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Dispute Settlement Body
9 January 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 9 January 2004

Chairman: Mr. Shotaro Oshima (Japan)

Prior to the adoption of the agenda, the item concerning the adoption of the Panel Report in the case on "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries" had been removed from the proposed agenda, following the decision by the European Communities to appeal the Panel Report.

Subjects discussed: Page

1. Japan – Measures affecting the importation of apples

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 10 December 2003, the DSB had adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report, in the case on: "Japan – Measures Affecting the Importation of Apples".

2. The representative of Japan said that his country wished to reiterate its deep regret and concerns regarding the Reports of the Panel and the Appellate Body in this proceeding, which had been adopted by the DSB on 10 December 2003. Japan noted, however, that neither the Panel nor the Appellate Body had ruled against Japan taking necessary measures on apple fruit from the United

States in order to prevent entry of fire blight into Japan, in accordance with the appropriate level of protection for Japan. Pursuant to Article 21.3 of the DSU, Japan wished to inform the DSB of its intention to implement the DSB's recommendations and rulings in a manner consistent with its obligations under the SPS Agreement. In this regard, Japan would need a reasonable period of time to design an appropriate measure to ensure the appropriate level of protection for itself. Japan looked forward to consulting with the United States in order to reach an agreement on such a period of time, pursuant to Article 21.3(b) of the DSU.

3. The representative of the United States said that her country welcomed the statement of Japan that it intended to implement the DSB's recommendations and rulings in this dispute. The United States hoped that, with the benefit of the clear guidance contained in the Panel and the Appellate Body Reports, Japan would remove its WTO-inconsistent measures promptly.

4. The representative of the European Communities said that this dispute concerned the import conditions applied by Japan on apple fruit imported from the United States, as a response to a specific risk factor: i.e. fire blight disease. The EC had participated as a third party in this dispute because of its systemic interest regarding the interpretation of the provisions of the SPS Agreement. The EC had already expressed its reservations about the Appellate Body Report in this case. The EC noted with interest that even the beneficiary of the inappropriate application of the burden of proof in this case, the United States, had expressed, at the DSB meeting in December 2003, its disagreement with the approach taken. However, as a major fruit exporter, the EC was also interested in the broader lessons that Japan should draw from this dispute, especially in relation to the principles of risk assessment. Therefore, the EC would closely watch Japan's reaction to this ruling in that broader sense. The EC would request Japan to implement the findings of the Reports by adopting appropriate regulations for the importation of apples from all sources and not just from the United States.

5. The DSB took note of the statements, and of the information provided by Japan regarding its intentions in respect of implementation of the DSB's recommendations in this case.

2. Dominican Republic – Measures affecting the importation and internal sale of cigarettes

(a) Request for the establishment of a panel by Honduras (WT/DS302/5)

6. The Chairman recalled that the DSB had considered this matter at its meeting on 19 December 2003 and had agreed to revert to it. He drew attention to the communication from Honduras contained in document WT/DS302/5.

7. The representative of Honduras said that this was his country's second request for the establishment of a panel in the dispute under consideration. His delegation had given the reasons for requesting the establishment of a panel on this matter at the 19 December 2003 DSB meeting. Honduras was of the view that the cigarettes it exported to the Dominican Republic were granted less favourable treatment, contrary to the obligations of the Dominican Republic under the GATT 1994. In particular, Honduras considered that: (i) there was discrimination between like domestic and imported cigarettes in respect of the Selective Consumption Tax, in violation of Articles III:2, III:4 and X:3(a) of the GATT; (ii) there was no transparency or predictability for the government and traders regarding trade (tax) requirements affecting the marketing of cigarettes in the Dominican Republic, in violation of Article X:1 of the GATT; (iii) there was discrimination between like domestic and imported cigarettes in respect of the stamping requirement solely in the territory of the Dominican Republic, in violation of Article III:4 of the GATT; (iv) through the bonds to be posted for engaging in the importation of cigarettes, barriers were imposed on access to the Dominican market, in violation of Articles II:1(a) and (b) and Article XI:1 of the GATT, or there was discrimination against imported cigarettes, in violation of Articles III:2 and III:4 of the GATT; (v) charges or fees other than ordinary customs duties had been imposed that did not meet the

requirements laid down in Articles II:1(a) and (b) of the GATT, and, in one case, one of these charges was inconsistent with Article XV:4 of the GATT. These measures had distorted the conditions of competition for cigarettes of Honduran origin exported to the Dominican Republic and had altered the competitive advantages of Honduras in the production and exports of cigarettes. At the present meeting, Honduras was requesting, for the second time, the establishment of a panel with standard terms of reference as set out in Article 7.1 of the DSU.

8. The representative of the Dominican Republic said that her country continued to disagree with the decision of Honduras to request the establishment of a panel. As her delegation had indicated at the 19 December DSB meeting, the Dominican Republic considered the claim by Honduras to be unfounded in fact and in law. The measures affecting the importation and internal sale of cigarettes identified by Honduras were consistent with the provisions and principles of the GATT. Contrary to the view of Honduras, the measures did not discriminate between imported cigarettes and cigarettes produced in the territory of the Dominican Republic. They did not afford imported cigarettes less favourable treatment than that accorded to domestic cigarettes. The Dominican Republic had not imposed bans or restrictions on imports of cigarettes that ran counter to Article XI or other provisions of the GATT. The measures were, moreover, in keeping with the obligations of the Dominican Republic under Article II of GATT, since the alleged other duties and charges imposed by the Dominican Republic were in conformity with its Schedule of concessions. Likewise, the measures complied with the provisions of Articles X and XV of the GATT. The claim brought by Honduras appeared rather to challenge the sovereign right of countries to adopt internal measures ensuring that traders – whether domestic or foreign – satisfied the tax obligations laid down in national legislation. Honduras also appeared to seek to restrict the right of the Dominican Republic effectively to determine the tax base applicable to imported cigarettes for the purpose of payment of the Selective Consumption Tax.

9. Finally, she wished to note that in spite of her country's objection, Honduras had failed to modify its panel request in order to satisfy the requirements of Article 6.2 of the DSU. Honduras had still not sufficiently identified some of the specific measures at issue. The Dominican Republic would bring this shortcoming to the attention of the Panel and would request it to reject the claim of Honduras on this and other substantive grounds. In view of all the above considerations, the Dominican Republic continued to disagree with the allegations and interpretations made by Honduras. However, it recognized and respected the automaticity of the WTO dispute settlement system. Therefore, although it deplored the decision of Honduras to request the establishment of a panel, her country would appear before the Panel in order to defend its measures and would demonstrate that the claim of Honduras had no legal or factual basis.

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

11. The representatives of Chile, China, the European Communities and the United States reserved their third-party rights to participate in the Panel's proceedings.

3. United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan

(a) Report of the Appellate Body (WT/DS244/AB/R) and Report of the Panel (WT/DS244/R)

12. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS244/9 transmitting the Appellate Body Report on "United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan", which had been circulated on 15 December 2003 in document WT/DS244/AB/R, in accordance with Article 17.5 of the DSU. He 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. 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".

13. The representative of Japan said that her delegation wished to express its appreciation to the Appellate Body, the Panel and the Secretariat for examining this important case and for their efforts in issuing the Reports. Before going into the substance of the Reports, Japan wished to draw Members' attention to the circumstances leading to the inscription of this agenda item by Japan on 22 December 2003. After the circulation of the Appellate Body Report, Japan had been asking the United States whether it intended to request the adoption of the Reports by the DSB, partly because of the particular nature of the findings in the Appellate Body Report. The United States had not indicated at all what its intention was until to the very deadline for inscription of agenda items of the present DSB meeting. Therefore, based on thorough review of the Appellate Body Report, Japan had decided to inscribe this item on the agenda of the present meeting. From a sceptic's perspective, one could argue that the United States had not replied to Japan's numerous inquiries hoping to let the 30-day deadline under Article 17.14 of the DSU pass without either side requesting the adoption. Of course, Japan would not wish to presume that the United States had not acted in good faith. Yet, the lack of transparency on the US side concerning its intention was very regrettable.

14. Japan was disappointed that the Appellate Body had made no recommendations to the DSB in relation to this case. Nevertheless, Japan welcomed some of the Appellate Body's findings that bore systemic importance. First, the Appellate Body had found that the Sunset Policy Bulletin, established by the US Department of Commerce, as such, was a measure challengeable in WTO dispute settlement proceedings. Second, it had found that Article 2 of the Anti-Dumping Agreement regarding the definition of dumping and dumping margin calculation applied to sunset reviews, and that it was inconsistent with the WTO Agreement to base an affirmative likelihood determination under Article 11.3 of the Anti-Dumping Agreement on positive dumping margins previously calculated in a WTO-inconsistent manner using "zeroing".

15. The very fact that the United States had opted not to request the adoption of the Reports implied that it was fully aware of the consequences of these important findings by the Appellate Body. In other words, the United States appeared to be acutely cognizant of the real possibilities of findings of inconsistency of the US sunset review procedure with the WTO Agreement in other on-going proceedings. Japan very much looked forward to actual application of these findings to these other dispute settlement proceedings, to which Japan was a third party, so that the disciplines on sunset reviews be strengthened. The United States had been applying many anti-dumping measures against steel products from Japan. As a result, there were many more sunset reviews concerning these products to come. Japan would, taking into consideration the findings by the Appellate Body in this proceeding, continue to closely monitor US sunset review determinations in terms of their consistency with the WTO Agreement.

16. Taking advantage of this occasion, Japan wished to express its sincerest gratitude to many of the third parties to this dispute that had supported Japan's claims and had contributed to the substantive discussions. Finally, Japan noted with great regret that the Appellate Body had chosen not to complete its analysis on two issues while reversing the Panel's findings, stating that there was not a sufficient factual basis to do so, although Japan had proven the facts of this case and the United States had not contested the facts in question.

17. The representative of the United States thanked the Panel, the Appellate Body and the Secretariat for their hard work on this dispute. The United States was pleased that the Reports of the Panel and Appellate Body had confirmed that US laws and regulations governing sunset reviews, as well as the particular sunset review at issue in this dispute, complied with the Anti-Dumping Agreement. In particular, the United States was gratified that both the Panel and the Appellate Body had agreed that the US Department of Commerce had sufficient evidence upon which to base its decision to keep in place the anti-dumping duty order on corrosion-resistant steel from Japan. The United States was also pleased that the Appellate Body had not disturbed the Panel's finding that Commerce had conducted this particular sunset review consistent with the WTO Agreements.

18. However, the United States wanted to make a few points with respect to the Appellate Body's discussion of Commerce's Sunset Policy Bulletin, which was a transparency tool to provide the public with guidance on Commerce's conduct of sunset reviews. The Panel had found that the Sunset Policy Bulletin was not a mandatory measure that could be challenged in WTO dispute settlement. The Appellate Body had reversed that finding because it believed that the Panel had not fully considered the relevant arguments. The United States was confident, however, that any future panel that properly considered all the relevant factors would reach the same conclusion as this Panel. Under US law, the Sunset Policy Bulletin had no independent legal status. It mandated no behavior whatsoever. This was true as a matter of fact, and any conclusion to the contrary would simply mischaracterize US law.

19. Indeed, any contrary result would be extraordinarily counterproductive to the objective of greater transparency in government decision-making. The Anti-Dumping Agreement left authorities with broad discretion in conducting antidumping sunset reviews. The US authorities considered that the public benefited from guidance on how they might conduct these reviews. It was difficult to see why WTO Members would wish antidumping authorities to provide less guidance to the interested public rather than more, for indeed that would be the consequence of any successful challenge to the Sunset Policy Bulletin. A decision to challenge useful tools like the Sunset Policy Bulletin was deeply misguided.

20. The United States also wished to comment on certain aspects of the Appellate Body's reasoning. Paragraph 168 of the Appellate Body Report stated that, "When a measure is challenged 'as such', the starting point for an analysis must be the measure on its face." Paragraph 168, however, must be read in the context of the proper approach to the factual question of the meaning of a measure under a Member's municipal law. The United States noted, for example, that the Appellate Body had referred to its statement in its recent report on US – Carbon Steel that a party asserting that another party's municipal law was inconsistent with a WTO obligation must introduce evidence as to the scope and meaning of that municipal law. Furthermore, as the panels in the US – Section 301 and US – Export Restraints had correctly pointed out, municipal law consisted not only of the provisions being examined, but also domestic legal principles that governed the interpretation of those provisions. Thus, while it might in many instances be true that domestic legal principles called for the examination of a measure on its face, this would depend on the specific interpretive principles of municipal law. Indeed, the Appellate Body had also pointed out in US – Carbon Steel that the text of a measure might not, in all cases, be sufficient evidence to prove the scope and meaning of a municipal law.

21. The United States also wished to comment on the Appellate Body's discussion of what might constitute a measure. While there was much in this analysis with which the United States agreed, it considered that the discussion had gone beyond the task with which the Appellate Body was presented. WTO dispute settlement, like other forms of dispute resolution, operated most effectively when it concerned itself with the particular dispute before it. Broad statements made out of the context of the facts and claims in that dispute should be avoided, in particular because such statements might turn out to be inapplicable or inappropriate in the context of other disputes. Further, in specific respects, broad conclusions of the Appellate Body in this Report were not supported by the materials

it cited. For example, in footnote 80, in responding to the Panel's findings that the Sunset Policy Bulletin was not a mandatory legal instrument that could give rise to a WTO breach and was not, as such, a challengeable measure, the Appellate Body had listed a number of GATT and WTO panel reports as supporting the general proposition that "instruments containing rules or norms could constitute a 'measure'". However, with the exception of one of the disputes cited by the Appellate Body, the instruments at issue had independent legal effect within the responding party's legal system. The exception was US – Export Restraints, where the panel had concluded that the "Preamble" to the US countervailing duty regulations, Commerce "practice," and the US "Statement of Administrative Action" were not challengeable because they did not have independent legal effect. Thus, these reports did not support the conclusion that panels had considered instruments with no independent legal effect to be "measures" subject to dispute settlement. In any event, none of this changed the fact that the Sunset Policy Bulletin mandated no action whatsoever, and that a proper analysis would reach this conclusion.

22. The United States noted that Japan had made some comments concerning the placement of these Reports on the agenda of the present meeting. It was puzzled that Japan had raised this point. There was nothing in the DSU that said which party to a dispute was to propose the adoption of a report or when. The United States wanted to point out that Japan, likewise, had not responded to US inquiries about its plans for putting the Reports up for adoption. The United States also noted that in any event Japan had been able to put this item on the agenda without difficulty.

23. The representative of Korea said that his country had a keen interest in the way the United States had conducted its sunset reviews under Article 11.3 of the Anti-Dumping Agreement, Korea had participated as a third party in this dispute. Korea wished to express its gratitude to the Appellate Body for coming up with the important findings on issues of systemic interest to the WTO. In particular, Korea welcomed the finding of the Appellate Body that the Sunset Policy Bulletin had published in 1998, and had been guiding the US Department of Commerce since, it was challengeable as such. It had been a source of serious concern that the US Department of Commerce had applied the Sunset Policy Bulletin in such a way that the review under Article 11.3 of the Anti-Dumping Agreement had always resulted in a finding that dumping would be likely to continue or recur, if the order were to be revoked. This practice of the US Department of Commerce based on the Sunset Policy Bulletin effectively deprived Article 11.3 of the Anti-Dumping Agreement of its meaning and Korea was pleased to note that the Appellate Body had made it possible for the standards provided for in the Bulletin to be subject to the WTO dispute settlement mechanism.

24. Korea was also satisfied with the Appellate Body's conclusion that the use of the zeroing methodology, which had already been found to be WTO-inconsistent in the context of dumping margin calculations under Article 2 of the Anti-Dumping Agreement, constituted a defect tainting the likelihood determination under Article 11.3 of the Anti-Dumping Agreement as well. This finding of the Appellate Body was important in the sense that the Appellate Body had reaffirmed the existence of an inherent bias in the zeroing methodology, which inevitably distorted not only the amount of the dumping margin, but also the very existence of dumping. As these findings of the Appellate Body illustrated, the Appellate Body had confirmed that Article 11.3 of the Anti-Dumping had imposed strict disciplines on the WTO Members wishing to extend anti-dumping orders beyond the five-year period, and Korea appreciated the Appellate Body for this.

25. It was regrettable that the Appellate Body had stopped short of finding the US measures at issue in this dispute to be WTO-inconsistent due to insufficient factual findings by the Panel. Nonetheless, the Appellate Body had made clear that Article 11.3 of the Anti-Dumping Agreement required the investigating authorities to conduct a rigorous examination in determining whether the expiry of the anti-dumping duty within five years of its imposition would be likely to lead to a continuation or recurrence of dumping and injury. Korea would closely monitor any future sunset review determinations by the United States on products from Korea.

26. The representative of Chile said that his country, as a third party to this dispute, wished to thank the Appellate Body and the Secretariat for the Report to be adopted at the present meeting at the request of Japan. Chile wished to highlight a number of aspects of this Report which had set an important precedent and had reversed conclusions of the Panel which Chile did not share, as it had pointed out during the appeal. First, Chile welcomed and concurred with the Appellate Body's statement that Article 11.3 of the Anti-Dumping Agreement established an exception to the general rule that any anti-dumping duty had to be terminated within five years at most. The fact that this was an exception required national authorities conducting such reviews to take a pro-active and diligent approach that would enable them to arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. According to the Appellate Body, such evidence had to demonstrate that dumping would be probable, if the duty had been terminated, and not simply possible or plausible. The Appellate Body had even added that this was a rigorous process that could take up to one year and involved a number of procedural steps. These conclusions were very closely related to paragraph 191 of the Appellate Body's Report, which reiterated that the use of presumptions might be inconsistent with an obligation to make a particular determination using positive evidence, since they predetermined a result. Irrebuttable presumptions were to Chile precisely what the Sunset Policy Bulletin established, as applied in practice, it had shown that the Department of Commerce had never terminated an anti-dumping duty within five years when the domestic industry had an interest in maintaining the duty. Unfortunately, an insufficient factual basis prevented the Appellate Body from reaching that conclusion.

27. Second, the Panel had erred in finding that Article 11.3 of the Anti-Dumping Agreement was separate from the other provisions of the Agreement as regards the definition of dumping. Chile agreed, and had stated as much during the proceedings, that Article 11.3 neither prescribed nor prohibited a specific methodology for conducting sunset reviews. However, it was illogical to argue that where the investigating authorities decided to use historical dumping margins to make their "likelihood determination", those margins could have been calculated in a manner inconsistent with the Anti-Dumping Agreement. In this connection, Chile noted the Appellate Body's conclusion that the definition of dumping set out in Article 2 of the Anti-Dumping Agreement applied throughout the Agreement, including Article 11.3, as stated at paragraphs 127 and 130 of the Appellate Body's Report.

28. In other words, the fact of US Department of Commerce having based its "likelihood determination" on margins calculated in a manner inconsistent with the Anti-Dumping Agreement implied that the Department had acted in WTO-inconsistent manner. Once again, Chile deplored the fact that the lack of factual aspects prevented the Appellate Body from concluding that use of the "zeroing methodology" in this particular review was WTO-inconsistent. This, in Chile's view, was the case, as was the fact of having relied on margins calculated prior to the entry into force of the WTO or *de minimis* margins, which were points that had not been addressed by Japan on appeal. Chile hoped that these points could be clarified in the proceedings of pending disputes.

29. Finally, Chile shared and wished to highlight the conclusion that the Sunset Policy Bulletin was a measure that was challengeable "as such". Chile was concerned that, on the basis of preambular language or certain aspects of a legal or regulatory provision, Members might be able to circumvent their WTO obligations by claiming that such provisions were non-binding. Notwithstanding that in this case the measure at issue had been applied in all sunset reviews without exception, Chile agreed with the Appellate Body that, first, nothing in the WTO precluded a non-binding measure from being challenged and, second, the Panel should have followed the analytical approach detailed at paragraph 99 of the Appellate Body's Report. The Report of the Appellate Body set an important precedent which bore out the fact that sunset reviews were not mere routine investigations in which the authorities had applied quasi-irrebuttable presumptions on the basis of a couple of considerations (some of which were WTO-inconsistent *per se*), without providing adequate opportunity for taking into account other facts, in particular those put forward by affected foreign

companies. On the contrary, the Appellate Body confirmed the expiry of anti-dumping duties within five years at most. Only after extensive investigation based on positive evidence could the authorities conclude that termination of the duty was likely to entail continuation or recurrence of dumping. Failure to proceed in this manner might give rise to discretionary action and arbitrariness, both of which had been categorically rejected by Members, Panels and the Appellate Body alike.

30. The representative of Canada said that his country did not have any comments on the substantive issues decided by the Appellate Body. At the same time, the statements by Japan and the United States had given rise to two procedural issues on which Canada wished to make a statement. First, Canada noted the observation by Japan concerning the 30-day time limit for the adoption of the report of the Appellate Body by the DSB. The implication of Japan's statement was that a failure on the part of the parties to a dispute to place the matter on the agenda would prejudice the validity or the binding nature of the findings. Canada did not consider, however, that if a report had not been placed by either party on the agenda of the DSB within the given time-frame, the report would vanish out of existence. On this issue, the words of the DSU were clear. The DSU provided that the report of the Appellate Body "shall be adopted". There was no suggestion in the DSU that a report would become invalid after the expiry of the time limit. Second, Canada expressed some concern about the US criticism of the Appellate Body's findings, and especially in respect of the suggestion by the United States that the Appellate Body should not make findings of a "broad" nature. Canada noted that in various cases in which the United States and Canada had been involved, the United States had made similar points, and in each instance the answer had been the same: there was a distinction between the interpretation of a law and its application to specific facts. Interpretation, by definition, must be broad and general; it must give meaning to a legal provision outside of the specific context and apart from the specific facts of a case. The interpretation must then be applied to the specific facts of each case to determine whether the measures at issue were consistent with the obligations of the challenged Member. Canada recalled that in the Steel case the United States itself had asked for "guidance" from the Appellate Body. Canada welcomed this since general interpretations of the WTO Agreement helped to preserve and advance the objectives of dispute settlement, as set out in Article 3.2 of the DSU.

31. The representative of Brazil said that his country had participated as a third party in this dispute. Brazil's main concern was with regard to Article 11.3 of the Anti-Dumping Agreement and the inappropriate use by the United States of past administrative reviews based on a "zeroing" methodology as evidence in sunset reviews. Brazil was, therefore, satisfied to see that the Appellate Body had found in paragraph 130 of its Report that: "if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of the USDOC's likelihood determination in the CRS sunset review". He reiterated that Brazil was satisfied with the Appellate Body's confirmation of this interpretation.

32. The representative of the European Communities said that on several occasions, the EC had expressed its position that the conditions for imposing an anti-dumping measure should also naturally be bound to be present when deciding to maintain that measure for another five years. The EC considered the introduction of sunset reviews as a key achievement of the Uruguay Round negotiations to avoid never-ending measures. Leaving excessive margin of manoeuvre to investigating authorities in conducting sunset reviews risked to reduce them to a formalistic exercise, which did not correspond to the object and purpose. In this regard, the EC welcomed the affirmation by the Appellate Body that: (i) the continuation of the duty was the exception; (ii) the investigating authorities had to base their decision on a firm evidentiary foundation; (iii) past dumping margins and import volumes were not always "highly probative" for the likelihood of continuation of dumping in a sunset review, and a case-specific analysis of the factors behind the import trends remained necessary; and (iv) the calculation of a dumping margin relied on in a sunset review the calculation of that

margin had to comply with the disciplines of Article 2 of the Anti-Dumping Agreement, and in particular with Article 2.4 thereof. On the last point, the EC noted with great interest the Appellate Body's finding that "zeroing" methodologies, whether in original investigations or otherwise, distorted not only the magnitude of dumping, but also affected its very existence. Therefore, such methodologies ran foul of the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement. The EC also welcomed the clarification by the Appellate Body that there was no WTO principle according to which non-mandatory measures could not be challenged "as such".[1] The EC considered that the so-called mandatory/discretionary "doctrine" was not based on any provision in the WTO Agreements. Whether or not discretionary legislation might be subject to challenge should depend on the specific obligations imposed by each provision of the WTO Agreement. Finally, this Report illustrated the need to introduce appropriate remand process. On several occasions, the Appellate Body had come to general conclusions as to the applicable rules in sunset reviews. Unfortunately, the Appellate Body could not decide whether the United States had respected those rules because the Panel Report did not contain uncontested facts. The present dispute settlement provisions would leave no other solution to the complainant than to restart the whole dispute settlement procedure. This created an unnecessary burden on Members and on the dispute settlement process and would appear to be contrary to the principle of prompt settlement of disputes.

33. The representative of Norway said that his country had participated in this dispute as a third party. Norway expressed appreciation to the Appellate Body and the Secretariat for their work in the proceedings. It also wished to extend thanks to Japan and the other third participants in this case for the good co-operation. Norway disagreed with the implication of the Appellate Body's overall conclusion that the measures in question were not found to be in breach with the Anti-Dumping Agreement and with WTO law as such. However, Norway welcomed the Appellate Body reversing some of the Panel's findings on certain important and central issues related to the sunset discipline. First, that the Sunset Policy Bulletin was challengeable under WTO law. Norway believed that the Appellate Body's ruling implied a clear warning that provisions that created irrebuttable presumptions or predetermined a particular result no matter how they were called or how they had been developed or characterized in a domestic legal system might be found inconsistent with the WTO law. Second, that dumping margins when relied upon in a sunset review must have been calculated in a WTO consistent manner. Furthermore, Norway appreciated that the Appellate Body had spelled out some general observations concerning the sunset process by indicating that the process had imposed serious disciplines on WTO Members wishing to maintain anti-dumping orders beyond their scheduled expiration date. This was a clarification of principal importance with regard to the interpretation of Article 11.3 of the Anti-Dumping Agreement. Finally, he wished to associate his delegation with the remarks made by Canada in respect of adoption of panel and Appellate Body reports. A report shall be adopted and, Norway believed, that the Chairman had to ensure that a report was placed on the agenda of a DSB meeting, if the parties to the dispute did not request the inclusion of such a report on the agenda.

34. The representative of India said that his country wished to express its gratitude to the Appellate Body for the very useful findings, both on the nature of the US Sunset Policy Bulletin as well as its reiteration of incompatibility of the zeroing methodology with the Anti-Dumping Agreement. India wished to endorse Japan’s concern that the Appellate Body could not complete the analysis relating to the zeroing methodology adopted by the United States in the light of the absence of adequate factual and legal basis. However, India also wished to note that the discretion available to the national investigating authorities was not restricted except where explicitly regulated by the provisions of the Anti-Dumping Agreement.

35. The representative of Argentina said that although his country was neither a party nor a third party to this dispute, it wished to join previous speakers who had emphasized the systemic importance

[1] Appellate Body Report, para.88.

of certain aspects of the Appellate Body Report before the DSB for adoption at the present meeting. Argentina welcomed the findings of the Appellate Body in this case. Indeed, these findings were of great significance in interpreting the obligations of Article 11.3 of the Anti-Dumping Agreement, which were incumbent upon all Members in the conduct of sunset reviews. Among the many important issues on which the Appellate Body had ruled, Argentina wished to emphasize those relating to measures that might be challenged under the dispute settlement system and the definition of the standard implicit in the term "likely" within the context of Article 11.3 of the Anti-Dumping Agreement. With regard to the first point, Argentina noted with satisfaction that the Appellate Body had adopted a comprehensive approach in defining measures that might be challenged under the DSU. With regard to the interpretation of the term "likely", Argentina wished to underline that this was a necessary and long-awaited clarification. The standard to be applied in determining that termination of the duty would be likely to lead to the continuation of dumping and injury was the cornerstone of the sunset review process. As the Appellate Body had clearly established, this standard required the investigating authority to demonstrate that continuation or recurrence of dumping and injury was likely – and not merely possible – in the event of termination of the duty. Finally, Argentina welcomed the Appellate Body's confirmation that sunset reviews required substantive investigations based on positive evidence, as the only way of reaching a determination that termination of the duty would be likely to lead to continuation or recurrence of dumping and injury. In sum, Argentina considered that the Appellate Body's decision had made a significant contribution to the correct interpretation and application of Article 11.3 of the Anti-Dumping Agreement.

36. The representative of Mexico said that his country also wished to thank the Appellate Body, the Panel and the Secretariat for the Reports. Mexico supported the comments with regard to the substance made by Japan, Chile and other delegations, which had referred the systemic problems of the sunset reviews. Mexico also had similar concerns in this regard.

37. The representative of Chile said that he wished to place on the record his country's position with regard to the point raised by Canada, which was subsequently supported by Norway. In Chile's view, there was no DSU provision which provided that the Secretariat or the DSB Chairman could place reports of panels or the Appellate Body on the DSB agenda for adoption.

38. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS244/AB/R and the Panel Report contained in WT/DS244/R, as modified by the Appellate Body Report.