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**Dispute Settlement Body**
**23 September 2008**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 23 September 2008

*Chairman: Mr. Mario Matus (Chile)*

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**1. Surveillance of implementation of recommendations adopted by the DSB**

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.70)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.70)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.45)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.8 – WT/DS292/31/Add.8 – WT/DS293/31/Add.8)

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.70)

2. The Chairman drew attention to document WT/DS176/11/Add.70, 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 9 September 2008, in accordance with Article 21.6 of the DSU. As noted in that 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 US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, for some months, the United States had expressed its regret that the EC had returned to criticizing its commitment to intellectual property rights and the TRIPS Agreement. Section 211 had been condemned more than six years ago. In those six years, the United States had failed to take any significant steps to implement the DSB's ruling. The most recent status report, once again, showed no progress and the EC was confronted with exactly the same lack of action in the Section 110 dispute. The EC could not but contrast this with the US assertion that it was second to none in the protection of intellectual property rights and the EC wished that this would be evidenced by appropriate action in the two disputes in question. To the EC and no doubt to other WTO Members as well, these were legitimate questions and certainly not regrettable and unfounded criticism. To finish on a more positive note, she said that bipartisan bills were pending in the US Congress to repeal Section 211. As had already been stated on several occasions, the EC sincerely hoped that the United States would finally progress and bring itself into compliance with its TRIPS obligations.

5. The representative of Cuba said that the national treatment obligation was laid down in the Paris Convention and the WTO TRIPS Agreement. It was a fundamental principle of the Paris Convention, which constituted the basis upon which the international intellectual property system had developed over the past 125 years. The most-favoured-nation treatment obligation, which was

contained in Article I of the GATT 1994, and was considered fundamental in a rules-based system for trade in goods, had been extended under the TRIPS Agreement to the area of intellectual property rights. As the body of final instance that reviewed the legal aspects of panel reports, the Appellate Body had concluded in 2002 that Section 211, which would have been in force for ten years in October 2008, was inconsistent with the principles of national and most-favoured-nation treatment, which were the cornerstones of the global trading system. As it had done so many times already, the United States continued to disregard the obligations it had undertaken. The principle of *pacta sunt servanda*, which provided that every treaty was binding upon the parties to it and must be considered inviolable, was systematically ignored by the respondent in this and in other cases under the DSB's consideration.

6. Pursuant to Article 23 of the DSU, Members seeking the redress of a violation of obligations under the covered agreements shall have recourse to the rules and procedures of the DSU. That provision was not optional and was a way of avoiding the damaging consequences that unilateral action entailed for the multilateral trading system. A Member's non-compliance, like in the case under consideration, called into question the obligation of resorting to the Understanding in order to resolve a dispute. One must not forget that the settlement of disputes and the implementation of the DSB's rulings were essential to maintaining the balance between the rights and obligations of Members. The system was weakened and eroded by an accumulation of unresolved conflicts and non-implemented decisions. The Section 211 case was not the only unresolved case, as demonstrated by the Agenda of the present meeting.

7. Cuba recalled that the issue of intellectual property rights had been, once again, on the Agenda of the G-8 Summit held in July 2008 in Japan. That matter had been discussed along with other issues of critical importance, such as the global economic crisis, food security, and global warming. A call had been made to conclude the Anti-Counterfeiting Trade Agreement in 2008, and to accelerate the discussions on the Substantive Patent Law Treaty. The leaders of the richest countries were highly concerned about the non-enforcement of these rights by other countries, but they were not when some of the Members of that exclusive club repeatedly failed to abide by their commitments. According to experts on the subject, intellectual property rights were the latest and the greatest competitive advantage enjoyed by the top industrialized countries. Therefore, it was not unusual to find the issue at the heart of their current debates. The United States, on the other hand, had opted for the violation of fundamental principles of the TRIPS Agreement, as the WTO Appellate Body noted in this particular case more than six years ago. However, that Member not only demanded high levels of protection in the international arena, but also continued to make claims in the WTO. This clearly reflected an offensive and unacceptable double standard. Prolonged lacked of compliance, repetitive and false status reports, statements in which the United States continued to maintain that it was the most compliant Member, and turning of a deaf ear to the claims of many other Members and to irrefutable facts were actions which affected not only one Member in particular, but also the system itself, by undermining its credibility. Cuba reiterated how important it was that to take appropriate action to ensure that the DSB's recommendations and rulings were implemented through the immediate repeal of Section 211 by the United States.

8. The representative of China said that his country believed that full implementation of the adopted DSB's rulings and recommendations, namely the withdrawal of the illegal measures, was of most importance for the effective functioning of the WTO. China noted that the measure taken by the United States in this dispute nullified not only the interests of the EC under the TRIPS Agreement, but also the interests of other WTO Members. Although every Member of the WTO had the right to take recourse to the dispute settlement system, it was definitely a heavy burden for developing countries to do so due to the lack of human and financial resources. Therefore, it was quite understandable that Cuba expected to benefit from the full and faithful implementation of the DSB's ruling in this dispute, and to pay a lot of attention to the status of pending disputes. China noted that the United States had, on various occasions, asked other WTO Members to implement and improve protection of intellectual

property rights. However, as this case had demonstrated, the laws of the United States seriously violated the TRIPS Agreement, which represented minimum standards of IPR protection. In this regard, China wished to join the EC and Cuba in urging the United States to take proper measures faithfully to enforce the intellectual property rights according to the TRIPS Agreement and to implement the decision of the DSB in this dispute as soon as possible.

9. The representative of India said that her country thanked the United States for its status report and the statement made at the present meeting. India appreciated the steps taken by the United States thus far to repeal Section 211 as steps in the positive direction, however, India noted that there was no substantive change in the situation. India felt compelled, yet again, to stress that the principle of prompt compliance was missing in this dispute. India, therefore, wished to renew its systemic concerns about this situation of non-compliance as this continuous non-compliance situation by WTO Members clearly undermined the credibility and confidence that Members reposed in the system.

10. The representative of Viet Nam said that his country wished to thank the United States for its status report and noted that this item had remained on the DSB's Agenda for a long time. Viet Nam called on the United States to take necessary and urgent steps to fully comply with its WTO obligations.

11. The representative of Thailand said that his country thanked the United States for its status report. Like previous speakers, Thailand was concerned about the systemic implications of this dispute. Non-implementation of the DSB's rulings and recommendations undermined the rules-based multilateral trading system. Thailand, therefore, called on the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

12. The representative of Brazil said that his country thanked the United States for its status report concerning the surveillance of implementation in this dispute and expressed, once again, its concerns about this case. As stated before, it was Brazil's understanding that, despite all the endeavours of the US administration in working together with the US Congress, the non-compliance situation remained. As a general remark, it was most unfortunate that providing detailed and up-to-date information in status reports had become a custom that was honoured more in breach than in the observance. Perhaps the United States and other delegations could remind the DSB of specific actions or initiatives that they were undertaking in their respective status reports. Now, without prejudice to the suggestion, Brazil strongly urged the United States to fully implement the DSB's recommendations in this dispute.

13. The representative of the Bolivarian Republic of Venezuela said that her delegation noted the status report submitted by the United States, and underlined the critical importance of prompt and satisfactory compliance with the DSB's recommendations for the proper functioning of the dispute settlement system. It was necessary for the United States to provide redress to the affected parties. This was the only way for the United States to show its commitment to fully abide by its WTO obligations. Her delegation, once again, requested the parties to find the appropriate means to put an end to this dispute.

14. The representative of Nicaragua said that her delegation wished to support previous speakers and noted the lack of compliance with the DSB's recommendations and rulings in this dispute. Being a WTO Member did not just imply benefiting from multilateral trade, but it also implied respecting and implementing the DSB's recommendations and rulings. Under the DSU, Members had undertaken to fully comply with all the DSB's recommendations and rulings. Her delegation wished to reiterate its systemic concerns regarding the proper functioning of the multilateral dispute settlement system, and called for urgent measures to be taken towards the implementation of the recommendations and rulings of this case.

15. The representative of Mexico said that the DSU required prompt compliance with the DSB's recommendations and rulings in order to ensure the effective solution of disputes to the benefit of all Members, as provided for in Article 3.3 of the DSU. In this respect, Mexico urged the parties to this dispute to adopt necessary measures to ensure compliance with the DSB's recommendations and rulings, which would benefit all Members.

16. The representative of the United States said that his country regretted that the EC was again suggesting that US actions in this dispute had somehow undermined the authority of the TRIPS Agreement. The United States failed to understand how its commitment to implement the DSB's recommendations and rulings in this dispute and its efforts to comply could undermine the "authority" of the TRIPS Agreement. To the contrary, these affirmed its commitment to the TRIPS Agreement. The United States would imagine that the EC felt similarly about its many years of efforts to comply with its obligations under the SPS Agreement and the GATT 1994. On the other hand, the United States welcomed the EC's recognition of the bipartisan bills that had been introduced in the US Congress. The United States reiterated that the US administration continued to work with the US Congress to implement the DSB's recommendations and rulings in this dispute. The United States also regretted very much that some Members – including some whose record of protecting intellectual property rights appeared less than robust – continued to criticize the US commitment to intellectual property rights. These criticisms were completely unfounded. It was of course true that the United States remained a strong advocate of substantial protections for intellectual property internationally. However, the United States was also second to no one in providing strong intellectual property protection within its own territory. The United States also looked forward to continuing to work with all Members to secure the protection of intellectual property rights around the world. Finally, the United States regretted that one Member had suggested that the US administration was not providing sufficient details of how it was working with the US Congress to implement the recommendations and rulings in this dispute. The United States recalled again that it was not always possible or appropriate to recount internal governmental efforts to pass legislation. And, as the United States had stated previously, the United States had heard similar criticisms about the level of detail of US status reports in other disputes in which the US Congress ultimately had passed legislation.

17. The representative of Cuba said that his delegation wished to respond to the comments made by the United States. First, it was difficult to believe that the United States was fully committed to compliance with the obligations under the TRIPS Agreement and the DSU provisions since Section 211 had been in force for more than 10 years. More than six years had now past since the DSB had adopted the recommendations and rulings in this dispute. Furthermore, on the Agenda of the present meeting, several items relating to compliance involved the United States. There was not much to report with regard to pending legislations in the US Congress. Over the past 10 years, there had been different draft bills – some intended to amend or modify Section 211 and others to cover up Section 211. Those draft bills, like those currently under consideration by the US Congress aimed at repealing or modifying Section 211 to bring it into compliance with the WTO rules, had not been supported by the US administration. The successive US administrations, together with the Republican leadership of some Congressional Committees, had manoeuvred in order to hinder the approval of any drafts which would put the US legislation into compliance with the WTO rules and intellectual property rights, thereby complying with the legal obligation under the DSU. Cuba believed that this matter must not continue indefinitely without a solution because this lack of compliance undermined the credibility of the TRIPS Agreement, the DSU provisions and the DSB. Furthermore, it undermined the credibility of the WTO Agreements and the principles upon which the WTO was based. Large and small, poor and rich countries, whatever their status, they all benefited from the same rights and all had the same obligations.

18. 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.70)

19. The Chairman drew attention to document WT/DS184/15/Add.70, 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.

20. The representative of the United States said that his country had provided a status report in this dispute on 9 September 2008, 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 continue to work with the US Congress with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

21. The representative of Japan said that his country thanked the United States for its statement and the most recent status report. Since the United States had taken certain measures to implement part of the DSB's recommendations in November 2002, as reported by the United States, there had been little tangible progress in this long-standing dispute regarding the remaining part of the DSB's recommendations and rulings. A full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[1] Japan called on the United States to redouble its efforts to this end.

22. 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.45)

23. The Chairman drew attention to document WT/DS160/24/Add.45, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

24. The representative of the United States said that his country had provided a status report in this dispute on 9 September 2008, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and would continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter. In this regard, the United States shared the EC's goal of discussing how a mutually satisfactory solution to this dispute could be achieved.

25. The representative of the European Communities noted that at the present meeting before the DSB was the 45th status report by the United States on continued non-compliance. As the EC had made clear many times, the EC was always ready to be constructive. However, the EC could not be constructive on its own. The EC was left, once more, to express its frustration that it was not getting closer to the settlement of this case.

26. The representative of China said that, once again, this case demonstrated that the United States did not provide effective and adequate protection of intellectual property rights. China wished to join others in urging the United States to take proper measures to enforce the intellectual

[1] Article 3.3 of the DSU.

property rights in good faith according to the TRIPS Agreement, and to implement the decision of the DSB in this dispute as soon as possible.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.8 – WT/DS292/31/Add.8 – WT/DS293/31/Add.8)

28. The Chairman drew attention to document WT/DS291/37/Add.8 – WT/DS292/31/Add.8 – WT/DS293/31/Add.8, 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 measures affecting the approval and marketing of biotech products.

29. The representative of the European Communities said that the EC was happy to report, once more, that good faith cooperation between the complainants and the EC continued. The EC kept a regular dialogue with the three complainants and held regular technical meetings which were aimed at addressing all relevant biotech-related issues of their concern. Progress in the processing of pending applications and on national measures continued. Sixteen authorizations had been granted since the establishment of the WTO panel, seven in 2007 only. One authorization (A2704-12 soybean) had been granted on 8 September 2008 and another one was expected in the coming days/weeks (LL25 cotton). One draft authorization decision on oilseed rape T-45 would be transmitted to the Council. Following the clarification by EFSA on concerns related to the relevant antibiotic marker gene, expected by mid-December, the EC might be in the position to authorize four more GM events (one GM potato and three maize hybrids) before the end of the year or in early 2009. The EC believed that given the inevitably sensitive nature of biotech issues, dialogue was the appropriate way forward and remained open to continue discussions with the three complainants. The seventh technical meeting between the EC and the United States had already been tentatively scheduled for October. Finally, with regard to the statement made by Brazil, under Item 1(a) of the Agenda of the present meeting, concerning the specificity of status reports, she hoped that she had given sufficient detail in her intervention, but would also be happy to develop individual aspects of product applications or authorizations covered by the Panel Reports.

30. The representative of Canada said that her country thanked the EC for its statement. As mentioned at the previous meeting, Canada had agreed to an extension of the reasonable period of time for the EC to bring itself into compliance with the DSB's findings until 31 December 2008. While Canada believed that progress was being made, it continued to have concerns about the ongoing timeliness and the predictability of the EC's approval system for biotech products, as well as continuing, and new member State bans on the cultivation and marketing of biotech products. Canada would continue to monitor the situation closely.

31. The representative of Argentina said that his country, as mentioned by the EC, had continued to work on solving pending issues. Argentina would continue working both with the parties and in particular with the EC and wished to thank all for the efforts made up until now as well as the EC for the report on progress.

32. The representative of the United States said that his country had filed its consultation request in this dispute over five years ago, in May 2003. At that time, the EC's moratorium on approvals of biotech products had resulted in the United States being shut out of major EC markets for grains and grain products. The DSB had adopted its recommendations and rulings nearly two years ago, finding that the EC's moratorium had resulted in "undue delay" in breach of the EC's obligations under the SPS Agreement. The reasonable period of time for the EC's compliance in the dispute brought by the

United States (DS291) had expired in January 2008. Unfortunately, over five years since the initiation of the dispute, almost two years since the adoption of the rulings and recommendations, and over eight months since the end of the reasonable period of time, US grain producers remained shut out of major EC markets. Currently, approximately 50 biotech product applications were backed up in the EC's approval system. In its statement at the present meeting, the EC had claimed progress on the basis of the recent approval for import and use of an herbicide-tolerant soybean variety. This was only the second decision in all of calendar year 2008 on a pending biotech application. Rather than being a symbol of progress, the EC's handling of this soybean variety instead helped illustrate why the United States had serious concerns with the EC's approval system.

33. This variety of soybean had first been submitted to the EC for approval in October 1998. Since that time, ten different countries, including Japan, New Zealand, and South Africa, had found this soybean variety to be safe and had approved its use. Until just a few days ago, however, the EC failed to make a decision on this product. Indeed, in the dispute brought by Argentina (DS293), the DSB had found that the EC had breached its obligations under the SPS Agreement because it had failed to complete its approval procedure for this soybean variety without undue delay.[2] Fourteen months ago, in July 2007, the product had received a positive safety assessment from the EC's own scientific committee. EC member States, however, had failed to follow the EC's own scientific assessment and had failed to grant approval under the EC's "qualified majority" system of voting. The application had been resubmitted to member States, this time at the level of the EC Council. Despite the EC's own positive safety assessment, EC member States had again failed to grant approval. Only after an additional waiting period had the product finally been approved for import and use in the EC. In sum, the DSB had found that this product application was subject to "undue delay" in breach of SPS rules, EC member States had failed to act in accordance with the EC's own scientific safety assessments, and the approval of this soybean variety had taken nearly 10 years from the time an application had first been submitted. The EC's handling of this herbicide-tolerant soybean thus did not speak favourably of the EC's record, and had only emphasized the problems with the functioning of the EC's biotech approval system. Although the United States had growing concerns with the EC's actions concerning the approval of biotech products, the United States was confident that the EC could address these concerns if it found the political will to do so. The United States continued to urge the EC to take the steps necessary to resolve this dispute.

34. The representative of the European Communities said that if she was not totally mistaken, the soybean product that the United States had been referring to was not covered by the US Panel request and consequently not by the Panel's ruling that the United States had obtained in this case. Furthermore, to the extent this example was meant to illustrate a so-called backlog in the applications, she wished to re-iterate that the GMO regulatory regime was working normally. Its functioning should not be rigidly assessed in terms of number of authorizations per year since this was dependent on various products and case specific elements and, in particular, on the time needed by applicants to answer requests from EFSA on additional scientific information. This being said, the EC did estimate that the current yearly rate of authorization would roughly be the same as in 2007.

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

[2] "European Communities – Measures Affecting the Approval and Marketing of Biotech Products" (WT/DS293/R), para. 7.2019(ii); para. 8.53(a)(iii).

## 2. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB

(a) Statements by the European Communities and Japan

36. The Chairman said that this item was on the Agenda of the present meeting at the request of the EC and Japan. He then invited the respective representatives to speak.

37. The representative of the European Communities said that the EC welcomed Japan's announcement at the previous DSB meeting that it would maintain its additional duties on certain US products as a result of the incomplete implementation of the DSB's recommendations and rulings in this dispute. As already mentioned in previous meetings, the United States was indeed now preparing the eighth distribution of anti-dumping and countervailing duties under the Continued Dumping and Subsidy Offset Act. As from next month, the United States would start distributing the duties collected in the latest fiscal year on imports made prior to 1 October 2007. The EC wished to ask again the United States if and what steps it intended to take to stop the transfer of those anti-dumping and countervailing duties to its industry and finally put an end to the condemned measure. 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 implementation reports in this dispute.

38. The representative of Japan said that preparatory works for a new round of distributions for FY 2008 publicly initiated in June 2008[3] appeared to be well underway, as shown by the US Customs' recent publication of the list of "certifications"[4], or the list of the claims filed by the US domestic producers for FY2008 distributions. These actions demonstrated that the CDSOA remained operational or, in the words of the US Customs, "the distribution process will continue for an undetermined period".[5] Japan urged the United States to immediately terminate the illegal distributions and repeal the CDSOA not just in form but in substance so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance with its obligations.

39. The representative of the United States said that, as his country had already explained at prior 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. The United States welcomed the EC's recognition that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EC and Japan had inscribed this item on the Agenda of the present meeting.

40. The representative of Canada said that her country agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

41. The representative of India said that her country thanked the EC and Japan for maintaining this issue before the DSB once again. India fully shared their concerns. As mentioned by previous speakers, the latest action demonstrated that CDSOA remained operational and the United States was still distributing disbursements under the CDSOA to the US domestic industry. These disbursements

[3] See US Customs and Border Protection's website at: http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/prelim_report08.ctt/prelim_report08.pdf.

[4] Idem. http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_08/fy08_certs.ctt/fy08_certs.pdf.

[5] Id. http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml.

made by the United States to its domestic industry under the Byrd Amendment affected the rights of other WTO Members. It was India's concern that non-compliance by Members led to a growing lack of credibility of the WTO dispute settlement system. India, therefore, urged the United States to cease its WTO-inconsistent disbursement. India supported the view that continued surveillance by the DSB was needed.

42. The representative of Brazil said that his country wished to point out that the disbursements made by the United States to its domestic industry under the Byrd Amendment continued to be in force, affecting the rights of other WTO Members. Brazil reiterated that full implementation of the DSB's recommendations and rulings had not yet been achieved.

43. The representative of Thailand said that his country thanked the EC and Japan for bringing this matter before the DSB. Thailand continued to be disappointed at the United States' maintenance of these WTO-inconsistent disbursements. Thailand thus urged the United States to cease the disbursements, repeal the Byrd Amendment with immediate practical effect, and resume providing status reports until such actions were taken and this matter was fully resolved.

44. The DSB took note of the statements.

### 3. European Communities and its member States – Tariff treatment of certain information technology products

(a) Request for the establishment of a panel by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/DS375/8 – WT/DS376/8 – WT/DS377/6)

45. The Chairman recalled that the DSB had considered this matter at its meeting on 29 August 2008 and had agreed to revert to it. At the present meeting, he drew Members' attention to the joint communication from the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contained in document WT/DS375/8 – WT/DS376/8 – WT/DS377/6, and invited the respective representatives to speak.

46. The representative of the United States said that at the DSB meeting held on 29 August, the United States had briefly described its concerns with the duties currently imposed by the European Communities and its member States on three information technology products: set top boxes with a communication function, flat panel computer monitors, and multifunction digital machines. As the United States had noted, these were products covered by the Information Technology Agreement, one of the signature achievements of the WTO. The EC and its member States had promised duty-free treatment to those products, and that commitment was reflected in their WTO tariff schedules. As explained in the joint panel request, the EC's decision to impose duties on these products was contrary to Article II of the GATT 1994. The United States had spent over two years trying to work with the EC to address its concerns, without success, including in formal consultations held in June and July. The EC's assertion at the August meeting that litigation would not solve this problem was particularly remarkable given the amount of effort that had been expended by the co-complainants in trying to address their concerns without recourse to dispute settlement. The EC's actions not only impeded trade in these products, they also threatened to undermine tariff commitments on information technology products, which were so important to trade and investment in both developing and developed countries. Therefore, the United States, together with Japan and Chinese Taipei, requested for a second time that the DSB establish a panel to examine the matters set forth in their joint panel request, with standard terms of reference.

47. The representative of Chinese Taipei said that at the 29 August DSB meeting, his delegation had acted jointly with the United States and Japan to request that a panel be established to hear their

dispute with the EC concerning the tariff treatment by the EC and its member States of certain information technology products. At the present meeting, Chinese Taipei was making the same request with the United States and Japan that a panel be established to adjudicate this dispute. Chinese Taipei had already explained the detail of its rationale for making this panel request at the previous DSB meeting. Briefly, the EC and its member States had promised to accord duty-free treatment to certain products covered by the Information Technology Agreement (ITA), and this was reflected in their WTO Schedule of Concessions. However, the EC's existing measures imposed tariffs on some of the products covered by the ITA, including flat panel displays, set-top boxes with communication functions, and multifunctional digital machines. By doing so, the EC and its member States had violated their obligations under the GATT 1994. As one of the largest suppliers of IT products in the world, Chinese Taipei's trade interests had been seriously injured by the EC's measures. This dispute was not only of enormous economic significance, but the measures imposed by the EC and its member States also raised serious systemic concerns. In its attempts to resolve this dispute, Chinese Taipei had made extreme efforts in consultations with the EC, but had found no mutually satisfactory solution. Chinese Taipei hereby requested, once again, jointly with the United States and Japan, that a panel be established according to Article 6 of the DSU and Article XXIII of the GATT 1994.

48. The representative of Japan said that his country supported the statements made by the United States and Chinese Taipei. As stated by them, Japan, the United States and Chinese Taipei, once again, jointly requested that a panel be established by the DSB to examine the matter set out in their panel request. There was no need to repeat Japan's position in this dispute at the present meeting, because it had been explained in detail in the joint panel request. In short, imports to the EC of certain ITA products at issue in this dispute were subject to duties, instead of being provided duty-free treatment as committed and required by the existing EC Schedules. As a result, duties had been applied to those products in excess of those set forth in the Schedules, and commerce of co-complainants had been accorded treatment less favourable than that provided in the Schedules, inconsistent with the WTO obligations assumed by the EC and its member States, in particular, those under Article II:1(a) and (b) of the GATT 1994. Japan recalled that the joint panel request had been on the Agenda of the 29 August DSB meeting. Following that meeting, Japan was now requesting the establishment of a panel for the second time. Therefore, a panel shall be established at the present meeting, pursuant to Article 6 of the DSU with standard terms of reference.

49. The representative of the European Communities said that, as previously stated, the EC had offered on many occasions to use the mechanisms foreseen in the ITA to solve these issues through negotiations. The ITA had a review clause which could be invoked by Members at any time. The co-complainants had thus far not demonstrated any willingness to do this, but had opted for litigation instead. The EC remained confident that the products in question in these disputes were correctly classified and received the tariff treatment provided for in the EC schedules of concessions, and the EC was consequently ready to defend its position before a panel. On a procedural aspect, the EC must, once again, stress that it was the EC which bore the responsibility for the matter covered by the disputes, as this was a matter of exclusive EC competence. The EC was, therefore, the only respondent in these disputes. Naming member States on the panel requests was thus incorrect. The EC regretted the steps taken at the present meeting by Japan, Chinese Taipei and the United States in requesting the establishment of a single Panel in these disputes, but did not oppose its establishment. The EC was of the opinion that the individual complainants had fundamentally different interests in this matter, as reflected in their separate and different consultation requests. While agreeing to the establishment of a single panel, however, the EC fully reserved its procedural rights, including those concerning the deficiencies of the panel requests and its right to request that the panel submit separate reports in these disputes, in accordance with the provisions of Article 9.2 of the DSU.

50. The representative of the United States said that, with respect to the EC's comments regarding an alleged unwillingness on the part of the co-complainants to engage in negotiations, no further

negotiations were necessary with respect to the products set out in their panel request. This was because the concerns identified in their panel request pertained to existing commitments of the EC. And with respect to the EC's assertion that the EC member States were not proper responding parties in this dispute, the United States had addressed this issue at the 29 August DSB meeting. The United States referred Members to that statement. At the present meeting, the United States simply noted that, because the EC member States had been named as respondents in the panel request, claims against the EC member States would be part of the Panel's terms of reference.

51. The representative of Chinese Taipei said that his delegation had taken note of the EC's statement and would convey that statement back to capital. As a Member of the WTO and a participant of the ITA, Chinese Taipei had supported the spirit of the ITA in promoting the "maximum freedom of world trade in information technology products" and in encouraging "the continued technological development of the information technology industry on a world-wide basis". Therefore, Chinese Taipei supported a review of the ITA to further expand the product coverage of the ITA to accommodate the rapid development of information technology. While welcoming the EC's proposal to expand the product and membership coverage of the ITA, and looking forward to working with other participants of the ITA to discuss how the ITA could be better improved, Chinese Taipei was of the view that the products concerned in this dispute were covered by the current ITA and thus were entitled with duty-free treatment. With the establishment of a panel to examine the issues of its concern, Chinese Taipei trusted that WTO's dispute settlement mechanism could help bring an effective and satisfactory solution to this dispute.

52. 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 to examine the complaint by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu contained in document WT/DS375/8 – WT/DS376/8 – WT/DS377/6.

53. The representatives of Brazil, China, India, Korea, the Philippines, Thailand, Viet Nam and Hong Kong, China reserved their third-party rights to participate in the Panel's proceedings.

**4. Japan – Countervailing duties on dynamic random access memories from Korea**

(a) Recourse to Article 21.5 of the DSU by Korea: Request for the establishment of a panel (WT/DS336/19)

54. The Chairman drew attention to the communication from Korea contained in document WT/DS336/19, and invited the representative of Korea to speak.

55. The representative of Korea said that his country requested that the DSB establish a panel to review the measures adopted by Japan on 29 August 2008 that purported to implement the DSB's decision in the DS336 dispute concerning Korea's challenge to Japan's measures imposing countervailing duties on imports of dynamic random access memories ("DRAMS") from Korea. As Korea had explained previously, and as was detailed in its panel request, dated 9 September 2008, the measures adopted by Japan on 29 August were not in accordance with the decision of the DSB or with the provisions of the SCM Agreement. Despite its earlier promise to comply with the DSB's ruling, Japan had instead engaged in delaying tactics in order to maintain an illegal countervailing duty on imports from Korea for as long as possible in contravention of the DSB's ruling. This conduct was not only inconsistent with Japan's obligations under the SCM Agreement; it also was fundamentally inconsistent with the obligation of good faith that was expressly required of all Members that participated in the DSU proceedings. On 9 September 2008, Korea and Japan had entered into an agreement confirming the procedures for review of the measures adopted by Japan on 29 August. Under paragraph 2 of that agreement, Japan had agreed that it would accept the establishment of a panel to review those measures at the first DSB meeting at which Korea's panel request appeared on

the DSB's Agenda. Pursuant to that agreement, and for the reasons that he had mentioned, Korea requested that the DSB establish a panel pursuant to Articles 6 and 21.5 of the DSU, with standard terms of reference, to examine the matters described in Korea's panel request.

56. The representative of Japan said that his country regretted that Korea had decided to request the establishment of a panel under Article 21.5 of the DSU. As Japan had explained at the previous meeting, Japan's investigating authorities had conducted the investigation scrupulously in accordance with the findings of the Panel and Appellate Body. As a result, Japan had taken necessary actions to bring its measures, found to be inconsistent with the SCM Agreement, into conformity with that Agreement. And Japan had taken all these actions before the expiry of the reasonable period of time. Under such circumstances, Japan failed to understand why Korea could claim that Japan had engaged in delaying tactics and was not acting in good faith. Japan was confident that it had fully implemented the recommendations and rulings of the DSB and stood ready to vigorously defend its position before the Panel. Japan expected the Panel to conclude that Japan had complied with its WTO obligations. Therefore, pursuant to the *ad hoc* procedures agreed by Japan and Korea under Articles 21 and 22 of the DSU, which had been circulated to the DSB in document WT/DS336/18, Japan did not object to the establishment of a panel at the present meeting.

57. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Korea in document WT/DS336/19. The Panel would have standard terms of reference.

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