regrettably, the Appellate Body had not held the Panel to a similarly rigorous standard regarding the Panel's finding that the Sunset Policy Bulletin was a "measure," based solely on the Panel's reading of the Appellate Body report in "US – Sunset Japan". The Appellate Body correctly noted in paragraph 215 of its Report that conclusions must be supported by qualitative and rigorous analysis. Yet the Panel here had offered none. The Appellate Body's description of the Panel's analysis as "concise" was something of an understatement. The United States was also confused as to whether the Appellate Body was now suggesting for the first time that *stare decisis* existed in WTO dispute settlement.

44. Moreover, the Appellate Body's statement that it had found the Sunset Policy Bulletin to be a measure in "Sunset Japan" was difficult to reconcile with the language of that Report. While the Appellate Body in "Sunset Japan" had outlined considerations for deciding whether something was a measure, and had noted that the Panel there had not applied these considerations, the Appellate Body had not itself appeared to complete the analysis to conclude that the Sunset Policy Bulletin was a "measure". Indeed, in paragraph 186 of the "Sunset Argentina" Report, the Appellate Body had cited no finding from its earlier Report that the Sunset Policy Bulletin was a measure. Instead, it had inferred from other aspects of its "Sunset Japan" analysis that, "This suggests that the Appellate Body treated the SPB as a measure". This was a thin reed on which to conclude that the Panel in this dispute did not need to analyze the question, and the United States hoped that this unfortunate approach would not be followed in the future.

45. The United States also had fundamental systemic concerns relating to the analysis of "as such" claims against measures such as the Sunset Policy Bulletin. One such concern was the proper approach to determining, as a matter of fact, what a measure did. This was the first step in determining whether the measure was consistent with WTO rules, and was the foundation of a correct legal analysis. If a panel mischaracterized the measure, its ultimate findings on that measure would

be flawed. In examining the Sunset Policy Bulletin, the Panel had followed the Appellate Body's suggestion in "Sunset Japan" that panels should begin by examining the face of the measure. However, this suggestion could not be applied mechanistically in all disputes. To do so would disregard differences among Members' municipal legal systems. For example, in the US legal system, court interpretations governed a statute's meaning. A panel could easily make incorrect findings about what a statute did if it were simply to look at the face of the statute and ignore court interpretations.

46. Another systemic concern related to the Panel's statement that it based its finding on what US authorities allegedly "perceive" the Sunset Policy Bulletin as requiring – rather than on what the Sunset Policy Bulletin actually required. This was a very dangerous approach. The credibility of the dispute settlement system depended on accurate and objective descriptions of the measures at issue. A finding based merely on a panel's conclusion on how a Member "perceives" a measure was the opposite of that. Panels must not apply artificial and subjective interpretive tools to determine what a measure did – they needed to look at what the Member's own legal system stated the measure did. The United States wished to emphasize that it raised these issues out of systemic concerns that were relevant in every dispute, and not just in those involving the Sunset Policy Bulletin. The United States asked that Members consider these questions in that light, for they were fundamental to the continued credibility of the system. Finally, the United States was disappointed that the Report seemed to relieve complaining Members of their obligation to draft clear panel requests. Although the Appellate Body had reiterated the importance of clarity in such requests, the Report had nevertheless placed the burden on the United States to guess what Argentina had intended to challenge. This was not the standard found in Article 6.2 of the DSU. The United States wished to conclude by thanking the members of the Appellate Body, the Panel, and the Secretariat for their hard work throughout the course of this dispute.

47. The representative of Mexico said that, at the present meeting, his country wished to comment on the Appellate Body report in the case under consideration. This was the third report to examine the sunset reviews carried out by the US authorities. In relation to those reports, and in particular the Report to be adopted at the present meeting, Mexico considered that progress had been made in clarifying the disciplines applicable to such review. However, Mexico did not agree with some of the Appellate Body's interpretations on this matter. He said that for the United States Article 11.3 of the Anti-Dumping Agreement was to all intents and purposes meaningless: to comply with it a Member needed only to determine the existence of dumping and injury in the original investigation in order to replicate that determination in the sunset review. In other words, for the United States, the instruments that regulated that type of review served no purpose; nor were there any rules for carrying out such reviews. Therefore, it was hardly surprising that in sunset reviews, whenever the US industry had intervened, an affirmative determination of continuation or recurrence of dumping had been made.

48. At the present meeting, Mexico also wished to comment on some specific issues contained in the Report. With regard to the Sunset Policy Bulletin (SPB), Mexico was pleased that, after three panels and three Appellate Body reports, it had finally been made clear that this US instrument constituted a measure that could be challenged in the WTO. Mexico regretted, however, that the Appellate Body had not confirmed that the SPB was inconsistent "as such", finding that the Panel had not carried out a "qualitative analysis" of all the cases in which the instrument had been used, as required under Article 11 of the DSU. In spite of this, Mexico trusted that the Panel currently analysing this instrument in the ongoing case related to the OCTG from Mexico would conclude, once the qualitative analysis had been carried out, that the SPB was an instrument that the US authority applied mechanistically in such review.

49. With regard to the determination of injury in sunset reviews, Mexico disagreed with the decision and reasoning of the Appellate Body on this matter. Concerning the implementation of Article 3, the Report raised more questions than it answered on determination of injury in sunset

reviews. On the one hand, it adopted the position that the authorities "are not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination".[7] However, a few paragraphs further on, it stated, "this is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3 ... . It seems to us that factors such as the volume, price effects and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 ... ".[8] In Mexico's view, this reasoning did not clarify the rules that applied to injury determination, but did give the authority a large measure of discretion to determine, "in its own judgement", when or how it should implement the disciplines of Article 3.

50. With regard to the determination of the "likely" standard used by the US International Trade Commission (USITC), Mexico was extremely surprised that the Appellate Body had upheld the finding that the statements made by the United States in dispute settlement proceedings under NAFTA were not relevant. Both the Panel and the Appellate Body had overlooked the fact that those statements were: (i) made with respect to the same challenged measure; (ii) made on the basis of exactly the same standard as the one provided for by the WTO and; (iii) statements in which the USITC had admitted that, with regard to the same review, the authority had not applied the likely standard required by Article 11.3. This was not a question of semantics nor was it a play on words; it meant that the US authority had not determined the likelihood of injury, but something quite different.

51. With regard to cumulation, Mexico also disagreed with the finding that there were no applicable disciplines for cumulation in sunset reviews. Members had negotiated a series of disciplines in order to allow cumulation. However, it now turned out that a Member could cumulate, without rules, in order to continue an anti-dumping measure beyond five years. This was entirely contrary to the extraordinary and strict nature of the obligation to terminate the measure laid down in Article 11.3. The Appellate Body had made it very clear that the obligation contained in Article 11.3 of the Anti-Dumping Agreement was to terminate an anti-dumping measure after five years. Continuation of such a measure was an exception, and, as such, must be monitored very closely. To that end, it was essential that the Appellate Body adopt a rigorous approach when analysing such measure with clear and strict rules for the conduct of such reviews. It had taken three sets of proceedings before panels and three before the Appellate Body merely to determine that a measure subject to this type of review was challengeable within the WTO framework. The Appellate Body could not allow the United States to transform the exception *de facto* into a rule.

52. The representative of the European Communities said that the EC particularly welcomed the Appellate Body's confirmation that the Sunset Policy Bulletin was a measure that might be challenged within the WTO system, and its findings that the issue of whether or not the Sunset Policy Bulletin was a "legal instrument" or "binding" in the US municipal law was irrelevant (para. 187 of the AB Report). The United States had argued that certain provisions of United States laws, regulations and administrative procedures were not "as such" inconsistent with the Anti-Dumping Agreement because the USDOC had some "discretion" when applying them. The Appellate Body had found that, in order to succeed with such a defense, the United States would, at least, have to demonstrate that such "discretion" permitted the USDOC in all cases, to avoid acting inconsistently with WTO obligations (paras. 247 and 265 to 269 of the AB Report). The EC agreed with the Appellate Body that, when municipal laws, regulations or administrative procedures that were intended to have general or prospective application permitted WTO-inconsistent actions in some cases, they were inconsistent with the Anti-Dumping Agreement.

[7] Appellate Body Report, paragraph 280.
[8] *Idem*. paragraph 284.

53. The representative of Norway said that her country had taken note of the decision of the Panel and the Appellate Body in this case and wished to make some remarks concerning one of the findings of the Appellate Body. With respect to the continuation of anti-dumping duties by the United States, Argentina had put forward evidence showing that the USDOC in 217 out of 217 cases had found that dumping was likely to continue based on certain mandated assumptions. In the present case, the Panel had found that Argentina had demonstrated that the USDOC regarded the assumptions in the Sunset Policy Bulletin (SPB) as conclusive, and that the relevant provisions of the SPB were inconsistent with Article 11.3 of the Anti-Dumping Agreement and in particular with the requirement that the investigating authorities had to conduct an "rigorous examination" and to base itself on a "sufficient factual basis" in making its decision. To Norway's surprise, the Appellate Body had reversed the Panel's finding regarding that point and had found that the Panel could not solely rely "on the overall statistics or aggregated results", even though the USDOC "rolled over" the measure in 100 per cent of the cases referred to. Rather, it should have relied on a "qualitative assessment" in at least some of the cases, to prove that the USDOC regarded the assumptions in the SPB as conclusive. Norway was certain that that point would be raised in future cases and expected that the findings in that respect would differ somewhat from the conclusion in the case at hand. Norway drew Members' attention to the paper on sunset reviews submitted in the context of the negotiations on rules by a group of countries, including Norway. In document TN/RL/W/76, a permanent solution to this problem had been suggested by abolishing the possibility of extensions through "sunset reviews" and introducing a "grace period" before a new measure could be introduced. The case before the DSB was a strong affirmation of the need for such a proposal.

54. The representative of Hong Kong, China said that her delegation thanked the Panel and the Appellate Body for their work on this case. On the whole, Hong Kong, China welcomed the Appellate Body and the Panel Reports as useful in clarifying the conduct of sunset reviews, although it had some comments and reservations with regard to parts of the findings. Hong Kong, China welcomed the confirmation that authorities could not simply assume that dumping was likely to continue or recur because a respondent made an incomplete submission. However, it had reservations on the finding that non-participation in a review could automatically lead to a determination that dumping was likely to continue or recur for that exporter. The Panel and the Appellate Body had confirmed that Article 11.3 of the Anti-Dumping Agreement required investigating authorities to make a determination supported by reasoned and adequate conclusions based on positive evidence, and not on assumptions or conjectures. To Hong Kong, China, therefore, investigating authorities could not simply assume that dumping was likely to continue or recur for that exporter simply because it chose not to participate in the review.

55. Hong Kong, China welcomed the clarification by the Panel, as endorsed by the Appellate Body, of standard for determining whether a particular measure was consistent with Article 11.3 of the Anti-Dumping Agreement, namely, "a scheme that attributes a 'determinative'/'conclusive' value to certain factors in sunset determinations – as opposed to only an indicative value – is 'likely to violate' Article 11.3". It also noted the Appellate Body's statement that a qualitative assessment of the likelihood determinations in individual cases was required. Regrettably, such a qualitative assessment was not performed and no conclusion was made as to the WTO-consistency of the relevant sections of the Sunset Policy Bulletin. Likewise, Hong Kong, China regretted that there was insufficient factual basis for the Appellate Body to complete the analysis of Argentina's conditional appeal with respect to the "practice" of the USDOC regarding the likelihood determination in sunset reviews. With the foregoing observations, Hong Kong, China urged the United States to take prompt action to bring its inconsistent measures into conformity with the Anti-Dumping Agreement.

56. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS268/AB/R and the Panel Report contained in WT/DS268/R and Corr.1, as modified by the Appellate Body Report.

4. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/272)

57. The Chairperson drew attention to document WT/DSB/W/272 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. Unless there was any objection, she proposed that the DSB approve the names contained in document WT/DSB/W/272.

58. The DSB so agreed.

5. United States – Anti-Dumping Act of 1916

(a) Statement by the United States

59. The representative of the United States, speaking under "Other Business", said that in connection with the dispute "United States – Anti-Dumping Act of 1916", she was pleased to inform the DSB that on 3 December 2004, President Bush had signed into law the Miscellaneous Trade and Technical Corrections Act of 2004. That Act included a provision that repealed the 1916 Act. As stated at the November DSB meeting, that action had brought the United States into compliance with the DSB's recommendations and rulings in this dispute.

60. The representative of Japan thanked the US delegation for reporting on the development on this matter since the November DSB meeting: i.e. that the US President had signed the Miscellaneous Tariff Act which contained the bill H.R. 1049 repealing the 1916 Anti-Dumping Act. Japan welcomed the enactment of the bill, and acknowledged the effort made by the US administration as well as the US Congress. However, Japan wished to report to the DSB with regret that on 23 November 2004, just days before the President signed legislation repealing the 1916 Act, a new lawsuit had been filed against several Japanese companies under the 1916 Anti-Dumping Act. At previous DSB meetings, Japan had been calling on the United States to take appropriate action so that these instances would not occur and so that no further damage would be inflicted upon the Japanese companies under the 1916 Anti-Dumping Act. Along with the US$30 million case now being pursued before the Federal Circuit Court, such instances raised much concern to Japan. His country regretted that the United States had failed to address Japan's concerns. Without retroactive effect, the bill repealing the 1916 Anti-Dumping Act would not affect the pending cases, as mentioned above. In that light, Japan again strongly urged the United States to do its utmost in order to effectively prevent damages being inflicted upon Japanese companies. In conclusion, Japan wished to state that as long as these pending cases threatened to inflict damages on Japanese companies, its position *vis-à-vis* the United States regarding these cases remained the same, notwithstanding Japan's expression of welcome concerning the repeal of the 1916 Anti-Dumping Act. Also in this regard, Japan would like to reserve all its rights under the DSU.

61. The representative of the European Communities said that the EC would simply like to refer to its statement made at the 24 November DSB meeting regarding this matter.

62. The DSB took note of the statements.

6. United States – Final dumping determination on softwood lumber from Canada

(a) Statement by the United States

63. The representative of the United States, speaking under "Other Business", said that her country was pleased to announce that the United States and Canada had agreed on a reasonable period of time for the United States to implement the rulings and recommendations of the DSB in the Lumber (Dumping) dispute (DS264). Pursuant to Article 21.3(b) of the DSU, the parties had agreed

on a reasonable period of time of seven and one-half months. Accordingly, the reasonable period of time would expire on 15 April 2005. The United States wished to thank the Arbitrator and the Secretariat for their efforts in connection with the arbitration proceedings that Canada had terminated when it had withdrawn its request for arbitration.

64. The representative of Canada said that his country wished to thank the Secretariat and the Arbitrator for their efforts and hard work. Unfortunately, the notification to the Arbitrator regarding this matter had been issued when he was already on his way from Australia.

65. The DSB took note of the statements.