WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/182
17 February 2005

(05-0665)

Dispute Settlement Body
25 January 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 January 2005

Chairperson: Ms Amina Mohamed (Kenya)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on: "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes" (WT/DS302/R) was removed from the proposed agenda following the Dominican Republic'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.27)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.27)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.12 – WT/DS234/24/Add.12)

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.2)

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.1)

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.27)

2. The Chairperson drew attention to document WT/DS176/11/Add.27, 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 13 January 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the last US Congress had been considering a number of legislative proposals to amend or repeal Section 211 and the Senate had held hearings on those proposals in July 2004. A new Congress had convened in January 2005 and the US administration was working with that Congress with respect to appropriate statutory measures to resolve this matter.

4. The representative of the European Communities said that on 17 December 2004, the EC had agreed with the United States to extend the time-period for implementation until 30 June 2005. It was most unfortunate that the United States, which was so eager to promote international protection of intellectual property rights, had been unable to bring a satisfactory solution to this dispute almost

three years after condemnation of its legislation. The EC had shown extreme patience in this case and expected that the United States would make use of these additional six months to finally end this dispute.

5. The representative of Cuba said that, as indicated in the US status report, which had been circulated on 14 January 2005, the EC and the United States had again agreed to extend the deadline for compliance with the DSB's recommendations in the Section 211 case. She noted that this was the fourth time that the United States had requested such an extension in order to meet its obligations as a WTO Member and to comply with the DSB decisions. She noted that the following week three years would pass since the Appellate Body had made its ruling on 2 February 2002 in relation to this dispute. The most recent extension reflected not only a remarkable lack of political will on the part of the United States to honour its commitments, but also the arrogant attitude of the United States whenever it had been confronted with the DSB decisions which were not to its liking. On a number of occasions, the United States had announced its apparent intention to look into the possibility of repealing Section 211 through a bill, but this had proved yet again to be not more than empty rhetoric. Her delegation noted with concern the US lack of interest in observing WTO rules and disciplines, as demonstrated by its unjustified, excessive and offensive delaying tactics, which impaired the rights of Members and undermined the international credibility of the DSB; one of the most sensitive institutions of the multilateral trading system. Cuba considered that the most recent extension was another deplorable action, which affected the balance of rights and obligations under the TRIPS Agreements and the basic WTO principles. Consequently, Cuba again urged the United States to desist from violating international law and to repeal Section 211, which was the only solution to this dispute.

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.27)

7. The Chairperson drew attention to document WT/DS184/15/Add.27, 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 13 January 2005, in accordance with Article 21.6 of the DSU. The US administration would work with the new Congress, which had convened this month, with respect to the recommendations and rulings of the DSB that had not been already addressed by the US authorities by 23 November 2002.

9. The representative of Japan said that the reasonable period of time for implementation by the United States of the DSB's recommendations and rulings in this dispute had been extended three times. As Japan had repeatedly underlined, prompt and secure implementation was a cornerstone of the credible WTO dispute settlement mechanism. It would be an understatement to state that Japan was very much disillusioned by the fact that little progress had been made since the 17 December 2004 DSB meeting and that no single bill had yet been introduced to the US Congress to address this matter. He noted that the re-extended deadline for implementation would expire on 31 July 2005. Japan sincerely hoped that, within the remaining six months, the concerted action by the US administration and the US Congress would bring about the fully-fledged implementation of the DSB's recommendations and rulings so as to end this dispute. If the United States fell short of implementation by that date, Japan would be entitled to have recourse to the DSU provisions in order to safeguard its rights and interest.

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

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.12 – WT/DS234/24/Add.12)

11. The Chairperson drew attention to document WT/DS217/16/Add.12 – WT/DS234/24/Add.12, 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 13 January 2005, in accordance with Article 21.6 of the DSU. As noted in that report, legislation to bring the Continued Dumping and Subsidy Offset Act (CDSOA) into conformity with US WTO obligations had been introduced in the last Congress in June 2003 and March 2004. In addition, on 2 February 2004, the US administration had, once again, proposed repeal of the CDSOA in its budget proposal for fiscal year 2005. The US administration would work with the new Congress, which had convened in January 2005, to enact legislation and would continue to confer with the complaining parties in these disputes, in order to reach mutually satisfactory resolutions of these matters. In that connection, the United States would be returning to a related agenda item later in the course of the present meeting.

13. The representative of the European Communities said that the implementation period in this dispute had expired more than a year ago, but Members were still in a situation where the United States had to take the very first steps to comply with the DSB's recommendations and ruling. The bills mentioned in the US status report had become void with the adjournment of the last Congress. The United States had, thus far, shown no willingness to implement the DSB's recommendations and worse, on several occasions, statements had been made questioning the need to do anything towards implementation. This directly undermined a core principle of the dispute settlement system. The widespread and systemic interests affected were disregarded for the interests of a few. He recalled that eight Members representing 71 per cent of total US exports and 64 per cent of total US imports had now the rights to retaliate against the United States. Most of the CDSOA disbursements benefited only a handful of companies. The failure of the United States had resulted directly in increased impairment of benefits of other WTO Members. The United States had just completed a fourth distribution of the collected duties. Around US$384 million had been transferred from exporters to their direct US competitors, which put the total amount distributed thus far at more than US$1 billion. The EC called on the US administration to convey to the new US Congress the need for immediate action in order to comply with the US WTO obligations. In the absence of such immediate action the EC would have no other option, but to exercise its retaliation rights.

14. The representative of Canada said that his country again noted the failure of the United States to comply with its WTO obligations with respect to this matter. As Members were aware, on 23 November 2004, Canada had launched a public consultation process with Canadians on its retaliatory options as a result of the US continued non-compliance in this dispute. The public consultations had ended on 20 December 2004. Submissions were currently being assessed by the Government of Canada. It had now been two years since the DSB had adopted the Appellate Body's decision, finding the Byrd Amendment to be inconsistent with the trade obligations of the United States. Canada's position was clear; the path to avoiding retaliation was to repeal the Byrd Amendment. Canada again called upon the United States to end this dispute and to repeal its WTO-inconsistent measure.

15. The representative of Japan said that, to date, the WTO-inconsistent CDSOA remained in effect and caused serious concerns among the WTO Membership. The WTO dispute settlement mechanism had often been hailed as one of the major achievements of the Uruguay Round negotiations, and Members had benefited substantially from its enhancement in comparison to the old

system under the GATT. Yet, instances of non-compliance such as the one related to CDSOA jeopardized the basis on which the rules-based WTO system had been found. In this light, Japan urged the United States to stand by the basic tenets of the WTO and to protect the interest of the WTO trading system. A prompt repeal of the CDSOA was imperative. The United States must act on its commitment towards meeting its WTO obligations. Only through adherence to the WTO rules, the United States could preserve the credibility of the dispute settlement mechanism. Japan wished to remind the United States that, together with the other seven complaining parties, it had now been entitled to suspend concessions or other obligations *vis-à-vis* the United States, pursuant to Article 22 of the DSU.

16. 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.2)

17. The Chairperson drew attention to document WT/DS160/24/Add.2, 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.

18. The representative of the United States said that his country had provided a status report in this dispute on 13 January 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration had been consulting on this matter with the new Congress, which had convened in January 2005. The US administration would continue to work with the Congress and confer with the EC in order to reach a mutually satisfactory resolution of this matter.

19. The representative of the European Communities said that the US status report, once again, indicated that the US administration had been consulting with the US Congress, and that it would continue to confer with the EC in order to reach a mutually satisfactory resolution. Unfortunately, this was not the first time in this case, or indeed in other disputes, that such an uninformative report had been submitted. He recalled that, three years ago, the EC had concluded a temporary arrangement with the United States in this case. The purpose of that arrangement was to give more time to the US Congress to introduce the necessary changes to Section 110(5) of the US Copyright Act, while providing in the meantime some relief to EC copyright holders. As the EC was aware, throughout the period in which that arrangement had been applicable, there had been no initiative by the US administration, or indeed, by the US Congress to introduce changes in the US legislation. This was, of course, extremely worrying due to systemic implications which had gone well beyond this case. Therefore, the EC hoped and expected that the US administration would convey to the US Congress the need to comply urgently with the US obligations under the TRIPS Agreement. As the EC had stated at the previous DSB meeting, the lack of implementation by the United States of the DSB's rulings was undermining efforts to ensure full compliance with the TRIPS obligations, an objective that the United States, the EC and all WTO Members shared. The EC recalled that it had reserved its right to reactivate, at any point in time, arbitration proceedings with regard to its request for retaliation against the United States pertaining to this case. The EC hoped, however, that a more productive approach to this dispute would prevail as a result of the necessary actions by the United States.

20. 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.1)

21. The Chairperson drew attention to document WT/DS204/9/Add.1, 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.

22. The representative of Mexico said that on 13 January 2005, pursuant to Article 21.6 of the DSU, his country had submitted the most recent status report regarding implementation in the case: "Mexico – Measures Affecting Telecommunications Services" (WT/DS204). In that status report, Mexico provided information regarding the notification of an agreement on implementation that had been reached by Mexico and the United States. Pursuant to that agreement, a reasonable period of time for implementation by Mexico, which was 13 months, would expire in July 2005. Mexico had complied with the first phase of that agreement, which had been notified accordingly to the DSB. Furthermore, Mexico was drafting regulations for the establishment of commercial agencies. Once that process was completed, Mexico would fully comply with the DSB's recommendations and rulings.

23. The representative of the United States said that his country wished to thank Mexico for its status report and looked forward to continuing consultations with Mexico as it worked to complete its implementation of the DSB's recommendations.

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

2. United States – Investigation of the International Trade Commission in softwood lumber from Canada

(a) Statement by the United States

25. The Chairperson said that this item was on the agenda of the present meeting at the request of the United States and invited the representative of the United States to make a statement.

26. The representative of the United States said that his country was pleased to report that it had implemented the DSB's recommendations and rulings in this dispute, as adopted at the 26 April 2004 DSB meeting. In July 2004, the US International Trade Commission had undertaken a four-month process that involved reopening its administrative record in the "Softwood Lumber from Canada" investigation to gather additional information, holding a public hearing, providing interested parties three opportunities to submit written comments, and engaging in additional analysis. That process had concluded with a new determination in November 2004, which had found that "an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value (LTFV)". In December 2004, the US anti-dumping and countervailing duty orders on softwood lumber from Canada had been amended to reflect the new determination.

27. The representative of Canada said his delegation welcomed the US statement on implementation a day ahead of schedule. Canada wished to thank the Panel and the Secretariat for their work on the dispute between Canada and the United States regarding softwood lumber, in this case the softwood lumber injury case. He recalled that at its special meeting on 26 April 2004, the DSB had adopted the Panel Report in the case "United States – Investigation of the International Trade Commission in Softwood Lumber from Canada". In its Report, the Panel had found that the threat of injury determination by the US International Trade Commission (ITC) was inconsistent with the US obligations under the Anti-Dumping Agreement and the SCM Agreement. The Panel had found that the US ITC determination that there would be a likely imminent substantial increase in

imports of softwood lumber products from Canada, was not one that could have been reached by an objective and unbiased investigating authority. As the US ITC's causation analysis was based on this same finding, the Panel had also found it to be inconsistent with the previously-mentioned Agreements. Consequently, the DSB had recommended that the United States bring its measures into conformity with its obligations under the Anti-Dumping and the SCM Agreements. Canada was reviewing the results of the US implementation and was aware of the time-lines going forward in this case. Canada would inform the DSB in due course of its response to the statement made by the United States that it had implemented the DSB's rulings and recommendations.

28. The DSB took note of the statements.

3. European Communities – Selected customs matters

(a) Request for the establishment of a panel by the United States (WT/DS315/8)

29. The Chairperson drew attention to the communication from the United States contained in document WT/DS315/8, and invited the representative of the United States to speak.

30. The representative of the United States said that it was with regret that the United States had to ask the DSB, at the present meeting, to establish a panel in this dispute. As described in its panel request, there were two principal issues in the dispute. The first was the EC's failure to administer its customs laws in an uniform, impartial and reasonable manner, as required by Article X:3(a) of the GATT 1994. The second was the EC's failure to maintain a forum for the prompt review and correction of administrative action relating to customs matters, as required by Article X:3(b) of the GATT 1994. The EC was a WTO Member in its own right and, accordingly, was subject to the obligations under the GATT 1994. However, the EC had failed to administer its customs laws and to provide for review and correction of customs decisions in a manner consistent with Article X of the GATT 1994. Customs law in the EC had been administered by member State authorities. Many key aspects of customs law administration had been left to member State discretion, reviewable by national courts. Review by an EC forum – the European Court of Justice – might be available only after years of domestic litigation. This system amounted to a trade barrier, and an especially burdensome one for small and medium-sized companies, which often lacked the resources necessary to find the most appropriate way to navigate the EC's complex system. The problem was widespread and systemic. The United States had discussed these issues in detail with the EC during consultations on 16 November 2004. In fact, these consultations had been the most recent in a series of attempts over the past seven years to have the EC address the question of customs administration. Regrettably, these consultations had not yielded a resolution of this dispute. While the United States remained open to addressing its concerns through further discussions with the EC, it believed that the only way to make progress at this time was to ask for the establishment of a dispute settlement panel.

31. The representative of the European Communities said that the EC strongly regretted the refusal of the United States to engage in a meaningful dialogue on this issue, and instead had proceed to litigation. Contrary to what the United States claimed, the issues subject to this dispute had not been raised in the relevant bilateral or multilateral fora in the past. The exact nature of the US concerns remained unclear to the EC. The United States had failed – before, during and after the WTO consultations – to provide a single example of real and practical problems for US operators resulting from the application of EC customs measures. When the United States had published this case in the Federal Register, the US authorities had received only three submissions from the US industry, none of which constituted any evidence in support of the US allegations of lack of uniformity in the application of EC customs measures. The failure of the United States to identify any concrete problems had made it impossible to explore an amicable solution to this dispute. He said that the United States seemed to allege that the EC should establish a single centralized customs administration in order to ensure uniformity in customs treatment across the EC. The United States also seemed to claim that the EC must provide for immediate review of customs decisions at the EC

level, as opposed to the review of those decisions by member States authorities and tribunals. These were questions regarding the distribution of competences in the administration of customs rules within the internal legal order of a WTO Member which had gone well beyond of what was required by the WTO rules. The EC had in place harmonized customs rules and institutional and administrative measures – enforced by the EC Commission and the European Court of Justice – to prevent divergent practices. These ensured effective co-ordination between the EC member States and uniform customs treatment in all member States. The EC considered, therefore, that it was fully in compliance with all WTO rules relating to customs matters. The EC accordingly objected to the establishment of a panel requested by the United States.

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

4. United States – Continued suspension of obligations in the EC - Hormones dispute

(a) Request for the establishment of a panel by the European Communities (WT/DS320/6)

33. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS320/6, and invited the representative of the European Communities to speak.

34. The representative of the European Communities said that the dispute under consideration was about the US ongoing suspension of obligations under the WTO Agreement *vis-à-vis* the EC and the continued imposition by the United States of tariff duties in excess of bound rates on imports from the EC. He further stated that the dispute was also about the US unilateral determination of alleged non-compliance by the EC and the US failure to invoke Article 21.5 of the DSU for settling the existing disagreement with the EC regarding implementation in the EC – Hormones dispute. He recalled that on 27 October 2003, the EC had notified the DSB of the adoption of its new Hormones Directive. As the EC had explained at that time, this Directive had removed the measure found to be inconsistent with the WTO Agreement in the EC – Hormones dispute, since it had been preceded by a thorough and independent scientific risk assessment, in particular through the opinions of the independent Scientific Committee on Veterinary Measures relating to Public Health. He recalled that at the 7 November 2003 DSB meeting the United States had disagreed with the EC's position. It had expressly denied that the new Directive was based on science and that it had implemented the DSB's recommendations and rulings. Despite that disagreement, the United States had refused to initiate dispute settlement proceedings under Article 21.5 of the DSU in order to obtain a multilateral review of the new Directive's compliance with the DSB's recommendations and rulings. The United States had also refused to accept the EC's offer for a mutually agreed procedure in the WTO to resolve the disagreement over compliance.

35. As announced in the DSB, to date, the United States maintained the suspension of obligations in relation to imports from the EC. The EC had initiated this dispute because it had no other option. The challenge by the EC of the US sanctions demonstrated the EC respect for the WTO as the proper forum to resolve trade disputes instead of the unilateral maintenance of sanctions. Specifically, the application of sanctions beyond the moment at which the respondent removed the measure found to be inconsistent with a covered agreement obviously violated Article 22.8 of the DSU. The imposition of import duties in excess of bound rates on imports from the EC, without continuing authorization from the DSB to suspend obligations, was inconsistent with Articles I and II of the GATT 1994. The United States continued to suspend obligations and to impose excess duties and had unilaterally made a determination to the effect that there was a violation of obligations under a covered agreement. Without recourse to the DSU provisions in such a situation, the US course of action was inconsistent with Article 23 of the DSU. In the given situation where there was a disagreement as to the consistency with a covered agreement of measures taken to comply with the DSB's recommendations and rulings, Article 21.5 of the DSU obliged the parties to have recourse to dispute settlement

procedures. The United States had regrettably failed to honour this obligation. Therefore, the EC was requesting the establishment of a panel at the present meeting.

36. The representative of the United States said that his country regretted that the EC had chosen to request the establishment of a panel. The United States was in the course of reviewing the studies and documents referred to in the EC's panel request in support of its measure. To date, the United States failed to see how the revised EC's measure could be considered to implement the DSB's recommendations and rulings in this matter. To assist in its review of the EC's new measure, on 13 December 2004, the United States had requested, pursuant to Article 5.8 of the SPS Agreement, that the EC provide an explanation of the reasons for the restrictions contained in its new measure. As of the present meeting, the United States had received no response to that request. The United States noted that the EC appeared to argue in its panel request that, through its unilateral declaration of compliance, the EC had somehow invalidated the DSB's authorization to suspend concessions or other obligations in this dispute. This was not a plausible interpretation of the DSU. The actions taken by the United States pursuant to the DSB's authorization were entirely consistent with US WTO obligations. In light of these considerations, the United States was not in a position to accept the establishment of a panel at present meeting.

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

5. Canada – Continued suspension of obligations in the EC - Hormones dispute

(a) Request for the establishment of a panel by the European Communities (WT/DS321/6)

38. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS321/6, and invited the representative of the European Communities to speak.

39. The representative of the European Communities said that the EC would not wish to reiterate the comments made under the previous agenda item, given that the background to both disputes was the same. The EC was well aware of Canada's disagreement with the scientific conclusions resulting from the EC's independent risk assessment. Despite that disagreement on the substance, the EC would have expected Canada to take a different approach on the procedure to solve the disagreement on compliance. Like the EC, Canada had traditionally been a strong supporter of multilateralism and the WTO dispute settlement system. He then drew attention to an extract from Canada's third-party submission to the Panel in the case "United States – Section 301" which read as follows: "A Member that makes a determination unilaterally that another Member has failed to bring a measure found to be inconsistent with a covered agreement into compliance with that agreement (also) violates Article 23 in that the DSU establishes a procedure for determining the consistency of the measure. Such a unilateral determination of non-compliance without recourse to the DSU procedures amounts to a determination that a violation has occurred other than through recourse to DSB dispute settlement procedures." Like the United States, Canada had refused to initiate dispute settlement proceedings under Article 21.5 of the DSU in order to obtain a multilateral review of the new EC Directive's compliance with the DSB's recommendations and rulings. Canada had also refused to accept the EC's offer for a mutually agreed procedure in the WTO to resolve the disagreement over compliance. As announced in the DSB, to date, Canada maintained the suspension of obligations in relation to imports from the EC. As indicated before, the EC believed that this course of action was inconsistent with Canada's obligations under Articles I and II of the GATT 1994 and Articles 23, 22.8 and 21.5 of the DSU. He did not wish to repeat the legal arguments supporting this view, which were equally valid for Canada. Therefore, the EC was requesting the establishment of a panel at the present meeting.

40. The representative of Canada said that his country was puzzled by the EC's position in respect of this issue. Canada's measures had been taken pursuant to an authorization from the DSB. The EC had not challenged that proposition. Canada was authorized to take these measures because the EC

had expressly failed to bring itself into compliance within a reasonable period of time. The EC had not challenged this fact either. And while the EC had referred to Article II of the GATT 1994 in its earlier statement with respect to the case against the United States, the EC was well aware that the DSB's authorization to retaliate remained in force and had not been abrogated or invalidated by this party. The EC now asserted that it was in compliance. And it had stated that it was in compliance because of its own notification to the DSB. But it had neither sought nor had received a multilateral determination that this was the case. The EC had thus asserted that its unilateral determination and declaration of compliance should override and annul the authorization of the DSB to suspend concessions in this case. And it had now proposed to seek a panel to justify its own unilateral determination. Canada would indeed be happy to discuss further with the EC the reasons why it considered itself to be in compliance with its obligations under the WTO Agreement. But it could not accept that the EC's unilateral declaration of compliance somehow invalidated Canada's multilateral authorization to suspend concessions. With respect to the statement made by the EC on Canada's commitment to multilateralism, he said that Canada remained committed to multilateralism. Canada rejected the EC's approach and did not consent to the EC's request for the establishment of a panel.

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

6. United States – Tax treatment for "Foreign Sales Corporations"

(a) Second recourse to Article 21.5 of the DSU by the European Communities: Request for the establishment of a panel (WT/DS108/29)

42. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS108/29, and invited the representative of the European Communities to speak.

43. The representative of the European Communities said that the repeal of the FSC/ETI bill represented a major and welcome step towards solving this long-standing dispute. Although it had taken more than four years to arrive at this result, and there were still issues that raised important concerns, the EC appreciated the effort put into this by relevant parties in the United States and notably in the US Congress. The EC Commission had accordingly proposed to the EC Council to suspend the EC Council Regulation 2193/2003 applying additional duties on a number of US products in recognition of that fact. This suspension was without prejudice to its rights under Article 22 of the DSU. The repeal Act, however, included transitional and grandfathering provisions, which appeared to be WTO-incompatible. In particular, the repeal Act provided that FSC/ETI benefits would still be available to US exporters up to the end of 2006 and, in some cases, for an unlimited period thereafter. As Members were aware, similar provisions had been condemned in the past. The EC strongly believed that if there was a divergence of views between WTO Members on whether measures taken to comply with a WTO ruling were consistent with the WTO Agreement, such disagreement must be resolved through the WTO dispute settlement system in accordance with the standard dispute settlement procedures (i.e. compliance panel under Article 21.5 of the DSU). A WTO dispute settlement procedure on the repeal Act had, therefore, been initiated. The EC hoped that since this was a compliance panel, the United States would accept in this case, as in other previous cases, to have such a panel established already at the present meeting. He stressed that the EC's request to establish a panel was without prejudice to the EC's continuous readiness to explore with the United States ways to end this long-standing dispute.

44. The representative of the United States said that on 24 November 2004, his country had informed the DSB of the enactment by the United States of the American Jobs Creation Act of 2004 (AJCA). The AJCA had repealed the tax exclusion of the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000" (ETI Act). It had thereby withdrawn the subsidy that had previously been found to exist and brought the measure in question into conformity with US WTO obligations. As the United States had previously explained, the AJCA was the most significant piece of US tax legislation

in 20 years. Because the repeal of the ETI provision was a significant change to the US tax law, the ETI repeal bill included rules to provide a smooth and orderly transition. The transition rules in the ETI repeal bill were consistent with transition rules typically provided in tax legislation that made changes of this magnitude. These transition rules were intended to prevent the legislation from having a retroactive effect on taxpayers who had entered into arrangements in reliance on then-applicable law. Transition rules were a common feature of US tax legislation and, the United States believed, of tax legislation of other Members. US Congressional leaders had consulted frequently with the EC over the course of the legislative effort, including on the transition rules. The United States had asked the EC to identify any particular commercial problem caused by the transition rules, and the EC had never identified any. Therefore, the United States was particularly surprised and disappointed with the EC's criticisms and its decision to prolong this dispute by requesting the establishment of yet another panel. Therefore, the United States was not in a position to accept the establishment of a panel at the present meeting.

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

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

(a) Joint request by Australia and the United States (WT/DS217/44)

(b) Joint request by Thailand and the United States (WT/DS217/45)

(c) Joint request by Indonesia and the United States (WT/DS217/46)

46. The Chairperson proposed that the three sub-items to which she had just referred be considered together since they pertained to the same matter. She then drew attention to the communication from Australia and the United States contained in document WT/DS217/44 and invited the representative of Australia to speak.

47. The representative of Australia said that in document WT/DS217/44 her country and the United States had informed the DSB of an Understanding reached with respect to the dispute "United States – Continued Dumping and Subsidy Offset Act of 2000" (WT/DS217). As set out in that document, Australia requested, jointly with the United States, that the DSB adopt the draft decision contained in WT/DS217/44. The Understanding reached between Australia and the United States recognized that the United States remained in non-compliance with the recommendations and rulings of the DSB in this dispute, and that Australia was entitled to request authorization from the DSB to suspend concessions or other obligations, pursuant to Article 22.2 of the DSU. Nevertheless, because Australia did not wish to proceed to seek authorization to retaliate at this point, the Understanding and the requested DSB decision were designed to preserve the respective rights of both parties at this point in time. Consequently, as set out in document WT/DS217/44, Australia requested, jointly with the United States, that at the present meeting the DSB "take note of the Understanding reached between Australia and the United States and agree that, upon a request by Australia, the DSB shall grant Australia 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".

48. The Chairperson drew attention to the communication from Thailand and the United States contained in document WT/DS217/45 and invited the representative of Thailand to speak.

49. The representative of Thailand said that, first of all, his country was grateful for the opportunity to include this item on the agenda of the present meeting. In document WT/DS217/45, Thailand and the United States had informed the DSB of an Understanding reached with respect to the dispute "United States – Continued Dumping and Subsidy Offset Act of 2000" (WT/DS217). As set

out in that document, Thailand was requesting, jointly with the United States, that the DSB adopt the draft decision contained in WT/DS217/45. The Understanding reached between the United States and Thailand coincided in terms of format and substance with the Understanding reached between the United States and Australia as well as the one between the United States and Indonesia. It recognized that the United States remained in non-compliance with the recommendations and rulings of the DSB in this dispute, and that Thailand was entitled to request authorization from the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. However, as Thailand decided to refrain from seeking authorization to retaliate against the United States at this stage, the Understanding and the requested DSB decision were designed to preserve the respective rights of both parties at this point in time. In this regard, as set out in document WT/DS217/45, Thailand requested, jointly with the United States, that at the present meeting the DSB "take note of the Understanding reached between Thailand and the United States and agree that, upon a request by Thailand, the DSB shall grant Thailand 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".

50. The Chairperson drew attention to the communication from Indonesia and the United States contained in document WT/DS217/46 and invited the representative of Indonesia to speak.

51. The representative of Indonesia recalled that on 11 January 2005, Indonesia and the United States had agreed to an Understanding with respect to the dispute "United States – Continued Dumping and Subsidy Offset Act of 2000" (WT/DS217). Accordingly, Indonesia and the United States, at the present meeting, jointly requested the DSB to adopt the draft decision as contained in document WT/DS217/46. Furthermore, Indonesia asked that "the DSB take note the Understanding reached by the United States and Indonesia and agree that, upon a request by Indonesia, the DSB shall grant Indonesia authorization to suspend concession or other obligation 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".

52. The Chairperson invited the representative of the United States to speak.

53. The representative of the United States said that his country joined Australia, Indonesia, and Thailand in requesting that any consideration by the DSB of a request for authorization to suspend concessions or other obligations by one of these Members be in accordance with the joint requests submitted to the DSB. Those documents provided that upon request of Australia, Indonesia, or Thailand, "the DSB shall grant 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. Decisions to be taken at the present meeting would assist the parties in their efforts to resolve procedural issues in this dispute in a mutually agreeable manner. The United States appreciated the DSB's support in this regard.

54. The representative of Japan said his country had no objection with regard to the decisions to be taken by the DSB at the present meeting, as set out in documents WT/DS217/44, WT/DS217/45 and WT/DS217/46. However, in light of its systemic interest, Japan wished to make the following statement for the record. Japan noted that a similar Understanding had been reached in another dispute involving Malaysia and the United States (DS58). However, at that time, no DSB decision had been sought. At the present meeting, the DSB was requested to take decisions as described in the respective requests. In the draft decisions pertaining to this dispute, the phrase "upon a request by" was used. In Japan's view, that phrase could suggest that the authority of the DSB to take a decision derived solely from the three requests lodged by the respective Members. Japan, however, understood

that the authority of the DSB to take a decision to grant authorization to suspend concessions or other obligations derived from the relevant DSU provisions.

55. The DSB took note of the statements.

56. The Chairperson proposed that: "The DSB take note of the Understanding reached between Australia and the United States and agree that, upon a request by Australia, the DSB shall grant Australia 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."

57. The DSB so agreed.

58. The Chairperson proposed that: "The DSB take note of the Understanding reached between Thailand and the United States and agree that, upon a request by Thailand, the DSB shall grant Thailand 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."

59. The DSB so agreed.

60. Finally, the Chairperson proposed that: "The DSB take note of the Understanding reached between Indonesia and the United States and agree that, upon a request by Indonesia, the DSB shall grant Indonesia 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."

61. The DSB so agreed.