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Dispute Settlement Body
20 July 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 July 2005

Chairman: Mr. Eirik Glenne (Norway)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on: "Mexico – Definitive Anti-Dumping Measures on Beef and Rice: Complaint with Respect to Rice" (WT/DS295/R) was removed from the proposed agenda following Mexico's decision to appeal the Panel Report.

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.33)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.33)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.18 – WT/DS234/24/Add.18)

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.8)

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.7)

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16/Add.3)

(g) Canada – Measures relating to exports of wheat and treatment of imported grain: Status report by Canada (WT/DS276/20/Add.2)

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 seven 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.33)

2. The Chairman drew attention to document WT/DS176/11/Add.33, 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 7 July 2005, in accordance with Article 21.6 of the DSU. As noted in the report, several legislative proposals relating to Section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, both in the US Senate and the US House of Representatives. The US administration was working with the US Congress to implement the DSB's recommendations and rulings. In this connection, his country would be discussing a related agenda item later in the course of the present meeting.

4. The representative of the European Communities said that the EC had shown patience in this dispute and had accepted on several occasions to extend the implementation period in the hope that more time would enable the United States to come into compliance. But more than three years after the condemnation of Section 211 the EC's expectations had not been met. He noted that although the implementation deadline had expired on 30 June 2005, the United States was still unable to report on any progress in the implementation process. The EC recalled that two bills were pending respectively in the US Senate and in the US House of Representatives that would, *inter alia*, repeal Section 211. Adoption of these bills would bring a satisfactory solution to this dispute by removing a legislation driven by specific interests. The EC had decided not to request retaliation at this stage, but to reserve its rights in the future. He noted that this matter would be discussed later in the course of the present meeting. The EC wished to call on the US authorities to consider the impact that the failure to comply had beyond the more narrow confines of this dispute.

5. The representative of Cuba said that the United States had allowed the third reasonable period of time – which had ended on 30 June 2005 – to expire without implementing the DSB's recommendations regarding Section 211 of the Omnibus Appropriations Act of 1998, demonstrating that it had no political will or interest in resolving this matter. It was striking that the United States was the first to champion of intellectual property rights when its own interests were affected. However, when other Members' interests were at stake the United States systematically delayed implementation of the DSB's rulings and recommendations. More and more, attitudes like that shown by this important WTO Member were weakening the credibility of the dispute settlement mechanism and undermining confidence in its effectiveness. Cuba, once again, condemned the fact that although it was now more than three years since the adoption by the DSB of the rulings and recommendations on Section 211, there had been no progress regarding the matter. Accordingly, Cuba urged that the United States be demanding with itself as well, and honour its obligations without further delay by repealing the aforementioned Act.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.33)

7. The Chairman drew attention to document WT/DS184/15/Add.33, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

8. The representative of the United States said that his country had provided a status report in this dispute on 7 July 2005, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments. In this connection, on 19 May 2005, legislation had been introduced in the US House of Representatives (H.R. 2473) that would implement the DSB's

recommendations and rulings with respect to the US anti-dumping duty statute. The US administration would continue to work with the US Congress to enact this legislation. As with the previous agenda item concerning Section 211, the parties would be discussing a related agenda item later in the course of the present meeting.

9. The representative of Japan recalled that in July 2004, upon request and pledge from the United States, his country had agreed to extend for the third time the deadline for the United States to implement the DSB's recommendations and rulings in this dispute, so as to expire on 31 July 2005. Japan was pleased to note the fact that the bill H.R. 2473, which would amend the relevant US anti-dumping statute, had been introduced to the US Congress on 19 May 2005. However, Japan deeply regretted that there had been no hint of any further steps with regard to the passage of that bill and was concerned that the United States was not likely to secure the implementation by 31 July. One of the fundamental obligations of all WTO Members was to ensure the consistency of their measures with the WTO Agreements. To address this matter, Japan and the United States had recently reached an understanding. Japan would revert to this subject under another agenda item to be considered in the course of the present meeting. As Japan had repeatedly stated before the DSB, prompt implementation was essential for the credible dispute settlement system. Japan urged the United States to do its utmost in order to secure the full-fledged implementation of the DSB's recommendations and rulings without any further delay.

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

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.18 – WT/DS234/24/Add.18)

11. The Chairman drew attention to document WT/DS217/16/Add.18 – WT/DS234/24/Add.18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

12. The representative of the United States said that his country had provided a status report on 7 July 2005, in accordance with Article 21.6 of the DSU. As noted in that status report, the US Administration had proposed repeal of the CDSOA in its budget proposal for fiscal year 2006. In addition, legislation that would repeal the CDSOA had been introduced in the US House of Representatives. The US administration would continue to work with the US Congress to enact legislation, and to confer with the complaining parties in these disputes, in order to reach mutually satisfactory resolutions of these matters.

13. The representative of the European Communities said that since 1 May 2005, the EC had been applying a 15 per cent additional import duty on imports of certain products from the United States. The EC had always considered retaliatory measures as a solution of last resort and had not taken that decision lightly. But the apparent lack of interest in the US Congress had left the EC no choice and the EC was bound to stress that, once again, the status report did not record any progress in the implementation process.

14. The representative of Canada said that his country noted the most recent status report of the United States on the Continued Dumping and Subsidy Offset Act of 2000. Canada had informed Members of its decision to suspend concessions to the United States as of 1 May 2005. The eight co-complainants in this dispute had recently attested to the importance of repealing the Byrd Amendment in an Aide Mémoire delivered to the US government. Canada continued to express its disappointment with the US failure to repeal the WTO-inconsistent Byrd Amendment. Canada again called upon the United States to end this dispute and repeal the Byrd Amendment.

15. The representative of Japan said that his country was pleased to take note of the fact that the bill H.R. 1121 had been introduced in the US Congress in March and that it had been referred to the Committee on Ways and Means. Japan also welcomed the proposal by the US administration of February 2005 to repeal the CDSOA. However, Japan regretted that the US status report contained no progress since the June 2005 DSB meeting when the previous status report had been submitted by the United States. This was all the more regrettable especially in view of the fact that the US Congress would enter into the summer recess in about 10 days. As a result of a continued lack of compliance by the United States with its obligations under the WTO, Canada and the EC had been imposing additional duties on US products as from 1 May 2005. Japan was closely watching how the US Congress might proceed with the deliberation of the proposed legislation. Should there continue to be no progress toward the repeal of the CDSOA, Japan would have no other option than to take the next appropriate steps, including exercising its right recognized under the WTO Agreements. Once again, Japan strongly called on the United States to intensify its efforts to secure a prompt repeal of the CDSOA.

16. The representative of Korea said that his country noted the US status report regarding implementation of the DSB's recommendations and rulings in the dispute: "United States – Continued Dumping and Subsidy Offset Act of 2000" (CDSOA). Korea recognized that the introduction of legislation repealing the CDSOA in the US House of Representatives was a positive sign for resolving this dispute. However, it was disappointing that there had been no substantial progress reported since the introduction of the bill. In this regard, Korea again urged the United States to promptly implement the DSB's recommendations and rulings.

17. The representative of India said that his country thanked the United States for the status report in relation to this agenda item and noted again with great concern that that report showed no change or progress from the report submitted to the DSB at its previous meeting. As his delegation had stated previously, India preferred full compliance by the United States with the DSB's decision rather than the suspension of concessions and other obligations under the authority obtained by India from the DSB. India, therefore, urged the United States to use the remaining few days left of its current Congressional session to repeal the CDSOA. India, of course, reserved all its rights under the DSU.

18. The representative of Mexico said that his country thanked the United States for its status report on compliance. He noted that the domestic procedures regarding its legislation for retaliation or suspension of concessions had almost been concluded. Therefore, in the absence of US compliance, Mexico might take retaliatory measures in the near future. Mexico reiterated that retaliation was a measure of last resort and that it was in favour of compliance. His country, therefore, echoed the statements made by other delegations urging the United States to repeal the CDSOA.

19. The representative of Brazil said that, like previous co-complainants to this dispute, his country thanked the United States for its status report submitted before the DSB at the present meeting. However, Brazil wished to signal its concern and disappointment with the lack of any progress reported in that status report as compared to the previous US report submitted to the DSB in June 2005. Brazil also wished to join previous co-complainants in urging the United States to promptly repeal the Byrd Amendment.

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

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.8)

21. The Chairman drew attention to document WT/DS160/24/Add.8, 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.

22. The representative of the United States said that his country had provided a status report in this dispute on 7 July 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration was working with the US Congress on this matter. The US administration would continue its consultations with the US Congress and continued to confer with the EC in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Communities said that, as every month, the DSB was bound to take note of the lack of compliance of the United States with the Panel's ruling on the US Copyright Act. Unless action was taken quickly, this situation would ruin the already damaged US reputation in the intellectual property field. This issue was of great concern to the EC, which had very recently issued a joint declaration with the United States on a global fight against piracy and counterfeiting. He noted that the 20 June declaration referred to the US commitment to "working effectively to combat piracy and counterfeiting at home and abroad". The EC hoped to see the practical translation of that statement as soon as possible, as Section 110(5) of the US Copyright Act did nothing else than to institutionalize piracy in the US music sector. Prompt action by the United States to remedy this unfortunate situation would be important both from the point of view of the EC's right holders and from a systemic point of view. The EC was still awaiting a formal signal from the United States regarding the steps it would be taking to settle the dispute. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration procedure on its retaliation request.

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

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.7)

25. The Chairman drew attention to document WT/DS204/9/Add.7, which contained the status report by Mexico on progress in the implementation of the DSB's recommendations in the case concerning Mexico's measures affecting telecommunications services.

26. The representative of Mexico recalled that on 2 June 2004, the United States and Mexico had reached an agreement regarding implementation of the DSB's recommendations in the case under consideration. He said that in relation to the only commitment outstanding in April 2005, Mexico had issued a draft ruling regarding the marketing of telecommunications services. As a result of that legal instrument, companies from any country settled in Mexico might market long-distance international services in Mexico without owning public telecommunications networks. Pursuant to that agreement, Mexico had been engaged in ongoing consultations with the United States on the different versions of the regulation. Mexico hoped that in the very near future, it would be able to publish the final version of that regulation. To that end, the time-period for implementation had now been extended until 29 July 2005. Mexico hoped that once published, together with the United States, it would be able to notify the DSB that it had reached a mutually agreed settlement in relation to the dispute under consideration.

27. The representative of the United States said that his country wished to thank Mexico for its status report. After filing its written report, Mexico had requested a further extension of the reasonable period of time until 29 July 2005. The United States had agreed to that extension. The

United States expected that the relevant documentation would be circulated to Members shortly. Turning now to Mexico's implementation of the rulings and recommendations in this dispute, the United States understood that the draft regulations for the resale of telecommunications services had been modified significantly since they had been released for public comment at the end of April. The United States intended to carefully review Mexico's modified regulations to assess Mexico's implementation once the final regulations had been published.

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

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16/Add.3)

29. The Chairman drew attention to document WT/DS246/16/Add.3, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's conditions for the granting of tariff preferences to developing countries.

30. The representative of the European Communities said that in its status report submitted before the DSB at the present meeting, the EC had notified the DSB that it had fully implemented the relevant DSB's rulings and recommendations in this dispute. Despite the complex and highly sensitive character that a revision of a GSP system entailed, the EC had fully respected the deadline fixed by the Arbitrator to implement the relevant DSB's rulings and recommendations. As the status report explained, following discussions within the Council and the other EC's institutions, the new GSP Regulation had been adopted (Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences) and had been published in the Official Journal of the European Union of 30 June 2005. According to the new GSP and in line with the time-limit fixed by the arbitrator, the special arrangements to combat drug production and trafficking of Title IV of Regulation (EC) No 2501/2001 and the provisions applied in conjunction with those arrangements had been repealed as of 1 July 2005. The EC had thus fully implemented the DSB's recommendations and rulings in this dispute.

31. The representative of the India said that his country thanked the EC for repealing its Drug Arrangements and for taking measures to bring itself into conformity with its WTO obligations within the reasonable period of time prescribed under the rules. India noted that the EC had implemented Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences. In essence, the new scheme consisted of a general arrangement granted to all beneficiary countries and territories, a special incentive arrangement for sustainable development and good governance, and a special arrangement for least-developed countries. While India was carefully examining details of the Council Regulation, it wished to observe, on a preliminary basis, that WTO Members might have systemic concerns with the special incentive arrangement for sustainable development and good governance.

32. He noted that the EC intended to suspend all *ad valorem* duties as well as specific duties (unless combined with an *ad valorem* duty) on all products listed in Annex II of its Council Regulation, which originated in a country included in the special incentive arrangement for sustainable development and good governance. However, in order to receive such tariff preferences, beneficiary countries must have ratified and effectively implemented specific conventions or committed themselves to ratify and implement specific conventions related to human and labour rights, narcotics and psychotropic substances, environment and governance principles. He referred to the statement made by India at the 20 April 2004 DSB meeting where the Appellate Body Report, and the Panel Report, as modified by the Appellate Body Report, had been adopted in this dispute. India had indicated then that the Appellate Body in this case had disregarded the ordinary meaning of the term "non-discriminatory", as well as the relevant WTO jurisprudence, and had also failed to conduct

an analysis of this term in the context of Article I.1 of the GATT 1994. It had then gone on to interpret the term "non-discriminatory" solely on the basis of paragraph 3(c) the Enabling Clause. India had expressed its concern about the lack of adequate legal basis in the Appellate Body's analysis for determining that developing countries could be treated differently by GSP donors, and the fear of a return to the era of special preferences that had prevailed before the GSP had been installed in the trading system. He did not need to go into the reasoning India had given for that analysis again at the present meeting. On this matter, Members might refer to paragraphs 39 to 53 contained in WT/DSB/M/167, dated 27 May 2004. However, he wished to point out that India had ended its statement inviting developing-country Members to study questions on how to negotiate tariff concessions with developed countries in the light of systemic implications of the Appellate Body's ruling. The manner in which the Appellate Body's guidance had been interpreted in the new EC's GSP scheme brought up those questions again before the developing-country Members.

33. In its attempt, which was also not a totally successful attempt, to comply with the *strict letter* of the Appellate Body's guidance on how to bring its tariff preference scheme into conformity with its GATT obligations, the EC seemed to have disregarded the *spirit* of that guidance. The Appellate Body had made clear that the term "non-discriminatory" in footnote 3 of the Enabling Clause required that identical treatment was available to all similarly situated GSP beneficiaries. The Appellate Body's guidance did not envisage that the "similarly situated beneficiaries" should be defined on the basis of a common commitment to a multitude of international conventions by those beneficiaries.

34. The Appellate Body had clarified that the burden of proof for an "exception" fell on the respondent as the party asserting the affirmative of a particular defence. Therefore, it would be for the EC to demonstrate that its new scheme complied with the Enabling Clause. In particular, the EC would need to demonstrate that its new scheme provided, in the words of the Appellate Body, preferential tariff treatment that was "generalized, non-reciprocal and non-discriminatory". In India's view, the new EC's scheme did not seem to meet this clear criteria established by the Appellate Body. Under the Appellate Body's interpretation, donors might apply different GSP schemes to different recipients based on perceived need, as long as they applied objective criteria. It appeared that the EC had made a conscious choice to limit the benefits under the Special Incentive Arrangement largely to those countries that previously benefited from the Drug Arrangements. Therefore, it would appear that the Special Incentive Arrangement had not been based on objective criteria, but it had rather been designed to benefit pre-selected countries.

35. The Appellate Body had also made clear that a GSP scheme must "respond positively" to the needs of developing countries, namely to their "development, financial and trade needs". The EC's new scheme required countries to ratify international conventions on human and labour rights, narcotics and psychotropic substances, and the environment in order to avail themselves of the trade preferences granted by the EC. In effect, the EC was imposing *its* needs that specific human rights or environment or labour conventions be respected by developing countries. All WTO Members, and in particular, all developing countries, should recognize that this was a trade preference scheme that crossed the line from trade and imposed requirements related to extraneous policy considerations. All WTO Members had the sovereign right to determine which international conventions they would ratify and implement. The EC's new tariff preference scheme – which was conditioned on the beneficiaries ratifying and implementing such diverse international conventions – might have serious systemic consequences for the integrity of the multilateral trading system. India wished to invite other WTO Members to reflect on this important issue and reserved the right to return to this matter in the future, as necessary.

36. The DSB took note of the statements.

(g) Canada – Measures relating to exports of wheat and treatment of imported grain: Status report by Canada (WT/DS276/20/Add.2)

37. The Chairman drew attention to document WT/DS276/20/Add.2, which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the case concerning Canada's measures relating to exports of wheat and treatment of imported grain.

38. The representative of Canada said that his country was pleased to inform the DSB that amendments to the Canada Transportation Act and the Canada Grain Act and associated regulatory changes would come into force on 1 August 2005. That would bring Canada into compliance with the DSB's recommendations and rulings. In response to the questions raised by the United States at the 20 June DSB meeting, he noted that Canada had provided the United States with a copy of the new regulation.

39. The representative of the United States said that his country thanked Canada for its status report. The United States appreciated the additional information that Canada had provided in its status report and at the present meeting about the regulatory changes that Canada intended to make by the 1 August deadline for implementation of the DSB's recommendations and rulings. The United States also appreciated Canada's answers to the US questions from the 20 June DSB meeting. The United States had additional questions concerning how Canada's new regulation would work in practice, which the United States would be pursuing with Canada bilaterally.

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

2. European Communities – Measures affecting trade in commercial vessels

(a) Implementation of the recommendations of the DSB

41. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 20 June 2005, the DSB had adopted the Panel Report pertaining to the case: "European Communities – Measures Affecting Trade in Commercial Vessels". He invited the EC to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

42. The representative of the European Communities said that the Council Regulation (EC) No. 1177/2002 establishing a Temporary Defence Mechanism (TDM) for shipbuilding had expired on 31 March 2005. Regarding the national schemes, the TDM regulation was not in force anymore and the member States could not grant operating aid any longer. Therefore, the EC considered that it had already brought its measures into conformity with the Panel's rulings and recommendations.

43. The representative of Korea said that, after hearing what EC had stated, Korea found that EC had not correctly understood what the Panel had recommended in this case. The Panel had made the following statement in paragraph 8.4 of its findings and recommendations: "[T]he Panel considers that its recommendation does not apply to the schemes, except to the extent that those schemes continue to be operational". That statement seemed unusual at first glance, but it became very clear in the context that if the illegal schemes were still operational because they were still being implemented, then the recommendation applied to them. In fact, all evidence had indicated that the EC member States continued to make disbursements pursuant to the illegal measures. Just in the final month of the TDM's existence, the EC had authorized four of its member States to provide state aid

under the TDM. These authorizations had been granted to Finland on 9 March 2005, to Germany on 16 March 2005, to Denmark on 22 March 2005 and to Poland on 30 March 2005, just one day before the expiration date. It was extremely unlikely that the disbursements authorized by the EC had been concluded before the adoption of the Report, much less by the time of the expiration of the TDM on 31 March 2005. Indeed, for example, the language of the Commission's authorization of the German state aid included the following statement: "The German authorities have undertaken to provide information on the application of the scheme at three monthly intervals, from the date of this decision, until and including its expiry or suspension."[1]

44. Obviously, aid authorized on 16 March 2005 that included reporting requirements on the application of the scheme at three month intervals was still operational beyond 31 March 2005 and remained operational to-date. If this was incorrect and the EC could state for the record at the present meeting that there would be no further application of the illegal measures through further disbursements, then all could rest assured of full compliance. However, failing such an unambiguous assurance, the domestic legal authority to implement the schemes continued to exist and they continued to be operational. Therefore, any disbursements under such schemes were explicitly covered by the Panel's findings. Yet, if that was the case and the EC stated at the present meeting that it would do nothing more, it would became unambiguously clear that the EC was in continuing violation of its WTO obligations and acted in defiance of the DSB's rulings and recommendations. Korea could only note its regret that the EC had refused to fully implement the DSB's rulings and recommendations in the case under consideration. Korea reserved all of its rights, provided under the DSU in the area of compliance.

45. The representative of the European Communities said that the Panel had made a clear distinction between the provision of aid; i.e. the decision to grant aid and the disbursement of aid; i.e. the action of payment of that aid. Despite Korea's insistence all along the procedure, the Panel had expressly declined to make recommendations in respect of disbursements of aid. As to the Panel's statement that its recommendations also covered national TDM schemes that had expired "to the extent that those schemes continue to be operational", the Panel had clarified in a footnote that this did not concern the disbursements of funds in respect of which it had already declined to make the specific recommendation requested by Korea.

46. The DSB took note of the statements, and of the information provided by the European Communities regarding implementation of the DSB's recommendations.

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

(a) Request for the establishment of a panel by the United States (WT/DS316/2)

47. The Chairman recalled that the DSB had considered this matter at its meeting on 13 June and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS316/2, and invited the representative of the United States to speak.

48. The representative of the United States said that, as discussed at the 13 June DSB meeting, the United States was concerned that certain measures of France, Germany, the United Kingdom, Spain, and the European Communities provided subsidies that were inconsistent with their obligations under the SCM Agreement and the GATT 1994. The subsidies at issue benefited Airbus, the European manufacturer of large civil aircraft. Over its 35-year history, Airbus had benefited from massive amounts of EC member State and EC subsidies that had enabled the company to create a full product line of aircraft and gain more than a 50 per cent share of large civil aircraft sales, at the

[1] Letter from Commissioner Neelie Kroes to German Foreign Minister Joschka Fischer. Add. of the authorization letters contain these reporting requirements.

expense of its US competitors. And yet Airbus continued to seek and receive new subsidies. It was time for the subsidies to end. Therefore, for the reasons discussed at the 13 June DSB meeting, the United States again requested that the DSB establish a panel to examine these matters, in accordance with Article 6 of the DSU, Article XXIII:2 of GATT 1994, and Articles 4, 7 and 30 of the SCM Agreement.

49. Further, as described in the US panel request of 31 May 2005, the United States also requested that the DSB initiate the procedures provided for in Annex V of the SCM Agreement, pursuant to paragraph 2 of that Annex. The United States was currently exploring options with the EC for naming the representative that would facilitate the information-gathering process pursuant to paragraph 4 of that Annex. In past disputes, the EC had emphasized that the Chairman might have an important role to play in identifying appropriate candidates and in developing the procedures and timetable for the Annex V process. The United States agreed with that and said that it might request that the Chair assist the parties in these matters.

50. At the present meeting, the United States wished to briefly address certain erroneous comments that the EC had made when the US panel request had been discussed at the 13 June DSB meeting. First, the EC had criticized the United States for allegedly choosing the path of litigation and confrontation instead of negotiation. There was no basis for the EC's assertion. The United States had been seeking for more than a year to negotiate a new agreement to end subsidies for the development and production of large civil aircraft. The United States remained ready and willing to negotiate such an agreement. But the EC had only been willing to reduce subsidies, not end them. Even now, certain member States were insisting on providing new subsidies to Airbus that Airbus stated it did not even need.

51. Second, the EC had described launch aid to the new Airbus A350 as a "non-existent measure." But there was no question that Airbus had applied to the member States for launch aid for the A350. Senior officials in the Airbus member governments had commented favorably on the applications, and the German government had included A350 launch aid in its budget. Moreover, the EC had flatly refused to commit that the member States would forego launch aid for the A350. More generally, the EC had made various statements at the 13 June DSB meeting that questioned the adequacy of the US panel request. Although the EC had not detailed its concerns, the United States considered that its request in fact complied fully with the requirements of Article 6.2 of the DSU. In light of the detailed nature of the request and the detailed consultations that had been held on these topics, the EC should fully understand the basis for US claims.

52. The representative of the European Communities expressed the EC's regret that the United States had chosen the path of litigation over that of negotiations. He recalled that during the 13 June DSB meeting the EC had noted that a number of measures referred in the US panel establishment request were not properly before the panel (and had not been included in the US consultation request). The EC noted that the United States had made no attempt to address the deficiency regarding the US panel request. Hence, the EC statements to this effect made on 13 June 2005 remained fully valid. Unfortunately, the EC could not agree to the simultaneous initiation of the Annex V procedure at this point in time. The United States had insisted in "United States – Upland Cotton" case that there must be an agreement between the parties to that end and the then Chairman of the DSB had agreed with the United States. Indeed, that practice had also been followed in "Korea – Shipbuilding" case. The EC had been consulting with the United States with a view to reaching an agreement on the initiation of an Annex V procedure and, in particular its scope, modalities and the name of the facilitator, but these consultations had not yet been successful.

53. The representative of the United States said that the United States was surprised and disappointed that the EC had chosen to block the initiation of the Annex V process. In the US view, there was no justification for this action. In fact, the United States recalled that at a previous meeting

of the DSB, the EC had taken an entirely different approach. At the 15 April 2003 DSB meeting[2], the EC had first quoted paragraph 2 of Annex V at length: "In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization …" The EC had then gone on to say: "There was no condition, and there was a clear obligation for the DSB to initiate the procedure." The United States wondered what had caused the EC to reverse its position for the present meeting. Moreover, he recalled that paragraph 1 of Annex V stated that every Member "shall" cooperate in the Annex V process. Given the EC's asserted preference for cooperation instead of confrontation, the United States would have expected the EC to agree to allow the Annex V process to move forward. The United States hoped that the EC would reconsider its stance and allow the DSB to take the decision that paragraph 2 of Annex V called for. The United States also noted that the EC had attempted to draw a parallel to the Cotton dispute. The Cotton dispute presented an entirely different situation. There, Brazil's invocation of the SCM Agreement before expiration of the Peace Clause raised unique questions. In particular, the US view was that the United States was (in the words of the Peace Clause) "exempt from actions" under the SCM Agreement provisions invoked by Brazil; in other words, the United States had considered that Brazil could not bring an action based on its SCM Agreement claims unless Brazil had first showed that the Peace Clause was inapplicable. The Cotton Panel had agreed that it could not make findings on Brazil's SCM claims unless Brazil had first demonstrated that the US measures were not protected by the Peace Clause. (Panel Report, para. 7.326.) It was for that reason that the United States had proposed that the interests of both Brazil and the United States could be safeguarded if a decision to initiate the Annex V procedure in that dispute be taken only if the panel were first to find that the Peace Clause did not cover the US measures at issue. The situation in this dispute did not resemble the Cotton dispute at all: the EC had no basis to argue that it was "exempt" from actions based on the provisions of the SCM Agreement that the United States had invoked, and consequently no basis to argue against initiation of the Annex V procedure.

54. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Articles 4.4 and 7.4 of the SCM Agreement and Article 6 of the DSU, with standard terms of reference.

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

56. The Chairman said, that with regard to the issue of the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement, which the United States had requested to be initiated pursuant to paragraph 2 of Annex V of the SCM Agreement, he wished to propose that the DSB take note of the statements made by parties to the dispute regarding this matter.

57. The DSB took note of the statements.

4. United States – Measures affecting trade in large civil aircraft

(a) Request for the establishment of a panel by the European Communities (WT/DS/317/2)

58. The Chairman recalled that the DSB had considered this matter at its meeting on 13 June and had agreed to revert to it. He drew attention to the communication from the European Communities contained in document WT/DS317/2, and invited the representative of the European Communities to speak.

59. The representative of the European Communities said that it was with regret that the EC had to move to request the establishment of a panel. The EC had explained at the 13 June DSB meeting

[2] WT/DSB/M/147.

why it had made genuine attempts to settle the case amicably instead of pursuing the path of litigation. Unfortunately, the United States had not been prepared to move an inch. That was not acceptable to the EC. Indeed, this proceeding would clearly show how massively Boeing was being subsidized over the past 30 years in blatant violation of the SCM Agreement and the 1992 Agreement between the EC and the United States. He recalled that during the 13 June DSB meeting, the United States had claimed that a number of measures referred in the EC's panel request were not properly before the panel. At that meeting the EC had expressed its strong disagreement. The EC wished to reiterate once more its disagreement over the US claim. He noted that the EC's recent request for an additional round of consultations filed on the 27 June 2005 was without prejudice to the EC's legal position and rights in connection to the US claims. The EC's sole objective was and remained through the filing of this consultations request to further clarify and, if possible, resolve certain issues in an amicable manner. Accordingly, and without prejudice to the ongoing consultations, the EC requested that the panel be established. The EC had not been able to reach agreement with the United States on the Annex V procedure and intended to revert to the DSB in respect of this matter at a future meeting.

60. The representative of the United States said that his country was disappointed that the EC had again requested a panel on this matter. The EC's request was broad, but without merit. The United States recognized that a panel would be established at the present meeting in this dispute. The United States intended to vigorously defend the measures at issue, but remained open to the possibility that the parties could resolve their disagreements with the EC before the DSB were to issue its ruling. The United States had received the new request for consultations that the EC had filed on 27 June 2005, to which the EC had just referred. While the request covered several measures that had been covered in the consultations that had led to the panel request, it also covered several additional measures. The United States had made itself available to the EC for consultations regarding the new request and was in the process of finding a mutually agreeable date and place.

61. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Articles 4.4 and 7.4 of the SCM Agreement and Article 6 of the DSU, with standard terms of reference.

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

5. Egypt – Anti-dumping duties on matches from Pakistan

(a) Request for the establishment of a panel by Pakistan (WT/DS327/2)

63. The Chairman recalled that the DSB had considered this matter at its meeting on 20 June 2005 and had agreed to revert to it. At the present meeting, he wished to draw attention to the communication from Pakistan contained in document WT/DS327/2, and invited the representative of Pakistan to speak.

64. The representative of Pakistan thanked for the opportunity to state the views of his country regarding its request for the establishment of a panel, as set out in document WT/DS327/2. This was the second occasion on which Pakistan's request was on the agenda of the DSB meeting, and Pakistan looked forward to the establishment of the panel to resolve this dispute. As explained at the previous meeting of the DSB that had considered that request, Pakistan believed that its panel request spoke for itself. He would, therefore, not repeat all of Pakistan's specific concerns regarding the Egyptian measure at issue other than to emphasize that in Pakistan's view, the imposition of definitive anti-dumping duties was inconsistent with the obligations of Egypt under Article VI of GATT 1994 and the provisions of the Anti-Dumping Agreement that had been cited by Pakistan. He also wished to reiterate that Pakistan enjoyed excellent relations with Egypt, and viewed this dispute as simply a disagreement between friends that would not affect the valued relationship between the two countries. Pakistan was confident that Egypt shared a common goal with Pakistan; i.e. to assist the panel and

expedite the proceedings, with a view to finding a positive solution to this dispute. Pakistan, therefore, hoped that the establishment of the Panel at the present meeting would serve as the first step in a harmonious consideration and resolution of the issues raised in Pakistan's panel request regarding Egypt's measure.

65. The representative of Egypt said that Pakistan's decision to proceed further with its request for the establishment of a panel could not but cause great disappointment to Egypt since it considered that this action was both unnecessary and unproductive for both Members. Egypt found it particularly regrettable that Pakistan had decided to proceed to litigation without further engaging in any meaningful dialogue, which would, without doubts, address more constructively its concerns. While Egypt understood that Pakistan intended to persist with its request for a panel establishment at the present meeting, it remained open to further consultations. As indicated on 20 June 2005, on the first occasion when Pakistan had brought its request for the establishment of a panel before the DSB, Egypt believed that some of the issues that had been cleared through consultations were still included in the panel request. In addition, Egypt considered that Pakistan's request for establishment of a panel had failed to fully satisfy all the requirements of Article 6.2 of the DSU. Furthermore, the request was deemed premature since judicial proceedings were still pending before an Egyptian court. For all these reasons, Egypt had no other option than to express its disagreement with the establishment of a panel. It nonetheless remained very confident that the panel that would be established would confirm that the anti-dumping measures imposed on matches in boxes imported from or originating in Pakistan, were consistent with the relevant provisions of Article VI of GATT 1994 and of the Anti-Dumping Agreement.

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

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

6. Japan – Measures affecting the importation of apples: Recourse to Article 21.5 of the DSU by the United States

(a) Report of the Panel (WT/DS245/RW)

68. The Chairman recalled that at its meeting on 30 July 2004, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by the United States concerning Japan's implementation of the DSB's recommendations in this case. He noted that the Report of the Panel contained in document WT/DS245/RW had been circulated on 23 June 2005 as an unrestricted document, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Report was now before the DSB for adoption of the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

69. The representative of the United States said that his country was pleased to request the adoption of the compliance Panel report in this matter, and wished to thank the Panel and the Secretariat for their hard work in preparing this clear and well-reasoned Report. The United States was pleased that the Panel had agreed that Japan's revised measures relating to US apple fruit were maintained without sufficient scientific evidence within the meaning of Article 2.2 of the SPS Agreement, and were not based on a risk assessment within the meaning of Article 5.1 of the SPS Agreement. The United States was also pleased that the Panel had found that Japan's revised restrictions were in breach of Article 5.6 of the SPS Agreement because there was a different measure – namely restricting imported fruit to mature, symptomless apple fruit – that met the requirements of Article 5.6. In particular, the United States wished to highlight the thoroughness and clarity with which the Panel had undertaken its analysis. The Panel had carefully examined and had made

findings on all aspects of Japan's revised measures, thereby providing a clear road-map to the further steps Japan must undertake to bring these measures into compliance. In so doing, the Panel had fully and admirably performed its task of assisting the parties to resolve their dispute through a clearly enunciated explanation of the legal rights of each. In complex disputes involving sanitary and phytosanitary measures, that clarity could be particularly important. The United States hoped that Japan would now bring itself into compliance, building on the foundation towards a positive solution established by the Panel Report. In that connection, he noted that the United States and Japan had requested a further suspension of the Article 22.6 arbitration in this dispute until 31 August 2005, to allow Japan to undertake necessary domestic procedures. Again, the United States wished to thank the Panel and Secretariat for their efforts in producing this very helpful Report.

70. The representative of Japan said that, at the present meeting, his delegation would wish to make a short statement, but somewhat longer version of that statement would be submitted to the Secretariat after the meeting, with the permission of the DSB Members. He said that Japan wished to express its gratitude to the Panel and the Secretariat for all their efforts. Having said that, Japan wished to express its disappointment with the findings of the Panel. He would touch upon two points amongst others. First, regarding the conditions of studies, Japan had undertaken studies to demonstrate that, amongst others, mature, symptomless apples could harbour endophytic bacteria, which would eventually lead to the establishment and spread of fire blight disease. These studies, proximate to the highest degree, had had to be done in a laboratory, in order to prevent a potential risk of fire blight bacteria from accidentally spreading to the unique, fire blight-free natural conditions of Japan. The Panel had, however, ruled that these new studies did not provide sufficient scientific evidence to establish the risk of fire blight in natural conditions. Japan did not subscribe to such judgment. The second point concerned the US measures. Japan had argued that, as had been demonstrated by the presence of codling moth in shipments to Chinese Taipei, the United States export control could involve a human error and thus was not 100 per cent reliable. It was regrettable that this argument had not been duly taken into account.

71. Nevertheless, Japan noted that the Panel had recognized some of the elements of Japan's revised phytosanitary measures. Also the Panel had confirmed that Japan would be entitled to verify that only mature, symptomless apples would be actually exported to Japan from the United States. Although Japan was disappointed with the Panel's findings, it had decided not to appeal. Japan accepted that this Panel Report would be adopted at the present meeting. Japan had always emphasized the importance of the proper functioning of the DSU and the faithful implementation of the DSB's recommendations and rulings. Once adopted, in view of the gravity of its obligation, Japan would sincerely address the implementation of the DSB's recommendations and rulings in a manner consistent with Japan's obligations under the WTO Agreements. Likewise, Japan hoped that other Members would commit themselves to securing full-fledged implementation of the DSB's recommendations and rulings to enhance the integrity of the WTO system as a whole. Japan also wished to inform the DSB that in order to secure compliance in a mutually acceptable manner, Japan and the United States had agreed to suspend the arbitration under Article 22.6 of the DSU until 31 August 2005. Japan and the United States had submitted the joint request to this effect to the Chairman of the Arbitrator on 18 July 2005.

72. The Chairman said that in light of Japan's request, he wished to ask if Members could agree that a longer version of Japan's statement pertaining to the agenda item under discussion be sent to the Secretariat in order to be reflected in the minutes of the present meeting.

73. The representative of the United States thanked the Chairman for asking the question and said that he had in fact wished to take the floor on precisely that point. The United States had taken note of Japan's request. However, the United States considered that the minutes of the meeting should reflect what had actually been stated at the DSB meeting, which was the practice throughout. That being said, if the Japanese delegation wished to circulate a longer statement to the DSB Members as a separate document that would of course not raise the same concern.

74. The representative of the European Communities said that, with regard to the procedural point, he supported the statement made by the US representative that the record of the meeting should reflect what had been stated at that meeting, but that did not prevent a Member from circulating a longer statement as a separate document. With regard to the substance, he said that the EC, which had participated as a third party in this dispute, would also like to thank the Panel for its Report. The EC trusted that Japan would revise its SPS practices in a manner consistent with the Panel's ruling. In so far as fire blight was concerned, apple fruit from all origins should of course benefit from the same conditions for import.

75. The Chairman said that, with regard to the procedural question, Japan's long statement pertaining to the agenda item under consideration could be circulated as a relevant DS document. He hoped that the procedure that he had just proposed would not raise problems to other Members and asked if that was agreeable to all Members.

76. It was so agreed.[3]

77. The DSB took note of the statements and adopted the Panel Report contained in WT/DS245/RW.

7. United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea

(a) Report of the Appellate Body (WT/DS296/AB/R) and Report of the Panel (WT/DS296/R)

78. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS296/8 transmitting the Appellate Body Report in the case on: "United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea", which had been circulated on 27 June 2005 in document WT/DS296/AB/R, in accordance with Article 17.5 of the DSU. He also wished to remind delegations that, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

79. The representative of the United States said that at the outset, on behalf of the United States, he wished to express his country's gratitude to the members of the Appellate Body and the Secretariat for producing a report of very high caliber. By way of background, he said that this dispute involved a countervailing duty proceeding in which the US Department of Commerce had determined that the Government of Korea subsidized Hynix – a Korean producer of DRAMS – by entrusting or directing Hynix's creditors to bail out that financially troubled company. The Panel had found that that determination was inconsistent with provisions of the SCM Agreement, essentially based on the Panel's conclusion that the Commerce Department lacked sufficient evidence. The Appellate Body had reversed the Panel's finding. While the United States was obviously pleased with this overall result, it was equally pleased by the thorough and professional manner in which the Appellate Body had analyzed the Panel's numerous errors.

80. While there was much to talk about in this Report, at the present meeting, he wished to mention only two aspects. First, there was the Appellate Body's finding that the Panel had failed to comply with its obligations under Article 11 of the DSU by engaging in a *de novo* review. According

[3] Japan's statement was subsequently circulated in document WT/DS245/19.

to the Appellate Body, at paragraph 190 of the Report, the Panel had erred when it "went beyond its role as the reviewer of the investigating authority's decision, and, instead, conducted its own assessment, relying on its own judgment, of much of the evidence before the USDOC." The Appellate Body's analysis should serve as an important reminder to future panels in trade remedy disputes that their task was a limited one. They were not to redo the work of domestic authorities, but instead they were to ask simply whether the determination made by domestic authorities was one that an objective and impartial decision maker could have made – not would have or should have made – based on the evidence before it.

81. The second aspect of the Report that he wished to mention concerned the Appellate Body's realistic appreciation of the evidence before the Commerce Department. Unlike the Panel, the Appellate Body had recognized that evidence of entrustment or direction was likely to be circumstantial in nature, and that that evidence had to be considered in its totality. Any other approach would render the SCM Agreement a nullity in a situation, such as the Hynix bailout, where a government chose the less transparent method of subsidization through private bodies. One example would suffice to illustrate the point. The Commerce Department record included an investment prospectus filed with the US Securities and Exchange Commission by one of Hynix's creditors – Kookmin Bank – which warned potential investors that the Government of Korea interfered in the Bank's lending decisions and caused it to make loans that it otherwise would not make.

82. However, even though the Panel had agreed with the United States that there was evidence of a Korean Government policy to save Hynix, the Panel had discounted the prospectus, essentially because the document did not identify Hynix by name. The Appellate Body had correctly noted the Panel's superficial consideration of this rather important piece of evidence, concluding at paragraph 155 that the relevance of the admission in the prospectus should have been considered in the broader context of the government policy to save Hynix, instead of in isolation.

83. In sum, the Appellate Body Report was eminently worthy of adoption by the DSB. Finally, while the Appellate Body had found numerous errors regarding the Panel's analysis of subsidy identification issues, he wished to note that the Panel's analysis of injury issues was on a much firmer footing. With one exception, the Panel had rejected Korea's claims that the US authorities had acted inconsistently with the SCM Agreement in determining that imports of subsidized Hynix DRAMS caused injury to the US DRAMS industry. The United States was also pleased to have the Panel's findings of consistency of the US measure adopted at the present meeting.

84. The representative of Korea said that the statement to be made by his delegation at the present meeting was about 20 pages. However, like Japan, which had just shown how to treat such a situation in a more cooperative way, Korea would also wish to circulate a long version of that statement as a DS document and would only make a short statement for the record.

85. The Chairman said that, in line with the procedure followed under the previous agenda item, he wished to propose that Korea's long statement pertaining to the agenda item under discussion be circulated as a DS document and that a short statement to be made at the present meeting be reflected in the minutes.

86. It was so agreed.[4]

87. The representative of Korea said that first his country wished to thank all involved in the proceedings for their hard work. In Korea's view, the Panel Report was a thorough and acceptable review of the facts and law in general. However, Korea had grave reservations regarding the Appellate Body Report. With regard to the Appellate Body's *de novo* fact-finding, he said that first of all, the Appellate Body had carried out *de novo* review of the facts in a manner inconsistent with

[4] Korea's statement was subsequently circulated in document WT/DS296/9.

Article 17.6 of the DSU. The key to understanding of the issue was to first note the method of analysis pursued by the US Department of Commerce (DOC). The USDOC had taken two particularly important steps. It had relied upon a "totality-of-the-evidence" approach and linked several distinct transactions together in a "single program" to support the approach. The Panel had looked at a number of critical pieces of evidence upon which the USDOC had relied. There were approximately ten such pieces of evidence for the alleged financial contribution in this case. The Panel had found that nine of these ten were impugned in various ways. The one piece of evidence that had been left standing was the supposed entrustment or direction of a Korean bank called KFB. However, even with that one piece of affirmed evidence of entrustment or direction, the Panel had overturned the DOC's subsidy determination. Taken individually or collectively, the Panel had found that the evidence was not compelling and that objective and unbiased investigating authority could not have reached an affirmative conclusion on that basis. The United States had appealed on this issue whether the Panel had improperly found that each and every individual piece of evidence, not totality-of-the-evidence, had to demonstrate entrustment or direction in and of itself. It was a most remarkable appeal, because the Panel had not done what the US had stated it had done. In Korea's view a fair reading of the Panel's language and context did not support the US arguments. Unfortunately, the Appellate Body had also ignored the plain language of the Panel Report and had reversed the Panel's factual findings.

88. Korea wished to further recall the point regarding the so-called "single program" approach of the DOC. That was, in making its totality of the evidence analysis, the DOC had linked all of the financial contributions together even though there was a qualitative difference. The Panel had found this to be critically important and Korea had argued that it was a keystone upholding the whole edifice of the DOC determination. However, the Appellate Body had not even bothered to address this critical issue. In its partial approach to the evidence, the Appellate Body had examined only a few instances – not "many" as it purported to do – and had then only focused on the weakest language of the Panel. If the Appellate Body was going to engage in this sort of in-depth factual analysis it must do so in a comprehensive manner. It had looked at a few instances and had simply stopped there and had drawn a generalized conclusion.

89. There was another instance of *de novo* fact-finding. Paragraph 156 of the Appellate Body Report mentioned that "Kookmin Bank ... acknowledged making loans in pursuit of government policy." That was a factually inaccurate statement. That was not what had actually been stated; it was not even what the DOC had found, nor what the United States had argued before the Panel and Appellate Body. Rather, the quoted document made conditional statements about what might happen in the future. There was no such acknowledgement by Kookmin Bank with respect to past actions. This was raw fact-finding by the Appellate Body that had not only ignored the thrust of the Panel's factual weighing and analysis, but had flatly misstated a critical fact.

90. The Appellate Body had repeated the fundamental error in its discussion of the supposed attendance of government officials at a meeting of Hynix's Creditors' Council. In paragraph 147 of its Report, the Appellate Body made a factual finding that the attendee was a Vice Chairman of the Korean government agency that participated in financial regulatory policy. However, the actual attendee at the meeting had been technical specialists, not civil servant, whose main functions were examining and auditing financial institutions. That distinction could make a substantial difference in what inferences one were to draw from the attendance of such a person at a meeting of the Creditors' Council.

91. The Panel, once again, had not actually made a fact-finding resolving this disputed fact; instead, the Panel had construed the facts in the manner most favourable to the United States before ruling against the United States. Incredibly, the Appellate Body had even acknowledged that that was a disputed fact, but then had stated that it would continue with the assumption that it was a government official "similarly" to what the Panel had done. But this was not similar in any way. Indeed, it was exactly the opposite of what the Panel had done. Once again, the Appellate Body had

construed a disputed fact against Korea and then had proceeded to rule for the United States. This was simply unacceptable for the Appellate Body to engage in such unfair and improper fact-finding.

92. There was an important question as to whether some of the creditor banks had actually taken part in the October 2001 restructuring program that had been countervailed by the DOC. However, despite DOC argument, several of the banks, including wholly government-owned banks, had refused to participate in that restructuring. They had exercised their appraisal rights and, when they had been offered a deal on their Hynix debt, had disagreed with the terms of the deal and asked for mediation. All parties, the Panel and the Appellate Body had known at that point that there was not at this time any dispute about the real situation. These banks had not participated. Thus, the DOC had countervailed transactions that had not occurred. The only question was whether or not there was evidence in the record that the DOC had ignored in this regard. The Panel had found that there was such evidence, not one, three evidences in the record, all of which had not been considered by the Appellate Body. The Appellate Body had rested its conclusion on the fact that the Korean respondent had not clearly responded in their questionnaire that there had been mediation. However, the Panel had explicitly taken into consideration that the questionnaire responses should have been more complete, but had found that, nonetheless, the evidence was clear that the DOC determination had been fundamentally undermined. What the Panel had stated in evaluating this factual aspect of the dispute was not even acknowledged in the Appellate Body Report. As had been shown, the Appellate Body had construed disputed facts in favour of the United States and then had ruled for the United States. Because it violated the basic principles of appellate review to construe disputed facts in favour of the prevailing party, one could only conclude that the Appellate Body had engaged in its own *de novo* fact-finding. On critical issues such as the question of whether there was evidence of mediation, the Appellate Body had gone directly into the case record and had reversed the Panel's conclusions.

93. With regard to Korea's cross-appeal, he said that *de novo* fact finding was not the only misjudgement of the Appellate Body in this case. He then enumerated others done by the Appellate Body. First, Korea had appealed that that a private body could not be entrusted or directed "to carry out" a governmental financial contribution if, in fact, the private body had not carried it out. The United States, supporting the Panel's contrary findings, had argued that the Panel had made this finding as part of a broader context, based on a totality of the evidence. That argument had been directly contrary to the US arguments underlying the main portion of its own appeal to the effect that the Panel had looked at each piece of evidence in isolation. The Appellate Body seemed to have completely missed it in its own analysis.

94. With regard to the evidentiary standard applied by the Panel, he said that the next issue was whether the Panel had imposed too strict an evidentiary standard on the United States by stating that the evidence proving entrustment or direction had to be "probative and compelling." The Appellate Body had upheld the Panel's description of the evidentiary standard and the manner in which it had been applied. That very improper standard of "compelling evidence" had actually been imposed by the DOC against Korea during the investigative process. At the preliminary determination stage, the DOC had created a presumption of guilt against the Korean respondents based on historical findings involving other producers and other banks. Then, in the final determination, the US DOC had stated that Korea had failed to rebut this presumption with "compelling evidence." Korea had to mention that point because, unbelievably, the Appellate Body Report was absolutely silent in this regard.

95. With regard to Article 22.5 of the SCM Agreement and *ex post facto* arguments, he said that the last issue was the interpretation of Article 22.5 of the SCM Agreement. Among other things, Article 22.5 required that investigating authorities issue a public report that contained "all relevant information on the matters of fact and law and reasons" for an affirmative determination. On this and other bases, the Panel had rejected some evidence offered by the United States as *ex post facto* rationalizations, because it was not contained or referenced in the report of the DOC's determination. Regrettably, the Appellate Body had reversed the Panel's finding. The Appellate Body seemed to consider it too burdensome on investigating authorities to require that they provide "all" of their

relevant supporting information in their reports. What was required was not "all information"; it was "all *relevant* information". This was not a great burden. It was simple transparency and fairness. By the Appellate Body's decision, as of now, "all" no longer meant "all." So what did it mean? Did it mean "none" or did it mean "some". It was very clear. "All" relevant information" had to be provided. Regrettably, that clear notion had been blurred by the Appellate Body.

96. Finally, he said that Korea had regrettably concluded that it could not support the flawed findings of the Appellate Body. The Appellate Body's analysis was outside the bounds of Article 17.6 of the DSU and, as such, was *ultra vires*. Korea commended the Panel Report to Members for adoption. In any event, at the very least, the US countervailing duty order had been found inconsistent with the United States' obligations under Article 15.5 of the SCM Agreement and should be brought into conformity without delay.

97. The representative of the European Communities said that the EC welcomed the decision of the Appellate Body, which brought very useful and thoughtful guidance on the key notions of the SCM Agreement that were entrustment or directions of a private body for the purpose of Article 1.1(a)(1)(iv) of the SCM Agreement. That provision was intended to prevent circumvention of subsidy disciplines by government by way of private bodies, for e.g. banks. In order for it to be effective, it was crucial to give the appropriate meaning to the terminology. The AB had done that. It was clear to the EC that the Panel in this dispute had applied an incorrect standard. The reliance on the export restraints Panel's notions of "delegation" and "command" as replacements for "entrust" and "direct"; used in the SCM Agreement, was clearly not appropriate. Entrust encompassed "giving responsibility"; command "exercising authority, informing, guiding". This might be done by way of a delegation or by way of a command, but also by much more subtle ways. In other words, entrustment or direction by a government might be implicit as well as explicit. The Panel's interpretation restricted the meaning of the two terms into a definition that was much too narrow and would seriously have affected the effectiveness of the WTO rules. The Appellate Body's conclusion that these terms had a broader scope had rightly corrected this.

98. The EC also particularly welcomed the endorsement by the Appellate Body of the "totality of the facts" approach. There were many non-transparent ways in which governments might intervene. In practice, an investigating authority would not always be able to obtain documentary evidence that by itself proved that the government had directed or entrusted a private body. Indeed, it was rare that a "smoking gun" would be conveniently available. Rather the investigating authority must be allowed to rely on the totality of the facts and evidence available, including circumstantial evidence. It was generally only by looking at the pieces of evidence in interaction with one another and giving them due weight, that an investigating authority could reasonably be in position to establish whether entrustment or direction existed. Requiring that a piece of evidence taken in isolation must be sufficient to establish entrustment or direction would have effectively reduced Article 1.1(a)(1)(iv) to a purely theoretical rule. The EC would finally note that this case illustrated once again the need for a remand process. The present rules led to an unsatisfactory situation when, as in the present dispute, the Appellate Body had reversed the Panel's finding, but could not complete the analysis, thus leaving part of the dispute unanswered. The EC hoped that this could be appropriately addressed in the ongoing negotiations.

99. The representative of Canada noted the observations made by other Members. In respect of the "US – Export Restraints" panel report, Canada pointed out that that panel had referred to "a *notion* of delegation or command" in its interpretation of "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement. For that reason, nothing in the Appellate Body's findings in the case under consideration vitiated or undermined the central findings of the panel in "US – Export Restraints". Moreover, in respect of the comments that the Appellate Body had exceeded its jurisdiction by looking into the "case record", Canada noted that one of the claims before the Appellate Body was that the Panel had not "objectively assessed" the evidence before it, as required by Article 11 of the DSU. In determining whether the Panel had objectively assessed the evidence before it, the Appellate

Body had no choice but to examine the case record. In doing so, it was not making new findings of fact. Rather, it was determining whether the Panel had based its findings of fact on the evidence before it. In the context of trade remedies, this would necessarily have to be done on the basis of the evidence before the investigating authority; i.e. the case record. Finally, Canada asked Members to reflect on whether the Panel had correctly determined that Article 1 of the SCM Agreement, which was a definition provision, was capable of being "violated", and whether its exercise of judicial economy in respect of Articles 10 and 19.4 of the SCM Agreement were appropriate.

100. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS296/AB/R and the Panel Report contained in WT/DS296/R, as modified by the Appellate Body Report.

8. United States – Section 211 Omnibus Appropriations Act of 1998

(a) Joint request by the European Communities and the United States (WT/DS176/16)

101. The Chairman drew attention to the communication from the European Communities and the United States contained in document WT/DS176/16 and invited the representative of the European Communities to speak.

102. The representative of the European Communities said that, as already mentioned earlier in the course of the present meeting, the EC noted its disappointment that the United States had failed to comply with a DSB's ruling and recommendation. However, the EC did not wish to request the authorization to suspend the application of concessions or other obligations to the United States at this stage. The EC had chosen instead to conclude an agreement with the United States preserving each other's rights in the future. He noted that a copy of this agreement had been circulated on 1 July 2005 as document WT/DS176/16. The EC together with the United States requested that the DSB adopt the draft decision attached to the understanding between the EC and the United States.

103. The representative of the United States said that his country joined the EC in requesting that any consideration by the DSB of a request for authorization to suspend concessions or other obligations by the EC be in accordance with the joint request submitted to the DSB. That document provided that; "upon a request by the EC, the DSB shall grant the EC authorization to suspend concessions or other obligations unless (i) the DSB decides by consensus not to do so or (ii) the United States objects to the level of suspension proposed or claims that the principles and procedures in DSU Article 22.3 have not been followed". The latter action would refer the matter to arbitration under Article 22.6 of the DSU. This decision would assist the parties in their efforts to resolve this dispute in a mutually agreeable manner. The United States appreciated the DSB's support in this regard.

104. The representative of Cuba said that her country noted with concern the Understanding between the EC and the United States (WT/DS176/16), containing a decision which, apart from ending the dispute under consideration without implementation of the DSB's recommendations and rulings, was unclear in content. The wording of the text, particularly the phrases "at this stage" and "at some future date", was vague. She asked whether the implication of that was that Members now had to wait another three years for the DSB's rulings to be implemented. Settlements of this kind should be a matter of concern to all WTO Members. As Cuba had stated previously, the provisions of Section 211 of the Omnibus Appropriations Act of 1998 were inconsistent with the TRIPS Agreement and were designed to harm Cuba's legitimate interests. Cuba deplored the fact that a settlement should be sought that overlooked the recommendations adopted by the DSB adopted in relation to this dispute more than three years ago. Cuba reserved the right to take appropriate measures under the relevant WTO provisions.

105. The DSB took note of the statements.

106. The Chairman proposed that: "The DSB take note of the Understanding reached between the European Communities and the United States and agree that, upon a request by the European Communities, the DSB shall grant the European Communities authorization to suspend concessions or other obligations unless (i) the DSB decides by consensus not to do so or (ii) the United States objects to the level of suspension proposed or claims that the principles and procedures in DSU Article 22.3 have not been followed, referring the matter to arbitration under Article 22.6 of the DSU."

107. The DSB so agreed.

9. United States – Anti-dumping measures on certain hot-rolled steel products from Japan

(a) Joint request by Japan and the United States (WT/DS184/19)

108. The Chairman drew attention to the communication from Japan and the United States contained in document WT/DS184/19 and invited the representative of Japan to speak.

109. The representative of Japan said that on 7 July 2005, Japan and the United States had reached an understanding with respect to the dispute "United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" (DS184) and had jointly informed the DSB of this understanding, which had been circulated as document WT/DS184/19. Regrettably the United States remained in non-compliance with the DSB's recommendations and rulings in this dispute and the agreed-upon reasonable period of time for the United States to secure the implementation would expire on 31 July 2005. However, on the basis of recognition and trust that the United States would continue to work to bring its measures into conformity with the DSB's recommendations and rulings, Japan would not, at this stage, request authorization from the DSB to suspend application of concessions or other obligations, as stipulated in Article 22.2 of the DSU. The Understanding between Japan and the United States recognized that Japan retained its right to be granted the DSB's authorization to suspend concessions or other obligations towards the United States, pursuant to Article 22.2 of the DSU at any future date. Consequently, Japan requested, jointly with the United States, and as set out in document WT/DS184/19, that the DSB "take note of the Understanding reached between Japan and the United States and agree that, upon a request by Japan, the DSB shall grant Japan authorization to suspend concessions or other obligations unless (i) the DSB decides by consensus not to do so or (ii) the United States objects to the level of suspension proposed or claims that the principles and procedures in DSU Article 22.3 have not been followed, referring the matter to arbitration under Article 22.6 of the DSU."

110. The representative of the United States said that his country joined Japan in requesting that any consideration by the DSB of a request for authorization to suspend concessions or other obligations by Japan be in accordance with the joint request submitted to the DSB. That document provided that: "upon a request by Japan, the DSB shall grant Japan authorization to suspend concessions or other obligations unless (i) the DSB decides by consensus not to do so or (ii) the United States objects to the level of suspension proposed or claims that the principles and procedures in DSU Article 22.3 have not been followed." The latter action would refer the matter to arbitration under Article 22.6 of the DSU. This decision would assist the parties in their efforts to resolve this dispute in a mutually agreeable manner. The United States appreciated the DSB's support in this regard.

111. The representative of Mexico noted that, both under the present agenda item and the previous one, two draft decisions had been submitted before the DSB. Mexico supported any initiatives which would permit Members to reach agreements in their own disputes because the DSU provisions had enough flexibility for that to take place. Mexico also believed that absent compliance, the best outcome was to find a mutually agreed solution. However, any such initiatives should be discussed

by Members and, in future, if similar situations were to arise, the DSB Members should be consulted, at least informally, prior to taking a decision on such matters.

112. The DSB took note of the statements.

113. The Chairman proposed that: "The DSB take note of the Understanding reached between Japan and the United States and agree that, upon a request by Japan, the DSB shall grant Japan authorization to suspend concessions or other obligations unless (i) the DSB decides by consensus not to do so or (ii) the United States objects to the level of suspension proposed or claims that the principles and procedures in DSU Article 22.3 have not been followed, referring the matter to arbitration under Article 22.6 of the DSU."

114. The DSB so agreed.

10. Appointment of Appellate Body members

115. The Chairman recalled that, at the DSB meeting held on 20 June 2005, he had reminded delegations that the terms of office of three Appellate Body Members – Messrs. Luiz Olavo Baptista, John Lockhart, and Giorgio Sacerdoti – would expire on 11 December 2005. He had also indicated that all three individuals had expressed interest in serving a second term. He had undertaken to conduct informal consultations with delegations regarding the positions on the Appellate Body currently held by Messrs. Baptista, Lockhart, and Sacerdoti. He had invited delegations with an interest in this matter to contact him by 15 July 2005. Between 21 June and 15 July, he had been contacted by a number of delegations. At the present meeting, in the light of his consultations, and consistent with the process discussed during the 20 June 2005 DSB meeting, he wished to propose that a decision on the reappointment of Messrs. Baptista, Lockhart, and Sacerdoti be taken by the DSB at its meeting on 27 September 2005. He asked if there was any objection to the approach that he had just proposed.

116. The representative of the European Communities said that the EC welcomed the Chairman's report and was pleased to note that there was general support among Members for the reappointment of Messrs. Baptista, Lockhart and Sacerdoti.

117. The Chairman proposed that the DSB take note of the statements and said that he would proceed along the lines discussed.

118. The DSB took note of the statements.