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Dispute Settlement Body
22 May 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 May 2007

Chairman: Mr. Bruce Gosper (Australia)

Subjects discussed: Page

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.54)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.54)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.29)

(d) United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Status report by the United States (WT/DS294/20/Add.3)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.54)

2. The Chairman drew attention to document WT/DS176/11/Add.54, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 10 May 2007, in accordance with Article 21.6 of the DSU. As noted in the status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US Administration continued to work with the Congress to implement the DSB's recommendations and rulings.

4. The representative of Cuba said that the United States had, once again, submitted a status report that was no different from the reports it submitted every month regarding the work that the US Administration was carrying out with the US Congress on legislative measures that could resolve this dispute. Also, the United States had not provided details as to when it intended to comply with the decisions of the DSB. Cuba noted that the US Administration had manoeuvred in the past to prevent the consideration and approval of a number of bills to repeal Section 211. Besides, the US President had, on a number of occasions, expressed his intention of vetoing any bill approved by the US Congress that was aimed at mitigating or eliminating the unlawful unilateral measures imposed by that country against Cuba, including Section 211. The growing presence and prestige of the Havana Club rum in the international market required financing, technology and experience, all of which had been provided by the French company Pernod-Ricard and the Cuban master rum-makers. The increased sales had led to the displacement of Bacardi in a number of markets, and this was what accounted for all Bacardi's attempts to take over the trademark. The Havana Club trademark was owned by the Havana Club Holding, of which the French company Pernod-Ricard was part. This had been recognized by the Madrid Court of Appeals, which in March 2007 had upheld the decision by the court of first instance to dismiss Bacardi's claim to recognition as owner of the trademark and to the cancellation of the registration held by its Cuban competitor. Cuba drew attention to the possible implications of maintaining Section 211 for the US business community and Cuba's trading partners. Every day, a growing number of US companies were becoming aware of this and were expressing

concern that Section 211 broke with the practice that both countries had followed until this law had been adopted. Up to that time, there had been mutual recognition between the two countries of the rights in intellectual property of its owners, whether natural or legal persons.

5. In compliance with its international obligations and notwithstanding the blockade and hostility policy maintained by the United States, Cuba had honoured and continued to protect the rights of hundreds of US companies which kept more than 5,000 registered trademarks up to date in Cuba. The US systematic failure to comply with the DSB's rulings cast doubts on the role it had traditionally assumed in this and other international organizations as second to none in the protection of intellectual property rights, and demonstrated its lack of commitment and political will to honour its obligations. As the months went by with no implementation of any ruling, doubts were cast on the credibility and efficiency of a dispute settlement mechanism, which was incapable in practice of resolving situations of this nature. Once again, his delegation wished to point out that the process was flawed. After the last deadline which had expired on 30 June 2005, the United States and the EC had notified their understanding not to implement the suspension of concessions. With that understanding, the dispute had fallen into a legal limbo since there was no deadline for implementation of the DSB's rulings, which was required under Article 21.3 of the DSU. Thus, the offender had no liability and felt no pressure to observe the principle of prompt compliance, and could disregard it indefinitely with the consent of the DSB, until the EC deemed it relevant and reacted. As in previous years, the US Congress had several legislative proposals for implementing the DSB's decision in this dispute. Some of them sought to perpetuate this legal aberration by promoting unsubstantial changes to Section 211. Others, however, aimed to eliminate it. Cuba hoped that what had happened in previous legislative periods would not be repeated this year and that the United States repeal Section 211, as this was the only proper solution and the one that suited all WTO Members, which would likewise be affected if this measure were extended, as established in some of the legislative proposals.

6. The representative of the European Communities said that the United States again could not report on any progress in the implementation of the DSB's ruling in the Section 211 dispute. The EC hoped that the present US Congress would realize that it was in the interest of the United States and of its industry as a whole to put an end to this situation which had damaging effect on the authority of the TRIPS Agreement. In this context, the fact that 49 representatives were already supporting bills to repeal Section 211 was welcome news and an encouraging sign. The EC urged again the United States to comply with its obligations under the TRIPS Agreement.

7. The representative of the Bolivarian Republic of Venezuela said that his delegation thanked Cuba for its statement, which it fully endorsed since, as it had stated on previous occasions, it considered Cuba's complaint regarding this matter to be legitimate. His delegation had also taken note the status report submitted by the United States. At previous meetings, the United States had mentioned that the US Administration was actively working to bring itself into compliance with the DSB's rulings and recommendations in all pending cases. In light of this, his country had hoped to receive detailed information on the concrete efforts by the US authorities to comply with the Panel's recommendations. The status report had dashed this hope and demonstrated a complete lack of progress with regard to this issue. His country had a systemic interest in this case and, therefore, reiterated its concern over this continued failure to comply with the DSB's recommendations. This situation not only undermined the sovereignty of the DSB, but could also set a dangerous precedent which could adversely affect other Members in the future as well as jeopardize the credibility of the WTO, in particular at a time when negotiations were under way to conclude a major round of trade negotiations. His country, therefore, urged the United States to show the political will necessary to find a solution which would be consistent with the Agreements and fundamental principles of the WTO as well as satisfactory to the interested parties.

8. The representative of Brazil said that his country wished to thank the United States for its status report and the statement made at the present meeting. Based on systemic considerations, however, Brazil wished to express its concerns with the protracted implementation process in this dispute. Situations like the one in the present dispute were evidently not in harmony with the fundamental principle of prompt implementation. Moreover, non-compliance situations lacking perspective of solution altered the carefully negotiated balance of rights and obligations to the detriment not only of the complaining party but also to the whole Membership. Therefore, Brazil urged the United States to take the necessary and urgent steps to put an end to the violations found in this dispute.

9. The representative of India said that her country wished to thank the United States for the situation report and the statement. However, in view of the systemic relevance of the issue, India renewed its concern. As mentioned previously several times, India noted that there was no substantial change in the situation report. India continued to reiterate that the rulings and recommendations of the DSB were to be fully complied with. India strongly felt that to ensure effective resolution of disputes to the benefit of all Members, principles of prompt compliance was not only essential, but it kept the rules-based multilateral trading system credible and vibrant. India, therefore, called on the United States to take required steps to implement the relevant DSB rulings.

10. The representative of China said that his country wished to thank the United States for its status report and the statement made at the present meeting. However, it was regrettable that this status report was identical to the report submitted in April and did not contain any new information concerning when this matter would be resolved to the satisfaction of the parties and other WTO Members. Although Members were conscious of the possible difficulties involved in implementation, the undue delay of full implementation of the DSB's rulings had caused systemic concerns about the functioning and efficiency of the dispute settlement system. As provided for in Article 21.1 of the DSU, prompt compliance with recommendations or rulings of the DSB was essential to ensure effective resolution of disputes to the benefit of all Members. Therefore, China again urged the United States to fully implement the decision of the DSB regarding this case as soon as possible.

11. The representative of Viet Nam said that his delegation was taking the floor in the DSB for the first time. Like previous speakers, and after listening very carefully to the statements with rationale arguments made by other delegations, he wished to take this opportunity to register Viet Nam's concern regarding the systemic issue of implementation of the decision of the DSB on the US Section 211. The Appellate Body report, issued on 12 January 2002 and consequently adopted by the DSB, had concluded that Section 211(a) and (b) of the US Omnibus Appropriation Act of 1998 violated the national treatment and most-favoured-nation obligations under the TRIPS Agreement as well as the Paris Convention for the Protection of Industrial Property. Members were aware of the fact that the United States had informed the DSB that it would continue to work in order to bring Section 211 into conformity with its WTO obligations. Thus, for whatever reason, the indefinite postponement of the DSB's rulings raised the question of the efficacy and credibility of the DSB and the multilateral trading system, setting a negative precedent that might affect other Members, especially developing countries, in particular regarding issues related to fundamental WTO principles of national treatment and MFN. Therefore, Viet Nam reiterated the request made by other Members that the United States implement the DSB's rulings and recommendations in this dispute without further delay.

12. The representative of Bolivia said that, having once again heard the brief report by the United States and noting that no progress had been made towards removing Section 211, Bolivia wished to express, once again, its concern. This non-compliance put into question the credibility of the multilateral dispute system and, once again, Bolivia wished to urge the United States to comply with the DSB's recommendations and rulings.

13. The representative of Nicaragua said that her country wished to thank the United Sates for the status report submitted at the present meeting, however, the non-implementation of the DSB's recommendations and rulings continued to create systemic difficulties for Nicaragua. As her delegation had previously stated, and as previous speakers had reiterated, this non-compliance put into question the credibility and effectiveness of the dispute settlement system and demonstrated a lack of coherence and equality in the application of intellectual property rights. Nicaragua hoped that the US Congress would very soon take the appropriate measures in this dispute.

14. 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.54)

15. The Chairman drew attention to document WT/DS184/15/Add.54, 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.

16. The representative of the United States said that his country had provided a status report in this dispute on 10 May 2007, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US Administration would work with the new Congress which had convened in January 2007 with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

17. The representative of Japan said that his country acknowledged that a certain measure had been taken in November 2002 to implement the part of the DSB's recommendations, as reported by the United States. However, it was regrettable that while three and a half years had passed since then, the issue of implementation in this case still remained on the agenda of the DSB. As Japan had repeatedly stated before the DSB, it believed that a full and prompt implementation of the recommendations and rulings of the DSB was essential for maintaining the credibility of the WTO dispute settlement system. In this regard, Japan noted the statement made by the United States along with its latest status report in which the United States stated that the US Administration was working with the new US Congress to pass specific legislative amendments that would implement the DSB's recommendations and rulings. Japan wished to renew its strong hope that the US Administration would accelerate its efforts to work with the US Congress in order to come into full compliance without further delay.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.29)

19. The Chairman drew attention to document WT/DS160/24/Add.29, 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.

20. The representative of the United States said that his country had provided a status report in this dispute on 10 May 2007, in accordance with Article 21.6 of the DSU. The US Administration would work closely with the new US Congress and continue to confer with the EC, in order to reach a

mutually satisfactory resolution of this matter. In this regard, the United States appreciated the EC's statement made at the 24 April 2007 meeting that it was open to working with the United States to seek a mutually satisfactory solution to this dispute. The United States shared the EC's goal of discussing how such a solution could be achieved.

21. The representative of the European Communities said that the EC's position regarding this dispute was well known, namely, the EC wished to see the law made conform to the WTO obligations of the United States. The EC had received indication that the new US Congress might be more receptive to the defence of TRIPS-derived rights. As already stressed in respect of the Section 211 dispute, long periods without concrete action to implement the recommendations undermined the authority of the TRIPS Agreement. This damaged the interests of the whole industry to the benefit of a limited group. The EC remained prepared to work with the United States to seek a mutually satisfactory solution to this dispute and hoped that a solution could be found in the near future.

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

(d) United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Status report by the United States (WT/DS294/20/Add.3)

23. The Chairman drew attention to document WT/DS294/20/Add.3, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

24. The representative of the United States said that his country had provided a status report in this dispute on 10 May 2007, in accordance with Article 21.6 of the DSU. As stated previously, the US Department of Commerce continued to work towards completion of a determination in one investigation in which the respondent had alleged a clerical error which it had requested be corrected, having completed implementation with respect to the other matters covered by this dispute.

25. The representative of the European Communities said that, at the previous regular DSB meeting, the EC had explained in detail why the US actions taken to implement the DSB's ruling in DS294 had not been satisfactory, and, in the EC's view, had failed to bring the United States into compliance with its WTO obligations. The EC would not reiterate its detailed explanations and would refer Members to the statement made by the EC at the previous regular DSB meeting. At the present meeting, it sufficed to say that the United States had not taken any actions correcting the shortcomings in its implementation of the DS294 ruling. In fact, in the meantime, the United States had made matters worse. On 30 April 2007, the US Department of Commerce had announced that the re-determinations made in respect of part of the 15 original investigations condemned in this dispute would take effect only as from 23 April 2007, in complete disregard of the 9 April 2007 implementation deadline. In addition, the United States was still refusing to revoke the order on stainless steel sheet and strip from Italy, in spite of clear evidence that the correction of an elementary arithmetical mistake would take the non-zeroed margin below *de minimis*. The EC was currently analysing the situation and would take the appropriate steps to protect its rights should no satisfactory solution be brought to the outstanding issues. In this respect, the EC and the United States had concluded, on 4 May 2007, a sequencing agreement. This agreement defined the procedures to review the measures taken or not taken by the United States and to request authorization from the DSB to suspend the application of concessions to the United States.

26. 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: Implementation of the recommendations adopted by the DSB

(a) Statements by Canada, the European Communities and Japan

27. The Chairman said that this item was on the agenda of the present meeting at the request of Canada, the European Communities and Japan. He then invited the respective representatives to speak.

28. The representative of Canada said that while his country appreciated the steps the United States had taken towards implementing the rulings and recommendations in this dispute, the United States had only prospectively repealed the Byrd Amendment. Anti-dumping and countervailing duties collected up to 30 September 2007 could still be disbursed to US producers under the terms of this legislation. As such, Canada believed that the US claim – made in its last status report from over a year ago – that it had "taken the actions necessary to implement the rulings and recommendations" in this dispute was not accurate. Canada, therefore, called on the United States to resume the submission of status reports and to repeal the Byrd Amendment.

29. The representative of the European Communities said that, at the previous regular DSB meeting, the United States had, once again, asserted having implemented the recommendations and rulings of the DSB in this dispute. The EC recalled that the CDSOA had been condemned for transferring the collected anti-dumping and countervailing duties to US companies in breach of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement. The United States had to stop those transfers by 27 December 2003. Yet, in October 2006, the United States had made the highest distribution thus far, disbursing to US companies more than US$380 million. The EC was still waiting for an explanation by the United States as to how this reconciles with its statement that it had implemented the DSB's ruling. In fact as long as the repeal of the Byrd Amendment would not produce effect and disbursements continued because of the transition clause, the United States would not be in compliance. Therefore, the EC wished to ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties to its industry. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

30. The representative of Japan said that at previous DSB meetings, the United States had repeatedly claimed that by enacting the Deficit Reduction Act of 2005, it had taken necessary actions to implement the DSB's recommendations and rulings and that it was not necessary to submit a status report under Article 21.6 of the DSU. Japan acknowledged that the Deficit Reduction Act of 2005, which had formally repealed the CDSOA, was a significant step forward in the right direction. However, the fact remained that, under the transitional clause, the CDSOA was still in force and the illegal distribution would continue for years to come. The United States had never disputed this fact, but maintained that the issue was resolved. Japan failed to see how the United States could take such a position. Japan, once again, called on the United States to take the necessary steps to immediately stop the illegal distribution and repeal the CDSOA not just in form but in substance. Japan also reiterated that the United States was under obligation to provide the DSB with a status report pursuant to Article 21.6 of the DSU. Japan reserved all its rights under the DSU until the United States fully complied with the recommendations.

31. The representative of Brazil said that his country thanked Canada, the EC and Japan for bringing this matter, once again, to the DSB's attention. In sharing their views that the United States had no basis to claim full compliance, Brazil still expected the United States to present a reasoned explanation as to why the mere passing into law of a prospective, delayed repeal of the WTO-illegal measure, would have brought the United States into conformity with the US obligations under the

multilateral rules. Meanwhile, WTO Members, and in particular the co-complainants, should not be deprived of any rights under the DSU.

32. The representative of China said that his country thanked and supported Canada, the EC and Japan for raising this matter before the DSB at the present meeting. China appreciated the efforts of the United States to implement the DSB's rulings and recommendations in this dispute and welcomed the repeal of the CDSOA. However, China shared the view expressed by previous speakers that the implementation issue had not been resolved in this dispute within the framework of Article 21 of the DSU. It was the obligation of a Member to fully and promptly implement the DSB's rulings and recommendations, which was critically important to the credibility and efficiency of the dispute settlement system. Therefore, China wished to join previous speakers in urging the United States to comply fully with the DSB's rulings.

33. The representative of India said that her country wished to thank Canada, the EC and Japan for raising this issue before the DSB once again. India appreciated the steps the United States had taken. However, India expressed concern that the United States was continuing to disburse anti-dumping and countervailing duties to its industry. India shared the views of Canada, the EC and Japan that the "issue" was not resolved in this dispute within the meaning of Article 21. 6 of the DSU. India, therefore, urged the United States to inform the DSB of the steps it proposed to take to ensure full compliance, and reiterated its request that the United States resume submitting status reports in this dispute.

34. The representative of Thailand said that his country wished to join previous speakers in thanking Canada, the EC, and Japan for bringing this matter before the DSB once more. As noted in previous DSB meetings, Thailand remained disappointed at the United States' continued illegal disbursement of funds under the CDSOA. Thailand also remained disappointed at the Unites States' continued lack of status reports on its outstanding implementation in this dispute. Therefore, Thailand again urged the United States to cease its WTO-inconsistent disbursements, to repeal the Byrd Amendment with immediate practical effect, and to resume providing status reports until such actions were taken and this matter had been fully resolved.

35. The representative of the United States said that as the United States had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Some Members had asserted that the United States would not have implemented the DSB's recommendations and rulings until the last CDSOA distribution was made. As the United States had stated previously, such questions were for panels to decide. Finally, with respect to comments regarding further status reports in this matter, those Members who had inscribed this item on the agenda of the present meeting were, of course, free to do so. However, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

36. The DSB took note of the statements.

3. United States – Continued existence and application of zeroing methodology

(a) Request for the establishment of a panel by the European Communities (WT/DS350/6)

37. The Chairman drew attention to the communication from the European Communities contained in document WT/DS350/6, and invited the representative of the European Communities to speak.

38. The representative of the European Communities said that this was the second time that the EC needed to bring the issue of zeroing by the United States to a WTO panel. This time, the request concerned the use of zeroing by the United States in 38 different specific measures taken since the initiation of the DS294 dispute. The details of the EC's claims were contained in the panel request to which the EC had referred. The Appellate Body had maintained a consistent and coherent line on this issue, confirming on several occasions that zeroing ran foul of fundamental obligations of the Anti-Dumping Agreement which were to establish dumping in respect of an exporter and a certain product and to conduct a fair comparison between the export prices and normal value. All these decisions had made clear that the practice of zeroing whether in original investigations or in reviews, whether in transaction-to-transaction comparisons or in weighted-average-to-weighted-average comparisons was *per se* WTO-incompatible. The EC would have preferred to avoid another dispute with the United States on this subject. After the general condemnation of zeroing *per se* in the case brought by Japan in January 2007, the EC was hopeful to find a mutually acceptable solution with the United States. Unfortunately, unlike the EC after the ruling in the case: "Bed Linen", the United States had shown a clear reluctance to draw the inevitable consequences of these earlier decisions, and even to stop the use of zeroing as required by the DSB's rulings in the DS294 dispute. In the present dispute, it had become rapidly apparent that the United States would not offer any acceptable solution. This left the EC no choice, but to move to the next stage by requesting at the present meeting the establishment of a panel on the continued existence and application of zeroing by the United States.

39. The representative of the United States said that, as his delegation had previously noted, the United States was no longer performing average-to-average comparisons in anti-dumping investigations without offsets. In addition, the United States was considering the issue of zeroing in assessment reviews in the context of a separate dispute. The reasonable period of time in that dispute would end on 24 December 2007. The EC's panel request was thus premature, and the United States could not agree to the establishment of a panel at the present meeting. The United States would also note that the request included a number of assessment reviews and sunset reviews that had not been consulted upon.

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

4. United States – Measures affecting the cross-border supply of gambling and betting services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda

(a) Report of the Panel (WT/DS285/RW)

41. The Chairman recalled that at its meeting on 19 July 2006, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Antigua and Barbuda concerning the implementation by the United States of the recommendations and rulings of the DSB pertaining to this dispute. The Report of the Panel contained in document WT/DS285/RW had been circulated on 30 March 2007 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Antigua and Barbuda. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

42. The representative of Antigua and Barbuda said that his delegation was pleased to recommend that the DSB adopt the Report of the Panel, which had been circulated to Members on 30 March 2007, in connection with Antigua and Barbuda's recourse to Article 21.5 of the DSU in its ongoing dispute with the United States over the cross-border provision of gambling and betting services. His delegation was profoundly grateful to the Panel, not only for its hard work, but also for the clarity and excellence of its Report. As most Members were no doubt aware, recent developments had somewhat overshadowed the release of this fine Report, but before addressing those developments he would discuss a few important rulings made by the compliance Panel in this case.

While, unfortunately, the previous reports in this dispute had left some considerable uncertainty and ambiguity in their respective wakes, such was not the case with this Report. He did not think that there remained any room to misconstrue or obfuscate the conclusions of this Report. And for that alone, his delegation was particularly thankful. In its Report, the Panel had made a number of important systemic rulings. First, the Panel had appropriately ruled that a "measure taken to comply" for purposes of Article 21.5 of the DSU must involve some change over circumstances that existed when the original rulings and recommendations in a dispute had been adopted by the DSB. The United States had asserted that the very measures found inconsistent with its WTO obligations in the original proceeding, unchanged, were themselves "measures taken to comply," essentially arguing that the rulings and recommendations of the DSB were in error.

43. Second, the Panel had ruled that a party which had lost on a key element of its case in the original proceeding, whether as the result of a failure to meet its burden of proof or otherwise, could not use an Article 21.5 proceeding to reargue its failed case. His delegation believed that this finding was particularly important, recognizing the need for finality of panel and Appellate Body reports to avoid what Japan so aptly expressed as a "potentially endless loop of litigation". In its consideration of the United States' plea for a "second chance", the Panel had crisply disposed of the often-stated claim of the United States that it had not actually lost on the GATS Article XIV defence. The Panel had correctly observed that the defence had two required elements, and if either or both failed, the defence failed in its entirety. Having failed, the United States was not entitled to the defence and thus was required to bring its offending measures into conformity with its obligations under the GATS. Much to his delegation's satisfaction, the Panel had also ruled that, notwithstanding its finding that the United States – having done nothing – remained out of compliance with the DSB's rulings, the Panel would express its views on the various arguments of the parties made during the course of the proceeding. First, in assessing all of the "new evidence and argumentation" on its Article XIV defence submitted by the United States in the compliance hearing, the Panel had concluded that even if the United States was entitled to a "second chance" to meet its burden of proof, it had still failed to meet that burden. So, the Article XIV defence failed yet again.

44. What was truly gratifying from his delegation's perspective, however, was the express recognition by the Panel of three particular matters that it had urged upon the earlier Panel and the Appellate Body, but which had unfortunately been overlooked. First, this Panel had acknowledged that the United States had a flourishing domestic, remote gambling industry; that a number of US states licenced and regulated remote gambling operators that offered services in many ways indistinguishable from the services offered to American consumers by Antiguan operators. Second, the Panel had observed that despite claims of the United States that these domestic operations were "illegal", the United States had chosen to undertake a prosecutorial crusade solely against foreign operators, leaving the sanctioned domestic operators untouched, unthreatened and free to run their businesses in the ordinary course.

45. Third, this Panel had realized what the others before it had completely missed that the federal measures at issue were discriminatory on their face, prohibiting only the cross-border provision of gambling and betting services and leaving unaffected wholly-intrastate gambling. As the entire US defence under Article XIV of the GATS hinged upon the supposed evils of "remote" gambling *vis-à-vis* "non-remote" gambling, this critical finding in essence made it impossible for the United States to successfully mount an Article XIV defence in respect of remote gambling. The crossing of a border, alone, could not logically form a basis for rejecting services otherwise identical to those that did not cross a border. Either "remote" was bad in every case or it was not. Finally, the Panel had also taken note of legislation passed by the US Congress in late 2006, which effectively underlined the discrimination in the application of United States laws towards remote gambling. This law criminalized financial transactions for "unlawful internet gambling", a definition which covered all foreign remote gambling services while providing capacious exceptions for a number of domestic remote gambling opportunities.

46. As pleased as his delegation was by this Panel Report, it was deeply saddened by the announcement by the United States on 4 May 2007 that it intended to withdraw its commitment for gambling and betting services under Article XXI of the GATS. This astounding and unprecedented action not only ran contrary to the object and purpose of the GATS, the DSU and the other WTO Agreements, but also boded very poorly for the future of dispute resolution by small, developing countries at the WTO. In the first place, it was not a little ironic that in the face of the concept of liberalization written into the GATS and the objectives of the Doha Round, the United States would be taking action at this time directly contrary to those objectives. It was difficult to see how the United States could on the one hand encourage and perhaps insist that other Members expand their commitments in services while simultaneously erecting a new barrier to trade in services from other Members. This was particularly so when one considered that the US component of the remote gambling industry was estimated to be in excess of US$10 billion annually.

47. His delegation also did not believe that this type of action was a suitable tactic in dispute resolution. There was something clearly wrong with the concept that after a long, difficult struggle covering years of dispute resolution at the WTO, an offending Member could ultimately avoid the consequences of its loss by withdrawing the commitment that had given rise to the claim in the first place. And, his delegation intended to actively resist this effort by the United States. As far as Antigua and Barbuda was concerned, this dispute had been resolved and the United States remained obligated to comply. If the United States wanted to try to shut out potential future liability to other Members, it was welcome to try. But this dispute was settled and Antigua and Barbuda was entitled to and would be expecting market access.

48. His delegation noted that in its public statements regarding the proposed withdrawal, the United States was apparently trying to limit the potential impact of its action, by stressing it was "clarifying" its schedule, rectifying a "mistake" that no other Members could have "reasonably expected" to result in a commitment to the cross-border provision of gambling and betting services due to "strong domestic laws against" gambling services. Of course, this assertion was untenable, particularly to the 100 or more of fellow Members who had been able to exclude gambling from their respective schedules under the GATS. All also understood that WTO Members were entitled to rely on the commitments made in the schedules of other Members without having to evaluate those commitments in light of domestic law. Even if it were, however, a cursory look at United States law and its domestic market would support exactly the contrary conclusion with respect to the voracious US appetite for and interest in remote gambling. The United States was the world's largest consumer and exporter of gambling services. Also, as the Article 21.5 panel in this case recognized, the United States had a large, sanctioned domestic industry. While the withdrawal of a commitment might be at least understandable if the United States had possessed a strongly anti-gambling culture, this was certainly not the case here. The unavoidable conclusion was that the United States sought with this action to erect a trade barrier to foreign competition in order to protect and enhance its own, flourishing domestic industry.

49. His delegation noted as well that if the United States believed it had made the commitment in error, it would have made sense to inform Antigua and Barbuda and other WTO Members much earlier than at the end of this hard-fought dispute. Back in 1997, senior US Administration officials had met with then Director of Offshore Gaming to discuss suggestions as to how to improve our regulatory scheme and offer assistance in Antigua government's efforts to supervise the industry. If a "mistake" had been made, why not tell us then? He believed that all knew the answer to that question. What was particularly disturbing was that the United States was proposing this unprecedented step without having made any attempt whatsoever to compromise this dispute or to enter into any kind of settlement with Antigua and Barbuda. In fact, despite repeated pleas to the United States to do so, it had never engaged with Antigua and Barbuda in any discussions with a view to settlement or

compromise. The only solution Antigua and Barbuda had ever been offered by the United States was for Antigua and Barbuda to abandon its claim and go away.

50. In a system that was replete with sincere references to good faith, fair dealing and cooperative resolution of disagreements, it was this failure to engage with Antigua and Barbuda at all that was most troubling. His delegation was unable to understand why there was no effort to find some middle ground. It was and remained ready to find a fair and reasonable solution. But it needed the other side to show up to do so. Antigua and Barbuda had been told simply that the United States "cannot change its laws" and "cannot stop enforcing its laws". One might be excused for expecting the United States to do just that. Indeed, was that not what was required in many if not most circumstances when a Member was asked to bring its measures into compliance with recommendations and rulings of the DSB?

51. This action, particularly in light of the very difficult, expensive and time-consuming process that WTO dispute resolution required, during all of which the United States had been aggressively seeking to destroy his country's industry through prosecution, threat of prosecution and interference with financial instruments and other normal means of commerce, reinforced Antigua's grave concern over whether WTO dispute resolution was actually a viable alternative for small countries. As the United States had apparently decided it would not comply with the DSB's rulings in this case, his country was left in a position of assessing what real recourse was left. Encouraged in large part by the United States itself back in the mid-1990s, his government had invested heavily in the development of this industry over more than a decade. A very sizable portion of its slender resources had been used to develop, regulate, supervise and legitimize this industry. Such an investment did not come lightly, nor was it easily replaced or replicated.

52. Antigua and Barbuda did not think that this assault on the system could be abided. Allowing this tactic to succeed and not only prevent this small country from reaping the benefits it was led to expect from WTO dispute resolution, but also enabling the United States to erect a high and firm barrier to international competition was in no one's best interest. His country was resolved to continue the process as far and for as long as it could be pursued. It intended to put this system to the full and final test. At the same time, his delegation asked other WTO Members to let their views on this be known. For starters, it strongly encouraged all member States to submit a claim for compensatory adjustment from the United States as a result of the proposed withdrawal of the commitment. Article XXI of the GATS allowed any Member who might be affected by the withdrawal to submit a claim for compensation. As every claim was generally prospective, it should not matter whether a Member had a current industry to sustain a claim. Not only did his country think that Members should press claims for compensatory adjustments as a matter of economic self-interest, but it also believed it important that the process was made as difficult as possible for the United States. His country in fact sincerely hoped that the United States would realize that a withdrawal of the commitment was in no one's long term interest and reversed this ill-advised course of action. His country would also encourage other Members who were opposed to this action to express themselves to the United States delegation and publicly. While this case might involve services that some Members might not choose to offer or consume, at the end of the day the commodity was irrelevant. What was relevant were the systemic issues raised by this dispute. To a large extent his country had been fighting these issues alone over the past few years. His country would hope that others might add their voices to the chorus if the WTO was to reach its potential as a truly fair and balanced international trading system. He than thanked the Chairman and the DSB Members for their attention to this matter of most urgent concern to his country. His country again recommended the adoption of the Panel Report and looked forward to support and encouragement as his country pressed on.

53. The representative of the United States said that his delegation wished to begin by thanking the members of the compliance Panel and the Secretariat for their hard work throughout the course of this dispute. The United States also wished to note that it was pleased that the Panel had recognized

that, depending on the nature of the DSB's recommendations and rulings, there may be circumstances in which compliance could be achieved without changing the text of a measure at issue, for example where the factual or legal context for that measure had changed. This dispute involved the regulation of cross-border gambling. In the United States, as well as in many other countries, gambling was viewed as an issue of public morals and public order that included the protection of children and other vulnerable groups. As a result, gambling was highly regulated. The threshold issue in this dispute was whether the United States had any obligation under the GATS with respect to cross-border gambling. In particular, the United States schedule did not even include the word "gambling", and the United States believed that its schedule was sufficiently clear in not covering gambling services. The United States had never intended such a commitment.

54. Indeed, in the course of the dispute, the United States had emphasized that its interpretation of its own schedule was supported, among other things, by the circumstances surrounding the negotiations. In particular, the United States had explained that under federal criminal laws, the international transmission of wagers by means of wire transmission had been unlawful since at least the early 1960s. Accordingly, the United States had explained that no one involved in the Uruguay Round negotiations in the mid-1990s could possibly have thought that the United States would make a market access commitment on cross-border gambling. No Member had suggested otherwise during the Round, nor had any Member raised the possibility that the United States would include a gambling commitment in its schedule. Likewise, most other major WTO economies had not included cross-border gambling in their schedule of services commitments. In sum, cross-border gambling services had not been an issue of negotiation during the Uruguay Round.

55. The first time that any WTO Member had ever raised the possibility that the US GATS schedule covered cross-border gambling was when Antigua and Barbuda had initiated this dispute in 2003 – ten years after the US schedule had been drafted. The original Panel had found that the US schedule had not been drafted with sufficient clarity to ensure that gambling services had been excluded from the broad category of "recreational services". The United States would emphasize, however, that the Panel had also explicitly acknowledged that the US coverage of gambling services appeared to be unintentional. The United States reiterated, because it was an important point, that the Panel had appreciated that the United States did not intend to cover gambling services in its schedule of services commitments.

56. The Appellate Body had upheld the Panel's construction of the US schedule, but on different grounds. Finding that the US schedule was ambiguous on its face, the Appellate Body had looked to a UN system of services classification for an interpretation of the coverage of "recreational services". It was important to note that although many Members had used that system as the basis for constructing their GATS schedules, the United States had not. Despite the unexpected findings that the United States GATS schedule had extended to cross-border gambling, the United States believed that it had other valid defences to the claims raised by Antigua. And in fact, the Appellate Body had agreed with the United States that the US federal statutes at issue in the dispute were "measures ... necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a) of the GATS. However, the Appellate Body had also found that on one narrow issue, the United States could not meet the requirements of the GATS Article XIV chapeau. In particular, the Appellate Body had found that the United States had not shown that US legal prohibitions applied equally to foreign and domestic suppliers of remote betting services for horse racing. Unfortunately, the United States had not been able to persuade the Article 21.5 Panel that – as the US Department of Justice had long maintained – US gambling laws governing horse racing applied equally to foreign and domestic suppliers. Given that this was largely a factual issue, the United States had decided not to appeal the Panel's findings, and instead to accept the result.

57. The United States was thus left with a finding of GATS-inconsistency with respect to an area of services regulation that it had never intended to be included in its GATS schedule, and that was

viewed in the United States as an issue of public morality and public order, involving the protection of children and other vulnerable groups, as opposed to an issue of international trade. Accordingly, the United States had decided to invoke the established multilateral procedures addressed to situations in which a Member believed it must modify its GATS schedule of services concessions. In particular, on 4 May 2007, the United States had initiated the procedure provided for under Article XXI of the GATS. In this way, the United States intended to bring its GATS obligations into conformity with a long-standing and well-recognized public policy. As provided under those procedures, this matter would be discussed at the next meeting of the Council for Trade in Services.

58. In sum, the United States accepted the results of the dispute settlement process, which included a finding that the United States had not shown that its gambling laws were consistent with WTO rules. In order to bring the United States into compliance and to resolve this dispute permanently, the United States had decided to invoke the procedures provided for under the GATS to modify the schedule of US commitments. This modification would ensure that the US GATS schedule reflected the original US intent of excluding gambling from the scope of US commitments.

59. The representative of the European Communities said that the GATS allowed WTO Members to regulate or ban internet gambling services for reasons of public policy, including morality and consumer protection. However, this had to be done in a non-discriminatory fashion. This was what the United States had refused to do, as established by the Appellate Body and now confirmed by the compliance Panel to be adopted at the present meeting. The EC regretted this. The EC had hoped for a non-discriminatory solution, with the same rules applying to US and foreign companies. The United States had now notified its intention to modify its commitment on "Other Recreational Services" in its GATS Schedule of Specific Commitments, by removing gambling and betting services from the sub-sectoral coverage. This showed that the United States was not willing to bring the relevant legislation into line with the US current GATS commitments which it, therefore, needed to modify. Article XXI of the GATS was the right procedure in this context. The EC wished to thank the Panel for the useful guidance that it had provided with regard to what was a "measure taken to comply" with the relevant recommendations and rulings. This should help all Members ensure prompt and adequate compliance with the rulings of the DSB with regard to any measures that had been subject to dispute settlement.

60. The representative of Brazil said that his country had not been a third party in the Panel proceedings. Brazil would like, however, to highlight some systemic issues arising out of the present dispute. First, he wished to thank the Panel and the Secretariat for their work. The findings and conclusions arrived at were certainly helpful for Members to better understand the scope of such a fundamental stage of the dispute settlement process as the implementation phase. As set out in Article 21.5 of the DSU, the compliance panel in this dispute had been established because there was a disagreement between the parties to the dispute as to the existence of measures taken to comply with the relevant DSB's rulings and recommendations. Had there been no such disagreement, there would be consequently no reason for the DSB to start a compliance procedure. The Panel's findings had shown that this should have been the case. The Panel had found that the three US federal criminal statutes the United States had alleged to be the measures taken to comply "were measures at issue in the original proceeding and were the subject of the recommendations and rulings of the DSB in this dispute".[1] More importantly, the Panel had concluded that: "[t]here has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, or even their interpretation, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS."[2]

[1] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Panel Report (WT/DS285/RW, of 30 March 2007), para. 6.25.

[2] Idem, para. 6.27.

61. The Panel had gone on to underscore that "[t]he United States' position in this compliance proceeding is also at odds with its earlier decision to seek a reasonable period of time in which to comply with the recommendations and rulings of the DSB".[3] As Members recall, the United States had asked that the Arbitrator under Article 21.3(c) of the DSU to "determine the 'reasonable period of time' for implementation of the recommendations and rulings of the DSB in this dispute to be 15 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, until the end of July 2006".[4]

62. Before the RPT Arbitrator, the United States had asserted that such a period would be "consistent with the periods that have been determined in previous arbitrations under Article 21.3(c) of the DSU for implementation by legislative means, which is how the United States intends to implement the recommendations and rulings of the DSB in this case".[5] The United States, as recorded in the Arbitrator's Award, had emphasized that "the only means of implementation that will achieve the necessary clarification is legislative means".[6] The Arbitrator accepted this consideration as one of the relevant particular circumstances to be taken into account in his assessment. In light of these statements by the United States, it was remarkable that, in its status report of 11 April 2006, the United States had claimed full compliance with the DSB's recommendations[7], whereas no legislative action had been taken within the reasonable period of time determined by the Arbitrator. It should be noted that, during the RPT arbitration, the United States had argued that implementing action by the Executive Branch would not be sufficient to "achieve the requisite clarity in the relationship between the relevant statutes".[8] More surprisingly, the United States, while entirely conscious of these circumstances, had taken the decision to disagree with Antigua and Barbuda, and prolonged litigation. Brazil was glad that the Panel had strongly disagreed with the US views on what a compliance procedure was meant for.

63. Brazil also wished to take this opportunity to share its systemic concerns about the implications of the process of modification of the US schedule under the GATS for the credibility of the dispute settlement system. Brazil did not question the right conferred by Article XXI of that Agreement. Nor it prejudged the final result of this process. Brazil sincerely hoped that this process would end up accommodating satisfactorily all the affected Members, and in particular Antigua and Barbuda, which had spent a sizeable amount of resources and time to have its views confirmed – clearly and more than once. But such a successful result depended on the United States' ability to contemplate the other Members' legitimate right to be duly compensated for the change in its services schedule.

64. In any event, it was clear that the solution preferred by the DSU – which could only be reinforced after years of litigation – was that a Member found to be applying an inconsistent measure remove the source of such illegality, as indicated in Article 3.7 of the DSU. The US move under the GATS in this case would eventually produce some solution, but not the solution envisaged in that provision. In addition, Brazil still had to be convinced that an essentially bilateral approach to the implementation of the DSB's recommendations would not undermine the rules-oriented approach

[3] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Panel Report (WT/DS285/RW, of 30 March 2007), para. 6.31.

[4] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Award of the Arbitrator under Article 21.3(c) of the DSU (WT/DS285/13, of 19 August 2005), para. 6.

[5] Idem, para. 7.

[6] Idem, para. 37.

[7] "United Sates – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Status Report by the United States (WT/DS285/15/Add.1, of 11 April 2006). See also WT/DSB/M/210, para. 34.

[8] Idem, para 9.

enshrined in the DSU. Moreover, Brazil was still to be convinced that developing countries that might decide to withdraw or modify concessions in their schedules as a solution to disputes would have the ability to persuade the developed country Members to agree with such an outcome.

65. The representative of India said that her delegation wished to thank the previous speaker and agreed with the views expressed. India also had not participated as a third party in this dispute. However the systemic issues arising out of this dispute, the findings and conclusions in these proceedings, would certainly help Members to understand the scope of such a fundamental stage of the dispute settlement process at the implementation phase. Since there was a disagreement between the parties to the dispute as to the existence of measures taken to comply with the relevant DSB's recommendations, the compliance Panel had been established under Article 21.5 of the DSU. The Panel had found that the three US federal criminal statutes the United States had alleged to be the measures taken to comply "were measures at issue in the original proceeding and were the subject of the recommendations and rulings of the DSB in this dispute".[9] More importantly, the Panel had concluded that "[t]here has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, or even their interpretation, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS".[10]

66. The Panel had gone on to underscore that "[t]he United States' position in this compliance proceeding is also at odds with its earlier decision to seek a reasonable period of time in which to comply with the recommendations and rulings of the DSB".[11] As Members recalled, the United States had asked that the Arbitrator under Article 21.3(c) of the DSU to "determine the 'reasonable period of lime" for implementation of the recommendations and rulings of the DSB in this dispute to be 15 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, until the end of July 2006".[12]

67. Before the RPT Arbitrator, the United States had asserted that such a period would be "consistent with the periods that have been determined in previous arbitrations under Article 21.3(c) of the DSU for implementation by legislative means, which is how the United States intends to implement the recommendations and rulings of the DSB in this case".[13] The United States, as recorded in the Arbitrator's Award, had emphasized that "the only means of implementation that will achieve the necessary clarification is legislative means".[14] The Arbitrator had accepted this consideration as one of the relevant particular circumstances to be taken into account in his assessment.

68. In light of these statements by the United States, it was remarkable that, in its status report to the DSB of 11 April 2006, the United States had claimed full compliance with the DSB's recommendations,[15] whereas no legislative action had been taken within the reasonable period of time determined by the Arbitrator. It bore noting that, during the RPT arbitration, the United States had

[9] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Panel Report (WT/DS285/RW, of 30 March 2007), para. 6.25.

[10] Idem, para 6.27.

[11] Idem, para 6.31.

[12] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", Award of the Arbitrator under Article 21.3(c) of the DSU (WT/DS285/13, of 19 August 2005), para. 6.

[13] Idem, para. 7.

[14] Idem, para 37.

[15] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services" Status Report by the United States (WT/DS285/15/Add.1, of 11 April 2006). See also WT/DSB/M/210, para. 34.

argued that implementing action by the Executive Branch would not be sufficient to "achieve the requisite clarity in the relationship between the relevant statutes".[16] More surprisingly, the United States, while entirely conscious of these circumstances, had taken the decision to disagree with Antigua and Barbuda, and prolonged litigation. India was glad that the Panel strongly disagreed with the US views on what a compliance procedure was meant for.

69. India also wished to take this opportunity to share its systemic concerns about the implications of the process of modification of the US schedule under the GATS to the credibility of the dispute settlement system. India did not question the right conferred by Article XXI of that Agreement. Nor did it prejudge the final result of this process. India sincerely hoped this process would end up accommodating satisfactorily all the affected Members, and in particular Antigua and Barbuda, which had spent a sizeable amount of resources and time to have its views confirmed - clearly and more than once. But such a successful result depended on the United States' ability to contemplate the other Members' legitimate right to be dully compensated for the change in its services schedule.

70. In any event, it was clear that the solution preferred by the DSU – which could only be reinforced after years of litigation – was that a Member found to be applying an inconsistent measure remove the source of such illegality, as indicated in Article 3.7 of the DSU. The US move under the GATS in this case would eventually produce some solution, but not the solution envisaged in that provision. In addition, India was still to be convinced that an essentially bilateral approach to the implementation of the DSB's recommendations would not undermine the rules-oriented approach enshrined in the DSU. Moreover, India was still to be convinced that developing countries that might decide to withdraw or modify concessions in their schedules as a solution to disputes would have the ability to persuade the developed country Members to agree with such an outcome.

71. The representative of the United States said that his delegation wished to address certain points referred to in the interventions just made that might benefit from additional clarity. First, the issue had been raised of respecting the results of the WTO dispute settlement system and the use of GATS Article XXI in this context. The WTO dispute settlement system had concluded with a definitive finding on the scope of the US schedule as drafted in 1994. The United States was not disputing that result. By invoking the GATS Article XXI process, the United States was respecting the findings of the dispute settlement system and was proceeding to use the multilateral Article XXI rules that had been adopted for the purpose of allowing WTO Members to make modifications in their schedule while maintaining a balance of benefits among WTO Members. The gambling dispute involved a unique situation in which a Member had never intended even to make a concession. Furthermore, it involved the highly sensitive issue of regulation of public morals. With the dispute settlement proceedings coming to their conclusion, the appropriate course for the United States in order to maintain the intended scope of its concessions and to preserve its policies on public morality and public order – as any WTO Member would wish to – was to follow the multilateral procedures set out in Article XXI of the GATS.

72. The United States must emphasize that in this unique case no other course of action would make sense. There could be no question of responding to a finding of an unintentional commitment on gambling in a way which would undermine the important public policy of preserving public morals and public order. In response to the suggestion that the Article 21.5 proceeding should not have taken place because there should have been no disagreement regarding the existence of measures taken to comply, the United States reiterated the point it made at the outset, that the Panel had recognized that, depending on the nature of the DSB's recommendations and rulings, there might be circumstances in which compliance could be achieved without changing the text of a measure at issue, for example

[16] "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services" Status Report by the United States (WT/DS285/15/Add.1, of 11 April 2006). See also WT/DSB/M/210, para. 9.

where the factual or legal context for that measure had changed. The relevant DSB recommendations and rulings in this dispute centred on the fact that the United States had not, in the original proceeding, shown that US gambling laws governing horse racing applied equally to foreign and domestic suppliers. The United States thought it could show this, though the Panel had ultimately disagreed. The US disagreement with Antigua and Barbuda on this point was a legitimate subject for an Article 21.5 proceeding. As for the suggestion that the United States had emphasized to the Article 21.3 arbitrator that the United States could only comply through legislation, the United States noted simply that the United States had not done so. In fact, the Article 21.5 panel had examined the full transcript of the Article 21.3 arbitration, and had not found that the United States had done this. The compliance Panel's discussion of this issue could be found at paragraphs 6.86-6.90 of its Report. The Panel had concluded that legislation was not the only means by which the United States could have complied, and that the absence of legislation was not determinative of the existence of measures taken to comply in this dispute. The fact that this became an issue at all in this dispute only highlighted the importance of ensuring that all dispute settlement reports be as accurate as possible, including through interim review comments from the parties. While it might not be practical to include an interim review in the Article 21.3 proceedings, it was certainly possible in other proceedings.

73. The representative of Brazil said that his delegation wished to thank the United States for its clarification as to which unintentional or intentional statements by the United States had been made before various WTO bodies. Brazil had not been a party to the arbitration under Article 21.3(c) of the DSU, as such participation was not foreseen under the DSU and Brazil had just quoted from official WTO documents. He thanked the United States for drawing attention to the excerpt in the Panel Report where the disagreement was referred to. It could be that other WTO Members were not reading correctly the US statements, as possibly was the case with regard to the US schedule under the GATS.

74. The DSB took note of the statements and adopted the Panel Report contained in WT/DS285/RW.

5. Chile – Price band system and safeguard measures relating to certain agricultural products: Recourse to Article 21.5 of the DSU by Argentina

(a) Report of the Appellate Body (WT/DS207/AB/RW) and Report of the Panel (WT/DS207/RW)

75. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS207/25 transmitting the Appellate Body Report on: "Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse to Article 21.5 of the DSU by Argentina", which had been circulated on 7 May 2007 in document WT/DS207/AB/RW, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute 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."

76. The representative of Argentina said that his country wished to thank the Panel, the Appellate Body and the respective Secretariats for their work towards resolving the dispute concerning the price band system applied by Chile to Argentina's exports of wheat and wheat flour. Argentina believed that it was important for the WTO to have insisted on the validity of the provisions of the Agreement on Agriculture, in that only tariffs were to be applied to agricultural imports while non-tariff

measures, such as price bands, were illegal. Argentina welcomed the Appellate Body's endorsement of the Panel's findings that, by maintaining a border measure similar to a variable import levy and to a minimum import price, Chile was acting in a manner inconsistent with Article 4.2 of the Agreement on Agriculture. It was, therefore, clear that the price band system was not an "ordinary customs duty". Consequently, pursuant to Article 4.2 of the Agreement on Agriculture, this system could not be maintained. Argentina also considered it positive that the Appellate Body had supported the work of the Article 21.5 Panel as a whole by establishing that the Panel had not erred in its allocation of the burden of proof or its interpretation of Article 4.2 of the Agreement on Agriculture and that it had discharged its responsibilities to make an objective assessment of the matter and to set out the basic rationale behind its findings. In spite of the fact that Argentina's appeal was conditional upon the Appellate Body's findings in relation to Article 4.2, Argentina regretted that the Article 21.5 Panel had decided that addressing the claim brought by Argentina in respect of Article II:1(b) of the GATT 1994 was unnecessary for the settlement of this dispute. Argentina believed that, irrespective of the particular inconsistency of the Chilean price band system, a finding of inconsistency of the measure with the second sentence of Article II:1(b) of the GATT 1994, given that it constituted "other duties or charges" not recorded in Chile's Schedule of Concessions (No. VII), would have given WTO Members greater certainty with regard to an obligation which was a central pillar of free, transparent and predictable international trade.

77. The outcome of this dispute had made it clear that, since 1995, when the WTO Agreements had come into force, Chile had maintained an improper barrier against Argentine wheat and wheat flour exports in spite of two WTO rulings on the illegality of such a measure. As the Appellate Body had affirmed, the obligation not to maintain such measures demonstrates that Members could not continue to apply measures coming within the purview of Article 4.2 of the Agreement on Agriculture as from the date of entry into force of the WTO Agreement. Ordinary customs duties were more transparent and more easily quantifiable than non-tariff barriers and, for this reason, were more easily compared between trading partners and thus could be more easily reduced in future multilateral trade negotiations. The validity of Article 4 of the Agreement on Agriculture, dealing with "Market Access", had thus been upheld. It was clear that the obligations laid down in this Article were not merely formal, but reflected the agreement reached at the time of the Uruguay Round during which negotiators had decided that certain border measures which restricted the volume of trade or distorted the price of imports of agricultural products, as was the case of the Chilean price band system, should not be maintained and/or should have been converted into ordinary customs duties at that time so as to ensure greater market access for such imports. Argentina trusted that Chile would terminate a measure that was clearly in breach of multilateral trade obligations and that it would not be necessary to have recourse to additional procedures provided for in the DSU. Argentina confirmed its intention to continue to work with all WTO Members to consolidate an open and rules-based multilateral trading system. It also wished to underscore the importance of the WTO dispute settlement system for defending Members' interests, in particular insofar as agricultural trade was concerned.

78. The representative of Chile said that his country accepted the adoption of the Reports of the Panel and the Appellate Body in this important dispute, though it had not endorsed their content or conclusions. Since he had a long statement to make at the present meeting, he would not comment on the content of the Report of the compliance Panel as Chile had made its position clear in its notice of appeal, which had been circulated in February 2007 and its arguments had been reproduced in the Appellate Body Report. Chile wished to focus on central issues in the Appellate Body Report and their systemic implications. The Appellate Body's conclusions in the original dispute that had to do with the scope of Article 4.2 of the Agreement on Agriculture and which the DSB had adopted in 2002, constituted a basis on which Chile was to consider its implementation of the recommendations. And they did indeed form the basis for Chile's amendment of its price band system in 2003 to bring it into full conformity with multilateral obligations. In the course of Article 21.5 proceedings, however, the Appellate Body had changed the parameters of its reasoning, namely, the basis on which implementation of the original recommendations and conclusions was to be considered. In other

words, the standard to be followed by the "complying" Member had become a moveable or "evolving" standard. First, in the original proceedings the Appellate Body stated in paragraph 234 of its Report that for a measure to be a variable import levy, "the presence of a formula causing automatic and continuous variability of duties is a necessary but by no means a sufficient condition". It had gone on to say that variable import levies have "additional features", which included "a lack of transparency and a lack of predictability in the level of duties that will result from such measures". However, in the Report that would be adopted at the present meeting, the Appellate Body had referred (paragraph 156) to paragraph 234 mentioned above, but had added that in making such a statement it was not "identifying a 'lack of transparency' and a 'lack of predictability' as independent or absolute characteristics that a measure must display in order to be considered a variable import levy". He asked what one were to conclude from this. That the Appellate Body now considered that variability was *per se* necessary and sufficient in order to consider that a measure operated as a variable import levy within the meaning of footnote 1 of the Agreement on Agriculture. Second, in paragraph 158 of its Report, the Appellate Body endorsed the Panel's rendering of the meaning of "variable import levies" and took the liberty of asserting (wrongly) that "Chile's appeal does not challenge this definition *per se*". But Chile had challenged the Panel's interpretation, both in its written submission to the Appellate Body and in its oral statement at the Appellate Body hearing. In other words, the Appellate Body had disregarded Chile's position. Third, in paragraph 233 of its original Report, the Appellate Body had stated that "variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously". In the present Report, however, the Appellate Body had dismissed Chile's argument that the Panel in the Article 21.5 proceedings ought to have determined whether the measure "ensures" continuous variability as opposed to the existence of a mere possibility of variability. Unfortunately, the Appellate Body had established a new standard based only on the "inherent variability" of a measure. In paragraph 160, it had endorsed the Panel's acknowledgement that "measures containing underlying formulas, which produce automatic changes in duties, display the same type of 'inherent variability' that characterizes variable import levies". Accordingly, any use of in-built formulas that produced automatic changes would be sufficient for a measure to qualify as a variable import levy or similar thereto, within the meaning of footnote 1 of the Agreement on Agriculture.

79. He provided a fourth example of this "evolving" methodology. The Appellate Body had also changed its own standard for the "continuous" variability requirement. It stated in paragraph 161 that the Panel had defined an "inherently variable measure" as one that caused and ensured automatic and continuous changes in duty levels. It further recognized that a measure would produce automatic changes if it incorporated an underlying scheme or formula. It should be pointed out that the Appellate Body had not used the term "continuous" on the second occasion or in the clarification at footnote 225 of its Report. Nowhere in its Report had the Appellate Body referred to the important point made by Chile that it was the transparency component of the scheme or formula that could cause WTO-inconsistency. If Chile had established a formula and calculations without disclosing them, it was not clear how the Panel would have found some in-built system reflecting "inherent variability".

80. Fifth, the Appellate Body had also overlooked another of Chile's essential arguments, namely that the Panel had misconstrued transparency and predictability by applying in establishing the level of duties rather than applying them to the duties that actually resulted from the system. In other words, the Appellate Body had failed to address the matter of whether a Member may itself determine the methodology it had used to set a level of customs duties that it deemed adequate within the bound level in its schedule of commitments. It was regrettable that these and several other arguments of Chile had been overlooked by the Appellate Body, as Chile believed that the measure ought to have been assessed on the strength of all its components and characteristics taken together, rather than singly. As to the "transmission of international prices to the domestic market", the Appellate Body had found no fault with the Panel's assessment that the measure did impede transmission. But Chile failed to understand the scant justification offered in paragraph 223, unless this was simply an earlier conclusion. As for Argentina's allegation that the price band system generated "overcompensation",

the Appellate Body addressed none of Chile's arguments and failed in particular to make any comparison to show how the changes in ordinary customs duties produced the alleged overcompensation.

81. Finally, in what was perhaps the conclusion of the Appellate Body that worried Chile the most because of its systemic effects, there was a reference to the determination that the price band system was a border measure "other than ordinary customs duties" (distinta de un derecho de aduana propiamente dicho), since for the Appellate Body it needed only be ascertained whether the measure was similar to one of those listed in footnote 1 (paragraph 171). Such a conclusion was beyond the scope of the Agreement on Agriculture because footnote 1 expressly used the wording "que no sean derechos de aduana propiamente dichos", and this expression was there for some reason. But the Appellate Body had overlooked it. Unfortunately, the Appellate Body had also overlooked the fact that the WTO and its Members considered that while some measures that existed had similar characteristics to those described in footnote 1 of the Agreement on Agriculture, they were "ordinary customs duties". As well as these substantive issues, Chile was also concerned about a procedural matter and drew the attention of other Members to the standard applied to the burden of proof. While it had no quarrel with the findings in paragraphs 136 to 138 of the Appellate Body's report, Chile pointed out that the Appellate Body had taken them as the sole basis for its conclusion and had ignored numerous statements in the Panel Report where the approach was to assume that the Chilean measure was inconsistent and so it was for Chile to establish that it had changed the original measure to make it WTO-consistent. In short, in good faith and on the strength of the conclusions and reasons in the original report of the Appellate Body, Chile had made substantial changes to its law precisely in order to give effect to the recommendations adopted in 2002. And in doing so it believed that it had eliminated those elements which were deemed at the time to be inconsistent with the WTO.

82. The implementation measure consisted in applying "ordinary customs duties", and it was, therefore, regrettable that the Appellate Body should endorse a panel report deemed to be mistaken in law. In this way, a Member had been penalized a second time for maintaining a system which, having been changed substantially from what it originally was, applied "ordinary customs duties" with a level below the bound ceiling. In fact, since the legal amendments had been introduced, the price band system had, 90 per cent of the time, generated payment only of the MFN tariff, or even less. In other words, for long periods, in order to enter Chile products from Argentina – and from elsewhere – paid less than 6 per cent of the MFN rate or quite simply paid no customs duties. So Chile wondered again, as it had done in this same forum in 2002, did this mean that applying a tariff at a level approximating the bound rate rather than applying one at a lower rate or not applying one at all, would facilitate the transfer of prices and ensure better market access? Chile honoured its international commitments and there would be no exception in this case. A number of options were being examined for a mutually agreed solution that would put an end to this lengthy dispute, but at the same time safeguard the sovereign right of Chile, as of any other Members of the WTO, to establish the level of protection it deemed fit for the products in question.

83. The representative of the European Communities said that the EC had been a third party in these proceedings, and believed it was necessary to put a few words on record in relation to the question of the scope of review by an Article 21.5 panel. The Panel had made several obiter dicta on this question, and the Appellate Body had exercised judicial economy on this issue. Therefore, the EC would like to emphasise that it fundamentally disagreed with those Panel's findings. Unlike the Panel, the EC did not believe that Article 21.5 panels were precluded from examining new claims that could have been raised during the original proceedings, and that related to aspects of the original measure that remained unchanged. There was no legal basis whatsoever for such foreclosure in the DSU or in general principles of law, whether of substantive or procedural nature. The Panel's envisaged preclusion would also have the perverse effect of encouraging complaining parties to include a maximum of claims in the original panel request. Otherwise they would have to fear losing a claim that could become more relevant in the future in light of the compliance measure. Such an

approach would be judicially un-economic for all who were involved in dispute settlement, and it could give rise to a denial of justice where precluded claims fell outside the *res judicata.* The EC would have preferred the Appellate Body to reverse these fundamentally flawed *obiter dicta* of the Panel. As regards the core legal question of this dispute, Article 4.2 of the Agreement on Agriculture, the EC regretted that the Panel and the Appellate Body had not followed the approach proposed by the EC. In the EC's view, the measures at issue should have been considered as ordinary customs duties and not as measures falling under the prohibition of Article 4.2. Notably, there was sufficient transparency and predictability in the system.

84. The representative of Brazil said that her country had participated as a third party in this dispute and had followed with interest the interpretation made by the parties, third parties, the Panels and the Appellate Body on one of the main issues covered by this dispute, i.e. tariffication of non-tariff barriers on agricultural products prohibited by the Agreement on Agriculture in 1994. The Reports to be adopted at the present meeting were a definite conclusion that the price band system put in place by Chile, be it in its original or amended version, was inconsistent with the country's commitments under the Agreement on Agriculture. The Appellate Body had confirmed the similarity of the price band system to the border measures prohibited by the Agreement and that should have been converted into ordinary customs duties. It was worth noting that the inconsistency of the price band system had not been found on the grounds of particular and independent features such as transparency, predictability or the existence of a formula. Rather it was based on the overall assessment of the effects of the PBS, which had been found to restrict the volume of imports and to contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market. With this ruling, the Appellate Body had sent a clear message that there was virtually no room for concluding that a price band system, by virtue of its inherent design, structure and operation could be consistent with the provisions of Article 4.2 of the Agreement on Agriculture.

85. The representative of Thailand said that his country wished to thank the Panel, the Appellate Body, and the Secretariat for their work on this case, and welcomed the findings and conclusions of the Appellate Body in its Report. Thailand had participated as a third party in this dispute due to its concerns about the continued similarity of Chile's amended price band system to a variable import levy, which was one of the border measures prohibited under Article 4.2 of the Agreement on Agriculture. While Thailand appreciated the efforts Chile had undertaken to improve its price band system, it believed such changes were not sufficient to bring it into full compliance with the recommendations and rulings of the DSB. Therefore, Thailand fully agreed with the Appellate Body's findings and conclusions in this dispute, and trusted that Chile would implement the DSB's recommendations and rulings as soon as possible.

86. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS207/AB/RW and the Panel Report contained in WT/DS207/RW, as upheld by the Appellate Body Report.

6. Appointment of Appellate Body members

(a) Statement by the Chairman

87. The Chairman said that, under this agenda item, he wished to make a statement regarding his consultations on the process for selecting Appellate Body members. He recalled that at the 24 April DSB meeting, he had announced that he would consult with interested delegations on how best to proceed with regard to these positions in the Appellate Body, which would require a DSB decision in accordance with Article 17.2 of the DSU. These upcoming positions were the following. On 10 December 2007, Ms. Merit Janow's first term of office would expire. On the same date, Mr. Yasuhei Taniguchi's second and final term of office would expire. With regard to Ms. Janow, he had been informed that she did not wish to be reappointed to the Appellate Body for a second term.

On 31 May 2008, the second and final terms of office of two other Appellate Body members, Messrs. Georges Abi-Saab and A.V. Ganesan would expire. Consistent with his announcement made at the 24 April DSB meeting and given the fact that there was a need to proceed expeditiously he had carried out informal consultations with interested delegations and had held an open-ended informal meeting on 21 May 2007. At that meeting, he had put forward a proposal regarding the procedures with respect to these positions in the Appellate Body. However, there was no consensus on the proposal and he would, therefore, continue to consult on this matter in order to have the procedures in place as quickly as possible.

88. The DSB took note of the statement.

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

89. The Chairman drew attention to document WT/DSB/W/348, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he wished to propose that the DSB approve the names contained in document WT/DSB/W/348.

90. The DSB so agreed.