WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/210
30 May 2006

(06-2577)

Dispute Settlement Body
21 April 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 April 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

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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.41)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.41)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.16)

(d) European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs: Status report by the European Communities (WT/DS174/25/Add.3 – WT/DS290/23/Add.3)

(e) United States – Measures affecting the cross-border supply of gambling and betting services: Status report by the United States (WT/DS285/15/Add.1)

(f) European Communities – Countervailing measures on dynamic random access memory chips from Korea: Status report by the European Communities (WT/DS299/8)

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 then proposed that the six 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.41)

2. The Chairman drew attention to document WT/DS176/11/Add.41, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 10 April 2006, in accordance with Article 21.6 of the DSU. As noted in the report, several legislative proposals relating to section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both houses of Congress. The US administration was working with the US Congress to implement one or more of these legislative vehicles to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that the effective and non-discriminatory protection of intellectual property rights worldwide was a key element in the further development of international trade. This was well understood by the United States, which was a key promoter of the TRIPS Agreement and remained strongly committed to pursue strong and non-discriminatory protection of those rights. This stood in sharp contrast with the persisting passivity of the United States when it came to respect other Members' rights not only in this dispute but also in the Section 110 dispute, which would be also taken up in the course of the meeting. The US behaviour undermined the authority of the TRIPS Agreement and ran against the objective of enhancing the protection of intellectual property rights. Yet, repealing bills were pending in the US Congress. Their adoption would remove a discriminatory legislation that was driven by specific interests and would bring a satisfactory solution to this dispute.

5. The representative of Cuba said that, once again, Members were examining implementation of the DSB's recommendations regarding Section 211 of the US Omnibus Appropriations Act of 1998, an item that had been on the agenda of the DSB meeting for over four years. If one were to be objective, the title of this item should be changed so as to read: "Surveillance of Non-Implementation". The United States continued to repeat the ritual of presenting Members with identical reports, the only change being the date, as these reports did not indicate anything about actions which should be taken by the United States in order to meet its WTO obligations. The US status report provided no such information because, quite simply, the United States was doing nothing, apart from deceiving and making a mockery of the DSB. It was obvious that the United States now felt sheltered by the understanding that it had reached with the EC, which was to its advantage since that understanding set no deadline for meeting the US WTO obligations and ensured that no retaliation was imposed against the United States for its lack of compliance.

6. It had become a regular practice for the United States to breach its obligations time and again in the WTO while applying an obvious double standard by preaching and pressurising other countries to respect their obligations. Cuba wondered whether any credibility could be attached to a multilateral trading system based on binding rules and allegedly equal obligations for all participants, when one of its major players maintained an attitude of persistent and open defiance. In contrast, those developing countries that had come under review in dispute settlement proceedings had done their utmost to observe the principle of prompt compliance set forth in the DSU and had implemented the DSB's recommendations without undue delay, despite serious difficulties and considerable efforts that this had entailed for their Governments.

7. Cuba did not, and would not, forgo its right to resort to the dispute settlement mechanism when it saw fit. However, Cuba was concerned about systemic implications of such understandings because the DSB's decisions constituted obligations for Members. Compliance with these obligations was in the interests of all and could not and must not be circumvented by any Member. Cuba pressed its appeal to Members to secure observance of the letter of the multilateral trade agreements and their decisions, by demanding that the United States comply immediately, unconditionally and without further delay with all the DSB's rulings and recommendations, in particular those pertaining to this dispute, by repealing Section 211 which was unjust and discriminatory.

8. The representative of China said that, due to its systemic interest his delegation continued to be concerned about the progress in this dispute. Since the adoption on 2 February 2002 of the Panel

and the Appellate Body Reports pertaining to this dispute more than four years had passed. China appreciated US efforts made during these four years towards implementation of the DSB's rulings, but regretted that there was no indication when the matter would be resolved to the satisfaction of the parties and other Members. Such delays caused systemic concerns about the efficiency of the dispute settlement system. China believed that the WTO dispute settlement should constitute an effective and efficient system for trade disputes, which would bring a degree of certainty and predictability to international trade for all its Members. In the meanwhile, prompt implementation in this dispute was not only beneficial for other Members, but also for the United States which was the advocate of intellectual property rights at all foras. Once again, China wished to join the EC and Cuba in urging the United States to implement the DSB's decision in this dispute as soon as possible.

9. The representative of Brazil said that in view of the systemic relevance of the issue discussed under this item, his country expressed concerns about the continuation of the non-compliance situation in this dispute. More than four years had passed since the adoption by the DSB of the Panel and the Appellate Body Reports, but no implementing action had yet been taken by the United States. Perhaps more importantly, he noted that at this point in time there was no tangible sign in the short status report which had been provided by the United States that the matter would be settled soon. As Brazil had repeatedly stated, prompt and full implementation of the DSB's rulings and recommendations was one of the major means to keep the rules-based multilateral trading system credible and vibrant. In light of these considerations, Brazil urged the United States to take the necessary and urgent steps to implement the relevant DSB's rulings and recommendations.

10. The representative of India said that his country continued to remain concerned that this item had been on the DSB's agenda for a very long time without any indication when the matter would be resolved, and the parties had also not been able to provide any information to the DSB on the likely date of resolution. He reiterated that Members needed to reflect upon the systemic concerns about efficacy of the dispute settlement system, and to think about steps required to address these systemic concerns.

11. The representative of Argentina said that, like previous speakers, his country wished to express its systemic concern with regard to the delays in implementing the DSB's recommendations and rulings. Such delays were particularly evident in the dispute under consideration which had now been on the DSB agenda for over four years. It was Argentina's firm belief that prompt compliance with the DSB's recommendations and rulings was a critical element of the WTO dispute settlement system. There could be no doubt that long delays in implementation adversely affected the credibility of this system to the detriment of all Members. In this respect, Argentina urged the United States to redouble its efforts to ensure immediate compliance with the DSB's recommendations and rulings in the Section 211 dispute.

12. The representative of the Bolivarian Republic of Venezuela said that her delegation welcomed the status report by the United States regarding implementation of the DSB recommendations and rulings in the dispute "US – Section 211". However, as her delegation had already stated at previous meetings, her country was concerned about the US status report because that report offered no certainty that the decisions of the DSB were being implemented or would be implemented in the near future. This might have systemic implications. In this respect, her country wished to be fully associated with the statement made by Cuba and urged the United States to make every possible effort to modify its legislation as soon as possible and to comply with the DSB's rulings.

13. The representative of Canada said that his country thanked the United States for its status report in this dispute. Like other Members, Canada continued to be disappointed that the United States had not yet been able to bring itself into compliance with the DSB's recommendations and rulings. The WTO dispute settlement mechanism was best served when, in accordance with Article 21.2 of the DSU, Members fulfilled their obligations in a timely manner and in accordance

with the DSB's recommendations. At the same time, Members should not lose sight of Article 3.7 of the DSU, where they had agreed that, "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." Indeed, Article 3.4 of the DSU provided that the rulings and recommendations of the DSB shall be aimed at achieving a satisfactory settlement of the matter. Members had the right, and every interest, to ensure that any such settlements were consistent with the WTO Agreement. However, where Members sought, at any stage of the proceedings, to settle their disagreements and disputes, parties to a dispute should be encouraged in their efforts.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.41)

15. The Chairman drew attention to document WT/DS184/15/Add.41, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

16. The representative of the United States said that his country had provided a status report in this dispute on 10 April 2006, 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 in this dispute. The US administration continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments. The US administration would continue to work with the US Congress to enact legislation until those changes were made to implement the DSB's recommendations and rulings.

17. The representative of Japan said that his country noted the US status report and the fact that that there had been no new developments. As the status report reaffirmed, the US administration would continue to work with the US Congress to enact the H.R. 2473, which had been put before the US Congress in May 2005. Japan urged the United States to make further efforts to pass the legislation promptly. Japan emphasized that a full and prompt implementation of the recommendations and rulings of the DSB was essential for the credibility of the system and believed that this objective was shared by the United States.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.16)

19. The Chairman drew attention to document WT/DS160/24/Add.16, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

20. The representative of the United States said that his country had provided a status report in this dispute on 10 April 2006, in accordance with Article 21.6 of the DSU. As the report indicated, the US administration was working closely with the US Congress, and conferring with the EC, in order to reach a mutually satisfactory resolution of this matter.

21. The representative of the European Communities said that it was with deep regret and concern that the EC wished to emphasize again the lack of progress in the United States in solving this dispute. Almost five years after adoption of the Panel Report in this dispute, the United States had done little to solve this dispute and maintained a legislation that blatantly violated intellectual property rights and hurt the interests of music creators. The EC had received assurances from the United States that the US administration was actively discussing with the US Congress possible solutions to this dispute. But, the EC was still waiting for more detailed information on the concrete initiatives of the US Administration *vis-à-vis* the US Congress. The EC called upon the United States to take the necessary action to end a situation of non-compliance that had already lasted too long. Finally, the EC wished to recall that it reserved its right to reactivate, at any point in time, the arbitration proceedings on retaliation.

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

(d) European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs: Status report by the European Communities (WT/DS174/25/Add.3 – WT/DS290/23/Add.3)

23. The Chairman drew attention to document WT/DS174/25/Add.3 – WT/DS290/23/Add.3, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning protection of trademarks and geographical indications for agricultural products and foodstuffs.

24. The representative of the European Communities recalled that at the 20 January 2006 meeting, the EC had informed the DSB that the European Commission had proposed to the Council of the European Union a new Regulation on Geographical Indications which would implement the findings and recommendations of the DSB in this dispute. As stated in the status report already communicated to the DSB, that proposal had been adopted by the Council on 20 March 2006. This new Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs had been published in the Official Journal of the European Union on 31 March 2006 and had entered into force on the same day. Thus, the EC had fully complied with the DSB's rulings and recommendations within the reasonable period of time, which had been agreed with Australia and the United States.

25. The representative of the United States said that his country thanked the EC for its status report. He recalled that in previous meetings, the United States had highlighted a concern that, in a number of respects, the GI regulation proposed by the EC in December 2005 would introduce further encroachments on TRIPS-protected trademark rights beyond those in the previous GI regulation. The United States acknowledged that the EC had made certain changes in its final regulation that had addressed these concerns, and the United States thanked the EC for these improvements. However, certain aspects of the final GI regulation remained of concern, and the United States was not in a position at the present meeting to accept the EC's view that it had complied with the DSB's recommendations and rulings in this dispute.

26. For instance, the previous Article 14(2) provided for the continued use of trademarks that acquired rights before the submission in the EC of a registration application for a conflicting GI. In the final regulation, this applied only to trademarks acquiring rights before 1 January 1996, leaving any additional trademarks acquiring rights after 1 January 1996, potentially vulnerable. This change was particularly significant because the DSB relied on the previous version of Article 14(2) in finding that the regulation's violation of trademark obligations under Article 16 of the TRIPS Agreement was justified because the regulation imposed only very narrow exceptions to trademark rights. The significant expansion of these exceptions in the new regulation was, therefore, a matter of concern to the United States.

27. Second, it appeared that the 1 January 1996 date in the new Article 14(2) was intended to correspond to Article 24.5 of the TRIPS Agreement. Article 24.5 required, *inter alia*, that GI measures not prejudice the use of trademarks acquiring rights before the date of application of the TRIPS Agreement in the WTO Member concerned. While 1 January 1996, might be the appropriate date for the EC itself, several EC member States had TRIPS application dates later than 1 January 1996. Lithuania had, for example, only acceded to the WTO on 31 May 2001. For these EC member States, Article 24.5 applied to trademarks acquiring rights before the date of application of the TRIPS Agreement as to the EC member States concerned, which was after 1 January 1996. The new GI regulation ignored that. In any case, the EC should recall the DSB's finding that Article 24.5 of the TRIPS Agreement did not provide any authority to limit trademark rights, and that any exceptions to trademark rights must fit within the narrow bounds of Article 17 of the TRIPS Agreement. The United States hoped that the EC would take these comments into account in considering further amendments to its GI regulation and in applying this regulation. The United States would continue to examine the regulation and how it was applied.

28. The representative of Australia said that her country welcomed the actions taken by the EC in response to the recommendations and rulings of the DSB in this dispute. Australia appreciated the EC's willingness to consider the concerns expressed by Australia about the new regulation as originally proposed, and noted that the regulation as adopted by the EU Council included a number of amendments to overcome those concerns. However, Australia too was concerned that the protection of prior trademark rights provided by Article 14(2) of the new regulation might be limited to trademark rights acquired before 1 January 1996. Australia endorsed the points made by the United States on this issue. Limiting the protection of prior trademark rights to those acquired before 1 January 1996 undermined the basis of the Panel's findings that the breach of the EC's obligations in respect of trademark rights was justified under Article 17 of the TRIPS Agreement.

29. In addition, Australia noted that Article 14(2) of the new regulation established 1 January 1996 as the cut-off date for the protection of prior trademark rights throughout the existing territory of the EC. However, many current EC member States were not part of the territory of the EC as of 1 January 1996, even if they were WTO Members. Two questions immediately arose. First, was a retrospective limitation on trademark rights in respect of those EC member States which were not part of the EC's territory as at 1 January 1996 consistent with the EC's rights and obligations under the TRIPS Agreement? Second, was a retrospective limitation on trademark rights in respect of those EC member State which were not part of the EC's territory as at 1 January 1996 justifiable as a limited exception to trademark rights under Article 17 of the TRIPS Agreement? In Australia's view, the answer to both of these questions was no. Australia trusted that this aspect of the new regulation would be corrected. Finally, Australia assumed that the EC would exercise the significant level of decision making discretion provided by the new regulation in a manner fully consistent with the EC's WTO obligations, in particular those obligations relating to national treatment and the rights required to be granted to trademark owners.

30. The representative of the European Communities said that Article 14(2) of the Regulation was not intended to, and did not legally alter the relationship between trademarks and geographical indications to the detriment of trademarks as compared to the situation which had prevailed under the previous EC Regulation (Regulation 2081/92), and which the Panel had found to be compatible with the TRIPS Agreement in this dispute. The EC had already provided a number of clarifications bilaterally to interested Members on this issue, but stood ready to continue bilateral contacts and provide any further clarifications that might be needed. With regard to the concerns on other aspects of the EC Regulation raised by the United States and Australia, he would refer to the clarifications provided by the EC in the DSB meeting held on 17 February 2006. The EC had also already provided a number of clarifications bilaterally to interested Members. The EC was confident that the new

regulation fully complied with its WTO obligations, but naturally stood ready to continue bilateral contacts and provide any further clarifications that might be needed on this matter.

31. The DSB took note of the statements.

(e) United States – Measures affecting the cross-border supply of gambling and betting services: Status report by the United States (WT/DS285/15/Add.1)

32. The Chairman drew attention to document WT/DS285/15/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures affecting the cross-border supply of gambling and betting services.

33. The representative of the United States said that compliance with the recommendations and rulings of the DSB in this dispute related exclusively to the sole point of whether the United States was now able to show that relevant US laws did not discriminate against foreign suppliers of remote gambling on horse racing. US laws did not discriminate, and the United States could show this. As noted in the status report that the United States had submitted on 5 April 2006, the US Department of Justice had stated the position of the US Government regarding remote gambling on horse racing in testimony before a subcommittee of the US House of Representatives. The Department of Justice had explained that: "The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes."

34. In view of these circumstances, the United States was in compliance with the recommendations and rulings of the DSB in this dispute. The United States was aware from public statements that Antigua and Barbuda had a different understanding of the findings and conclusions of the DSB in this dispute. The United States believed that that understanding was incorrect, and that Antigua's misreading of the results of this dispute had fostered misperceptions concerning their implications. To set the record straight, he said that it might be helpful to recall certain key points about the actual results of this dispute. First, this was an issue of public morals and public order. The findings and conclusions in this dispute included an express finding that the measures at issue "are 'measures ... necessary to protect public morals or to maintain public order'" under the exception provided for in Article XIV(a) of the GATS. Second, the Appellate Body had made it clear that the sole outstanding issue under Article XIV related to horse racing. Under the chapeau of Article XIV, the Appellate Body had concluded that "the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services, notwithstanding the [Interstate Horseracing Act]...".[1] The findings and conclusions adopted by the DSB reflected this, stating that the United States had not "shown, in the light of the Interstate Horseracing Act" the non-discriminatory application of the relevant measures. Notwithstanding any assertions to the contrary, this question concerning horse racing is the only issue. Third, the Appellate Body had expressly clarified that "the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the [Illegal Gambling Business Act]."

35. Against this background, the considerations relevant to compliance in this dispute were clear and straightforward. The issue under Article XIV – the "only" issue, according to the Appellate Body – was the treatment of horseracing. As noted in the US report and its statement made at the present

[1] Appellate Body Report: "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", WT/DS285/AB/R, para. 371.

meeting, the US chief law enforcement agency, the US Department of Justice, had explained that US criminal statutes prohibited the interstate transmission of bets or wagers, including wagers on horse races; that it was currently undertaking a civil investigation relating to a potential violation of law regarding this activity; and that it did not believe that the Interstate Horse Racing Act had amended relevant criminal statutes. The United States hoped that this explanation put to rest any lingering misperceptions of the rulings and recommendations that the DSB had in fact adopted in this dispute.

36. The representative of Antigua and Barbuda said that his delegation thanked the United States for that recollection of the history of the rulings of the DSB, which it found somewhat selective. To no one's surprise, his country disagreed with that interpretation and was disappointed with the statement made by the United States at the present meeting. His country found it rather incredible that the United States would take the position that in essence it had been in compliance with the rulings and recommendations of the DSB in this matter all along. This was particularly ironic given the statement made by the United States in its submission that had been made in the summer of 2005 to the arbitrator appointed to establish the reasonable period of time for compliance that "In this dispute, both the legal form of implementation and the technical complexity of the contemplated measures requires a reasonable period of time of no less than 15 months". In that same submission the United States had further stated that it would be seeking to come into compliance through legislation and that such legislation would be "technically complex". Although his country had argued before the arbitrator that the United States could go a long way toward compliance by simple and prompt action by the executive branch of government, the United States had insisted that it would have to follow the legislative process in order to become compliant. The arbitrator's award of 11 months and two weeks was clearly dependent upon that position of the United States. For the United States to have taken that position with not only Antigua and Barbuda but with the WTO arbitrator, to buy itself an additional period of almost a year and then to state in effect that it had been compliant all along, not only reflected poorly on the United States and its good offices, but also put into question the efficacy of the dispute resolution process.

37. Clearly then, it would seem to his country that the United States believed that the Panel and the Appellate Body in this dispute had simply gotten the matter wrong by concluding that the United States had not met its burden of proof with respect to the chapeau of Article 14 of the GATS, and that the United States was going to use Article 21.5 proceedings to reassert its case and "meet its burden of proof " in the second go-round. The position of the US Department of Justice that the USTR had used now to assert its "compliance" was in fact no different to the position which had been raised during the course of the proceedings and found unpersuasive by both the Panel and the Appellate Body. How a Member could take a position already adjudicated in the dispute and assert that exact same position as a basis for coming into compliance with the DSB's recommendations and rulings was beyond his delegation's comprehension.

38. If this matter were to go to a compliance panel under Article 21.5 of the DSU, it would be, his country believed, the first instance in which a Member had gone before a compliance panel on the basis of having done nothing at all to bring itself into compliance with the DSB's rulings and recommendations. This was deeply troubling, not only to his country, but for the health of the dispute resolution system. What it meant to his country was that the United States might indeed have bought itself yet another year during which it could assert its offending measures against Antiguan industry with seeming impunity, while its "compliance" wound its way through the Article 21.5 procedure and it would have bought this extra year – extra two years really – taking into account its dissembling with respect to the reasonable period of time, and having done nothing at all to come into compliance.

39. If this was a flaw in the system, it should be fixed. Members should not be allowed to take the rules to illogical extremes to subvert the process. The need for urgency in the resolution of disputes, was explicitly written throughout the DSU. It was clear that the objective was expediency and even more so, when impairment effected a developing country such as Antigua and Barbuda. It

was difficult to understand why an overt objective of fair and fast resolution of trade disputes should be subject to substantial dilution by recourse to legalistic and formulaic approaches to what the written word of the rules might be stretched to permit. While his country was not certain where this dispute was headed from here, it was certain of its commitment to seeing this process through to the end, whenever and however long it might take.

40. The DSB took note of the statements.

(f) European Communities – Countervailing measures on dynamic random access memory chips from Korea: Status report by the European Communities (WT/DS299/8)

41. The Chairman drew attention to document WT/DS299/8 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 countervailing measures on dynamic random access memory chips from Korea.

42. The representative of the European Communities said that on 10 April 2006, the EC had submitted a status report on its progress in the implementation of the DSB's rulings and recommendations in the dispute under consideration, in accordance with Article 21.6 of the DSU. At that time, the Council of the European Union had just adopted the Commission's proposal implementing the DSB's rulings and recommendations by way of amending the Council Regulation which had imposed a countervailing duty on DRAMS originating in Korea. In the meantime, the implementing regulation had been published on 12 April and had entered into force on 13 April 2006. The official reference of this regulation was Council Regulation (EC) No 584/2006 of 10 April 2006 published in the Official Journal of the European Union No L 103 of 12 April 2006 and the document was now available in WT/DS299/9. With the publication and entry into force of Council Regulation (EC) No 584/2006, the EC had fully implemented the DSB's rulings and recommendations in this dispute.

43. The representative of Korea said that his country welcomed the statement made by the EC to the effect that it had undertaken a re-examination of the aspects of its administrative countervailing duty determination that had been found inconsistent with the EC's obligations under the SCM Agreement by the Panel examining this case. However, in Korea's view, the EC's re-examination had failed to comply with its WTO obligations. Korea would not go into each and every error in the EC's implementation. That would come if Korea were to decide to request the establishment of a compliance panel under Article 21.5 of the DSU. First, on the issue of subsidies, the EC had retained the methodology used in the original investigation. In particular, the EC had used the allocation method in Article 7(3) of the Basic Anti-Subsidy Regulation, according to which the amount of subsidy must be allocated over a five-year period. The five-year allocation period selected by the EC Institutions ran from 2001 to 2005, inclusive. As a result, as of 1 January 2006, all the financial measures countervailed by the EC Institutions were fully amortized and, thus, ceased to confer any benefit to Hynix. Therefore, the EC should, in fact, have repealed the countervailing duty on Hynix DRAMS as from 1 January 2006. This conclusion was in line with the approach taken by the EC in the framework of the dispute "US – Countervailing Measures Concerning Certain Products from the EC" (WT/DS212/RW).

44. Regarding the methodology for calculating the amount of the benefit conferred by the financial contributions, the Panel had found that the EC had made a fundamental error in considering a loan, loan guarantee and debt-to-equity swap to be the equivalent of a grant. In its re-examination, the EC had basically reaffirmed its grant methodology on the grounds that an alternative methodology would result in a higher benefit calculation. Although the Panel had acknowledged the "*considerable leeway*" afforded to investigating authorities in adopting a reasonable methodology, it had not admitted that a reasonable methodology could result in a finding of the same level of benefit as those calculated by the Commission's grant methodology. The EC had ignored the explicit findings of the

Panel that any reasonable calculation must result in a finding of a benefit that was lower than that based on the EC's original calculation.

45. The EC was able to arrive at this incongruous result by, among other things, comparing long-term instruments with short-term ones and collateralized instruments with non-collateralized ones, all without proper adjustments. The term and collateralization of debt were key issues, particularly when dealing with companies in distress, and should have been properly accounted for. Another major error of the EC in its benefit analysis was that it created a new category of entities which did not exist under the SCM Agreement. Article 1 of the SCM Agreement provided for rules on subsidization that required a finding of government action, action by a public body or actions by private bodies that were entrusted or directed by the government. There were only these three categories. If a private body had not been entrusted or directed, then it must be presumed that it had acted in its own commercial interests.

46. However, the EC created a fourth category of entities – private bodies which had not been entrusted or directed to act, but which the EC had found inconvenient as benchmarks because their actions did not fit the Commission's pre-conceived notions. Because of alleged, but unproved, governmental pressure, these commercial actors had not been recognized as benchmarks with no legal or factual justification. Furthermore, the Commission had determined, in effect, that all extinguishment of debt in the case of bankruptcy or insolvency was a benefit. However, not only was this finding by the Commission contrary to WTO jurisprudence, it was inconsistent with the EC's own internal rules. The Commission had not considered debt extinguishment in this manner when it had done an internal state aids finding.

47. With regard to the October 2001 debt-to-equity swap, the EC had concluded that "there was no real quantifiable cost to Hynix of issuing the new shares." However, the Panel had stated that shares did represent a surrender of ownership in the company and the ability of the shareholder to effect action by the company commensurate with the shareholder's level of ownership. In other words, they represented an obligation of the company and the market values that obligation in the form of the trading price for such shares in the market. The only means for the company to terminate that obligation was through a repurchase of the shares issued. Thus, the debt-to-equity swap could be regarded as a measure of benefit only when any premium paid by the participating banks were determined over the market price for Hynix equity, in other words, the difference between the swap price and the market price at the time the swap occurred. Instead of taking this approach, the EC had incorrectly treated the debt-to-equity swap as a forgiveness of debt.

48. The EC should also have taken this opportunity to correct certain calculation errors not addressed by the Panel on the basis of judicial economy and in light of other errors in the EC's benefit analysis. In particular, the Commission had yet to correct its calculation of the amount of extended maturities associated with the October 2001 restructuring. With respect to injury, the EC had also simply ignored the Panel's findings. According to the Panel, the EC's original analysis had failed to assess the importance of the economic downturn that existed in the DRAM market during the investigation period. In its re-examination, the EC had stated that there was no actual decline in demand during the investigation period. That statement was inconsistent with the explicit findings of the Panel because the underlying demand for DRAMS was different from the apparent domestic consumption of DRAMS. Moreover, the EC had stated that the data did not support the conclusion that there was a correlation between a decline in the demand growth rates and the decrease in DRAM prices. However, this conclusion was based on an incorrect comparison, whereas a proper comparison demonstrated that, in fact, there was a strong link between demand growth and the sales prices.

49. On the issue of overcapacity, the EC had concluded that, since Hynix was virtually bankrupt during the investigation period and remained afloat only through the subsidies provided by the

Government of Korea, worldwide overcapacity had artificially been maintained through the subsidization of Hynix. However, this conclusion was incorrect, since it was generally the case that insolvent companies were not shut down, but rather their business was bought either through an asset sale or as a going concern, and their capacity returned to production.

50. As for wages, the EC had not even examined the issue under the correct legal standard. It had examined wages as if it were a causal issue under Article 15.5 when the proper analysis was as an indicator of injury under Article 15.4. The EC stated that wages moved normally during the period and could not have been a causal factor in the alleged decline in the state of the EC industry. But that was not the issue. Rather, the stable behaviour of wages was actually an indication that the industry was not suffering material injury. In light of the foregoing, Korea did not consider that the Commission's re-examination was a proper implementation of the DSB's rulings and recommendations in WT/DS299. Korea reserved all of its rights in this dispute and would continue to further consider its options.

51. The representative of the European Communities said that the DSB's rulings and recommendations had clearly not imposed any obligation to repeal the countervailing duty, but only to re-visit some aspects of the EC's investigation in light of the Panel's findings. The EC had done this scrupulously and had thus brought its countervailing measure into conformity with the WTO rules. As to the very detailed concerns just expressed by Korea, the EC did not consider that a DSB meeting was the appropriate forum to enter into a detailed and technical discussion. Of course, the EC stood ready to pursue a dialogue with Korea and would respond to any further concerns that Korea might have.

52. The DSB took note of the statements.

2. Mexico – Tax measures on soft drinks and other beverages

(a) Implementation of the recommendations of the DSB

53. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body Report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He also recalled that at its meeting on 24 March 2006, the DSB had adopted the Appellate Body Report in the case: "Mexico – Tax Measures on Soft Drinks and Other Beverages" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited Mexico to inform the DSB of its intentions in respect of implementation of the recommendations.

54. The representative of Mexico said that his country would comply with the DSB's recommendations and rulings in the dispute under consideration. To that end, a draft law removing the tax measure at issue in this dispute would be submitted to the Mexican Congress. The Executive intended to have the Congress examine the draft law as soon as possible. However, this would depend on the amount of time the Congress could set aside within its legislative agenda, given that the current session was coming to an end and Congress would be in recess until 1 September when the new legislature were to begin. Once the necessary reforms had been approved, the Congress would send them to the Executive for enactment and publication. Given that the first session of the new Congress would end on 31 December 2006, the modifications should enter into force no later than January 2007. This was the reasonable period of time proposed by Mexico. The dispute in question had resulted from a disagreement between Mexico and the United States within the framework of the North American Free Trade Agreement which, unfortunately, remained unresolved, despite more than

eight years of efforts on Mexico's part. Mexico reiterated its respect for international rules and hoped that other Members of the WTO would do the same.

55. The representative of the United States said that his country thanked Mexico for its statement that it intended to implement the DSB's recommendations and rulings in this dispute. The United States was pleased that Mexico had indicated that it planed to do so by repealing its discriminatory beverage tax. The United States was prepared to discuss with Mexico a reasonable period of time for its implementation. The United States could not comment at the present meeting on the specific proposal that Mexico had made for a reasonable period of time, but it looked forward to discussing the reasonable period of time with Mexico.

56. The DSB took note of the statements, and of the information provided by Mexico regarding its intentions in respect of implementation of the DSB's recommendations.

3. Implementation by the European Communities of the recommendations and rulings of the DSB in relation to "European Communities – Regime for the Importation, Sale and Distribution of Bananas"[2] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

57. The Chairman said that this item was on the agenda of the present meeting at the request of Honduras, Nicaragua and Panama. He then invited the representatives of the respective countries to speak.

58. The representative of Honduras said that in order to conclude their coordination efforts prior to taking an action under Article 21 of the DSU, Honduras and other affected Members had asked, once again, for the inclusion of this item on the agenda of the present DSB meeting. In previous statements made before the DSB, Honduras had already described the new EC regime, which was discriminatory and restrictive, and had explained why that regime constituted an implementation issue covered by Article 21 of the DSU. Therefore, he would not repeat those details at the present meeting. He only wished to revert to the issue of important trading interests which had been put at risk by these new and WTO-inconsistent measures applied by the EC, and to explain why it had become imperative for Honduras to seek legal remedies. In Honduras and other Latin American countries, the banana sector accounted for a large proportion of its national revenues, agricultural incomes and unskilled workforces. Bananas played a particularly important role in sustaining the large number of rural poor. Some 51 per cent of Honduras' rural population lived below the World Bank's poverty indicators. A significant proportion of them depended on bananas for survival. If Honduras were to lose its bananas exports to the EC – which had been plummeting since January 2006 – its rural poor would be the hardest hit. If the EC was allowed to maintain that regime, the harm he referred to would be irreparable not only for the people of Honduras, but for the region as a whole. Economists forecasted that total earnings from Latin American banana exports would fall by US$ 570 million, that the reduction in national revenue would amount to US$ 500 million and that employment would decline by some 125,000 jobs. In order to prevent such destabilising losses, Honduras had no alternative but to seek the remedies provided for in the DSU, and was holding consultations with other Members in order to define a common approach. Once these consultations had been concluded, Honduras would seek the assistance of the DSB to reach an early solution.

59. The representative of Panama said that between the previous DSB meeting and the present one, Panama had held consultations with the EC regarding its withdrawn banana tariff binding and new more-than-doubled "autonomous" tariff rate. While Panama appreciated the EC's willingness to consult, it was disappointed that the EC continued to insist that its more-than-doubled tariff was "trade

[2] WT/DS27.

neutral". Panama was equally disappointed to hear the EC say that it had no obligation: (i) to advise Panama when, and at what level, the MFN rate would be bound; (ii) to compensate MFN suppliers under the GATT provisions; or (iii) to adjust its current terms of access in any respect. The EC's position, as Panama understood, was that it would do nothing on this matter for the foreseeable future other than share import data with the supplying countries, but would cease even this step if legal recourse were to be taken. Panama could not see how the EC's position could be reconciled with the EC statement made at the previous DSB meeting that it "remains ready to address" Panama's concerns or with the EC's obligation under Article 21 of the DSU to comply promptly with its obligations under the covered agreements and to pay attention to all matters which had an impact on the interests of developing-country Members. Panama, a principal banana supplier to the EC market, was already being harmed by this arrangement. Panama did not have the luxury of waiting for its concerns to be examined by the EC at a later date. Whatever means would be necessary, including under the DSU compliance procedures, a prompt solution must be found.

60. The representative of Nicaragua said that at the 17 March DSB meeting, the EC had expressed regret that Nicaragua and other Members had "favoured the litigation route" rather than engaging in dialogue in "good faith". That statement by the EC had not properly reflected his country's position. Throughout this dispute, Nicaragua had advocated productive negotiations and continued to favour such an approach. If the EC were ready to negotiate a formula whereby access for its bananas would be improved at an early date, Nicaragua would be prepared to participate in good faith in such negotiations. What Nicaragua had declined to do was to accept a process in which it was told that: (i) for the time being Nicaragua must accept that the new EC arrangement as a *fait accompli*; (ii) it must "give the new regime time"; (iii) there could be a *rapprochement* in the future if Nicaragua first demonstrated with statistics to the EC's satisfaction that it had actually sustained injury; and (iv) must not seek legal remedies until the "dialogue" process has been exhausted. A "dialogue" of this kind did not amount to a negotiation. It would appear, on the contrary, to be a "pattern for containment", designed as a means of putting off legal claims and multilateral dispute. In Nicaragua's view, a process based on delaying the restitution of its rights could only mean that its developing economy would sustain further injury. Accordingly, until the EC indicated that it was ready to negotiate reforms for access with immediate effect, Nicaragua was bound to pursue the coordination efforts it had been engaged in with other affected Members regarding the most suitable legal remedies for securing fair and prompt relief for Nicaragua and other developing countries in the region.

61. The representative of the European Communities said that the EC had, once more, listened carefully to the statements made on this matter. However, the EC must insist that it did not consider this to be the appropriate forum to discuss this matter, for two reasons. First, the EC remained engaged in discussions with all interested banana MFN suppliers. The issues being raised at the present meeting had already been discussed at length with Honduras, Nicaragua and Panama in the DS consultations held on 19 January on their request. The EC was ready to engage in further discussions with the complainants in that context, if necessary. In addition, the EC had agreed to put its new tariff to the test of the market and to continue discussions with all interested MFN suppliers with the assistance of Minister Støre (Norway) and on the basis of the information drawn from the monitoring of the impact of the new MFN tariff. A third meeting had taken place recently and the process was well underway. The EC regretted that Honduras, Nicaragua and Panama had so far opted for the litigation "route" rather than dialogue. Second, the EC disagreed with the categorization of this matter as an "implementation issue" relevant to Article 21 of the DSU. The EC had already made its objection clear on several occasions, both before the DSB and in the context of the WTO consultations held on 19 January 2006. The EC had already elaborated on the grounds for this objection. This being said, the EC remained ready to address the issues raised at the present meeting and any other issues related to the new EC bananas import regime in the appropriate foras.

62. Discussions had to be based on market realities. The EC was confident that the new MFN tariff maintained total market access for MFN banana suppliers. Nevertheless, the EC had agreed to

monitor the impact of this tariff so as to ensure that market access for MFN suppliers was by no means impaired and to hold regular discussions with MFN suppliers on this monitoring process. The countries participating in this dialogue had agreed with Norway, which had offered its "good offices", on a framework for this process. The EC was ready to consider reviewing the tariff if, once the monitoring process provided reliable data for a representative period (one year), those data would show that the new MFN tariff failed to maintain market access for MFN suppliers. The EC had not proceeded with the rebinding in order to verify the real impact of the new MFN tariff in the market. Therefore, the EC would need to let the market monitoring process work before taking any decision on the tariff to be subject to rebinding.

63. The representative of the United States said that since the EC had implemented its new bananas regime on 1 January 2006, a number of Members – including the United States – had voiced serious concerns about the regime. However, the EC had not, as yet, addressed those concerns. Instead, the EC had taken the further step of "suspending" the request it had made for a waiver from GATT Article XIII – even though the EC continued to keep in place a special, preferential tariff-rate quota which it allocated to some Members, but not to others. The United States was disappointed by the EC's response to the concerns raised and was continuing its discussions with interested Members about this matter. The United States reiterated that this was a matter of great importance to many Members. It was imperative that the EC work with such interested Members to reach a mutually satisfactory resolution of the dispute as expeditiously as possible.

64. The DSB took note of the statements.

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

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

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

66. The representative of the European Communities recalled that at the previous DSB meeting, the United States had reasserted that it had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute. And for that reason the United States could not see the purpose of submitting status reports repeating the progress it had made. The EC recalled that the Continued Dumping and Subsidy Offset Act had been found in breach of WTO rules for transferring the collected anti-dumping and countervailing duties to the US competitors. The EC further recalled that these transfers would continue for a number of years since the Deficit Reduction Act repealing the CDSOA provided that duties collected on imports made before 1 October 2007 would still be transferred. Finally, the EC recalled that the Budget of the US Government for the Fiscal Year 2007 forecasted that US$249 million would be distributed in October 2006 and US$1.93 billion in October 2007.

67. The EC had asked the United States to explain how a repeal which maintained the obligation to transfer the anti-dumping and countervailing duties for a number of years and which would already lead to disbursements of more than US$2 billion in the two coming years, fully implemented an obligation to stop those transfers. The fact was that as long as those transfers continued, the United States would be in breach of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement and further action would be needed to bring the United States into full compliance with its WTO obligations. He noted that there had never been any ambiguity in the EC message. The EC had welcomed the adoption of the Deficit Reduction Act of 2005 as an important step in the right direction, but had also made clear that the issue of implementation had not yet been resolved. Thus, already at the 17 February DSB meeting, the EC had stressed that the US WTO breaches would

persist for a number of years and had called on the United States to continue submitting status reports on implementation. The EC regretted that the United States had simply failed to respond to the EC's and other Members' calls and to its clear obligation under Article 21.6 of the DSU. In the absence of a status report, the EC wished to ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The EC also renewed its call on the United States to submit implementation reports in this dispute.

68. The representative of Canada recalled that at the two previous DSB meetings, Canada had raised concerns regarding the refusal of the United States to submit status reports relating to the Byrd Amendment. The United States had claimed that it had "taken the actions necessary to implement the rulings and recommendations" in this dispute by prospectively repealing the Byrd Amendment. Canada reiterated that it welcomed the adoption of the prospective repeal of the Byrd Amendment, but noted, once again, that this latest move had not brought the United States into compliance with its WTO obligations. Until such time as disbursements under the Byrd Amendment had ceased, the United States would remain in violation of its commitments under the WTO Agreement. As Canada had stated in the past, this so-called method of repeal not only raised commercial concerns, but also had serious systemic implications for the effectiveness of the dispute settlement mechanism. In the light of the above, Canada and other WTO Members had urged, and continued to urge, that the United States resume submitting status reports on its efforts to fully implement the rulings in this dispute now, rather than at some indeterminate point in the future.

69. The representative of Japan said that his country was disappointed that the United States again had not submitted a status report to the DSB in the month of April. While Japan welcomed the enactment of the Deficit Reduction Act of 2005 as a significant step forward, it was of the view that the United States still failed to fully implement the DSB's recommendations and rulings because of the transitional clause, which stipulated that the duties collected on imports entered prior to 1 October 2007 would continue to be disbursed. The distribution under the CDSOA was in any form illegal. As long as the distribution continued, it could not be said that the implementation had been fully completed. Japan would like to continue to ask that the United States provide a sufficient explanation of the reason as to why it had considered that the implementation had been completed. Japan also requested information on how actual disbursements would work under the transitional clause. It was regrettable that no explanation had been offered by the United States. Until the termination of the illegal disbursement under CDSOA, Japan reserved all its rights under the DSU.

70. The representative of Chile said that there was no doubt that the Byrd Amendment remained a matter of concern to his country. In his country's view, the United States had failed to comply with the DSB's recommendations in this dispute because it continued to defer implementation. Chile was concerned for two reasons. First, this situation jeopardized the proper and natural functioning of the dispute settlement system by greatly undermining its credibility. Second, it continued to strain and distort one of the key commitments under the Agreement, namely "prompt compliance" with the DSB's recommendations in order to ensure the effective resolution of a trade dispute. It was common knowledge that the United States had already had a reasonable period of time in which to comply, that it had failed to do so, and that it had even exceeded that period by over two years. Compliance had, therefore, been very far from what could be considered "prompt", as provided for by the DSU rules. WTO case law[3] was very clear on the issue: "prompt" was to be understood as meaning "immediate" and, where this was impossible, "within a reasonable period of time". Under no circumstances, would two years or more be either immediate or a reasonable period of time. Chile sincerely hoped that this situation did not constitute a precedent within the WTO or the DSB and that WTO Members endeavoured to respect the principles and objectives of the multilateral dispute settlement mechanism.

[3] See the Award of the Arbitrator under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes: "United States – Continued Dumping and Subsidy Offset Act of 2000", WT/DS217/14, WT/DS234/22, para. 40.

71. The representative of Brazil said that his country thanked Canada, the EC and Japan for bringing again this matter to the attention of the DSB. Both as a complainant in this dispute and a WTO Member, Brazil would have preferred that it was not necessary to continue with this item as a result of full implementation of the DSB's recommendations. However, given the prospective nature of the repeal of the Byrd Amendment, Brazil considered that the issue had not been resolved within the meaning of Article 21.6 of the DSU. As a consequence, the United States should resume the submission of status reports on the implementation of those recommendations. While Brazil recognized the importance of the steps taken by the United States with the adoption of the "Deficit Reduction Omnibus Reconciliation Act", it remained to be convinced that, by the sole adoption of this law, the United States had implemented the DSB's recommendations at issue. Brazil would appreciate reasoned explanations by the United States on this point, particularly on how the next disbursements under the Byrd Amendment could be accepted as acts of compliance with recommendations that clearly held that each and every such disbursement was WTO-inconsistent.

72. The representative of Thailand said that his delegation wished to express its appreciation to the EC, Canada and Japan for raising this matter at the present meeting. Thailand joined previous speakers in expressing disappointment that the United States had not submitted a status report on its outstanding implementation in the case: "US – Continued Dumping and Subsidy Offset Act of 2000". Thailand, therefore, affirmed its previous views expressed during the 17 March DSB meeting, and urged the United States to continue providing status reports in DSB meetings until it had brought its actions into full conformity with the DSB's rulings and recommendations in this dispute, and until this matter had been fully resolved.

73. The representative of Korea said that his country shared the concerns raised by previous speakers on this issue. As mentioned at the 17 March DSB meeting, Korea believed that the enactment of the Deficit Reduction Act of 2005, which contained provisions of repealing the Continued Dumping and Subsidy Offset Act of 2000, was a significant step towards resolving this dispute. However, this dispute had yet to be resolved because the CDSOA disbursements continued by virtue of a transitional clause included in the repealing provisions. It meant that the United States still had an obligation to report on the status of implementation to the DSB under the Article 21.6. of DSU. Furthermore, more importantly, the United States should be reminded that the implementation had already been delayed for more than two years, and this delay had been seriously affecting the interests of exporting Members. Therefore, Korea wished to urge the United States to fully implement the rulings and recommendations of the DSB in this dispute without further delay by eliminating the CDSOA disbursements

74. The representative of Hong Kong, China said that her delegation wished to thank the EC, Canada and Japan for bringing this matter before the DSB. Hong Kong, China appreciated the steps taken by the United States to implement the DSB's rulings and recommendations, but the fact remained that as of now, the DSB's rulings and recommendations had not yet been implemented. Hong Kong, China urged the United States to take steps to stop the illegal payments immediately. Pending final repeal of the Byrd Amendment, it was important that this matter remained under Agenda Item I of the DSB meeting and that it be under the surveillance by the DSB as well as that the United States continue to submit status reports on implementation. Her delegation believed this was a matter of systemic importance and concern for all Members, and that it should be of systemic importance and concern to the United States as well.

75. The representative of India said that his country wished to join other Members who had spoken at the present meeting in expressing disappointment on the United States choosing to not even provide a status report in the matter to this meeting, despite the fact that it had not yet fully complied with its obligations based on the DSB's decision in this dispute. Duties collected on imports entering the United States continued to be subject to disbursements under the repealed CDSOA in contravention of these obligations. India preferred full compliance by the United States to suspending

concessions under the covered agreements to the United States under the authority already obtained from the DSB. Until the United States fully complied with its obligations, India continued to reserve all its rights under the DSU including the right to suspend concessions. India urged the United States to inform the DSB of the steps it would take to ensure full compliance. India also requested the United States to resume submitting status reports in this dispute.

76. The representative of the United States said that with respect to Members' questions and comments about the US implementation in these disputes, as the United States had already explained at the DSB meetings of 17 February and 17 March 2006, 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 recommendations and rulings in these disputes. With respect to Members' comments and requests about possible status reports by the United States, as it had already been explained, the United States had taken all actions necessary to implement the recommendations and rulings in these disputes. The United States, therefore, failed to see what purpose would be served by the submission of status reports repeating the progress the United States made in the implementation of the DSB's recommendations and rulings.

77. The DSB took note of the statements.

5. United States – Countervailing measures concerning certain products from the European Communities

(a) Statement by the European Communities

78. The Chairman said that this item was on the agenda of the present meeting at the request of the European Communities and he invited the representative of the European Communities to speak.

79. The representative of the European Communities said that with the risk of becoming repetitive, the EC deplored, once more, the fact that the United States had failed to submit a status report this time as well. During previous DSB meetings the EC had expressed its disappointment over this fact but apparently to no avail. There was no doubt that this practice undermined the objectives of Article 21 of the DSU, namely to allow the DSB and the WTO Members to survey the implementation progress of the relevant DSB's rulings and recommendations. The EC recalled that the USTR had re-opened the Section 129 proceedings in the DS212 case on 29 November 2005 and had given itself 180 days to complete the process. EC firms and governments had already received, and replied to all questionnaires from the US authorities. Having said that, the EC could not but express its concern over the multiplication of questionnaires and requests for information related to issues about which there had never been any allegations, such as the objective nature of external valuations in the British Steel privatisation. This was a cause for concern as this practice resulted unjustifiably in the prolongation of these proceedings and the keeping in place of these WTO-incompatible measures.

80. Further, as to the questions raised in previous DSB meetings, the EC would be particularly interested in receiving precise clarifications and replies concerning the estimated time-table regarding the issuance of preliminary findings from the Department of Commerce as well as more detailed information on the expected dates for the issuance of final findings in these proceedings. In addition, the EC expressed its hope that it would receive the preliminary findings soon and be given the chance to submit comments. The EC trusted that the United States would report on this exercise at each DSB meeting, and was confident that the US authorities would implement rapidly the 21.5 panel's findings by repealing these very old, unjustified and WTO-incompatible measures without further delays.

81. The representative of the United States said that his delegation would convey to its capital the EC's comments and its questions about these Department of Commerce proceedings, including its

questions from previous DSB meetings. Turning to the EC's comments about US status reports, as had been noted at previous meetings, he recalled that the United States had made a statement at the 27 September 2005 DSB meeting, when the DSB had adopted the Article 21.5 Panel Report in this dispute, and that the United States had followed up on that statement with a report to the DSB on the status of its implementation on 28 November. In connection with the EC's request and the EC's comments, he recalled that the second sentence of Article 21.6 of the DSU provided that: "the issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption". As it had been stated at two previous DSB meetings and the United States was pleased to repeat again at the present meeting, the United States would be happy to discuss with the EC on a bilateral basis their views on this issue. This offer had been made twice before but had not been taken up by the EC.

82. The DSB took note of the statements.

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

(a) Request by the United States for a decision of the DSB (WT/DS316/5)

(b) Request for the establishment of a panel by the United States (WT/DS316/6)

83. The Chairman proposed that the two sub-items to which he had just referred be considered separately. First, he drew attention to the communication from the United States contained in document WT/DS316/5, and invited the representative of the United States to speak.

84. The representative of the United States said that the first sub-item concerned the request by his country for a decision of the DSB, which – as the Chairman had just mentioned – had been circulated to Members in document WT/DS316/5. The US written request set out the reasons why the United States was seeking this decision. He then said that he wished to summarize what the United States was asking the DSB to do, and why. By way of background, he recalled that on 20 July 2005, the DSB had established a panel to examine the US claims regarding the subsidies that France, Germany, the United Kingdom, Spain, and the EC had provided and was continuing to provide to Airbus, the European manufacturer of large civil aircraft. That panel had been composed on 17 October 2005. Shortly thereafter, on 26 October 2005, the EC had filed a request for preliminary rulings that had raised various procedural objections with respect to the US panel request. In addition, certain member States had committed additional new subsidies to Airbus. Although none of the objections in the EC's preliminary ruling request had merit, the United States had indicated its willingness to hold further consultations with the EC in order to address those concerns, and thereby to simplify matters for the panel. The United States had also wished to consult on the new Airbus subsidies. Accordingly, the United States had filed a further request for consultations regarding the EC and member State measures on 31 January 2006. The United States and the EC had held those consultations on 23 March 2006. On 10 April the United States had filed a further request for the establishment of a panel, following up on those consultations.

85. In view of the relationship that he had just outlined between the US 2005 panel request and the request filed in the current month, the United States considered that the efficient functioning of the dispute settlement system would be served if the matters contained in this month's request were considered by the Panel established in July 2005. The United States, therefore, had decided to ask the DSB to take a decision to that effect, the decision Members were now discussing. As noted in the US request, the DSB had taken similar decisions in analogous situations. For example, Article 9.1 of the DSU also reflected a policy, in certain circumstances, of having a single panel consider multiple panel requests related to the same matter whenever it was feasible to do so. And, under Article 9.1, the

DSB had in the past taken decisions to refer a subsequently submitted complaint to a previously established panel.

86. While Article 9.1 of the DSU obviously did not apply to the situation before the DSB at the present meeting, the United States believed that the DSB's experience with that Article provided useful guidance. The United States had drawn upon that experience in structuring its request for a DSB decision. The United States hoped that Members of the DSB would be able to agree to the US request, and thanked Members in advance for their support. In this connection, the United States also recognized that the EC was facing similar procedural issues in its dispute regarding alleged US subsidies for large civil aircraft, since the EC had established two separate panels relating to the same matter. The United States believed that the decision it was seeking at the present meeting in DS316 would be an appropriate approach for addressing the procedural issues in DS317 as well, and it would be prepared to support such a request by the EC.

87. The representative of the European Communities said that the United States had put the most unusual request before the DSB. Essentially, the United States had requested that the terms of reference of the Panel as established on 20 July 2005 be modified as set out in documents WT/DS316/2 and WT/DS316/6. The EC rejected the US request for a number of reasons. The United States proposed to *ex post* modify the terms of reference of a Panel although the procedure was advanced. The EC noted that the Panel had already been composed; it had adopted Working Procedures (now suspended); it had taken a number of procedural decisions[4]; an Annex V procedure had been carried out and the Report by the facilitator had been submitted to the Panel on 24 February 2006.

88. Furthermore, despite considerable overlap, the terms of reference of the two Panels differed significantly. In essence, the second Panel was significantly broader in scope. It incorporated numerous measures not covered by the first Panel request, either because they had not been properly consulted upon or not adequately identified (at least five groups of measures), or because they had been added only in the second Panel request (at least six groups of measures). Moreover, the United States was seeking to add further legal claims in this new proceeding. Most of the above measures had not been subject to the Annex V procedure in this case. Moreover, the Annex V procedure in the old case covered now outdated facts concerning markets and prices.

89. The United States had proposed a merger of the terms of reference in a way that would severely violate the EC's due process rights in a serious prejudice case. If the United States had its way, it could arbitrarily pick and choose the measure and the relevant market situation. The EC would never obtain clarity as to which claim and data it needed to respond to. Finally, but most importantly, there was no legal basis in the DSU for the DSB to take a decision to merge two Panels in the circumstances as described above. Even if there were, it would require a positive consensus. The United States had referred to Article 9.1 of the DSU and had invoked the US – Steel case precedent. However, Article 9.1 of the DSU concerned an entirely different situation of multiple complaints by "more than one Member" regarding "the same matter". In such situations a "single Panel should be established". Hence, Article 9.1 of the DSU envisaged situations where multiple complaints by at least two WTO Members were brought relating to the same matter. Moreover, it was not mandatory; i.e. complainants did not have an automatic right to the merger. Thus, in the US – Steel precedent referred to by the United States eight complainants had attacked one and the same measure. The Panel had not been composed and no other procedural steps had been taken in these cases before they had been merged. Moreover, the United States as a defendant had to give its agreement. The United States itself admitted that there was no legal basis for its request. It already anticipated that the DSB

[4] Letter by the Chairman of the Panel concerning timetable and Working Procedures dated 9 November 2006; Letter by the Chairman of the Panel concerning preliminary rulings dated 9 November 2006; Letter by the Chairman of the Panel concerning the case name of 29 November 2006 concerning the case name; Communication by the Chairman of the Panel dated 1 March 2006 concerning suspension.

would refuse its requests and reserved its rights. For all the above reasons, the EC could not agree to this request by the United States.

90. The representative of Brazil said that his country noted the request by the United States, contained in document WT/DS316/5, for the DSB to take a decision concerning the relationship between the panel to be established in light of document WT/DS316/6 and the Panel established on 20 July 2005 in the context of this dispute. Although Brazil tended to agree with the US argument that, if taken, such a decision would be a means for a more efficient functioning of the dispute settlement system, it would appreciate clarifications from the United States about the following points: (i) Why had the United States preferred to ask for this decision in lieu of activating the provisions of Article 7 of the DSU, which specifically addressed situations where a party to the dispute wished panel's terms of references other than the standard ones? (ii) What could the implications of this decision be for future cases where, as in Brazil – Aircraft (DS 46) or Chile – Price Bands (DS 207), changes relevant to the measure at issue had been put in place after consultations had been held, but before the panel was established, or where an amendment to the challenged measure was introduced while the panel was engaged in considering the said measure? Brazil recalled that, in the two cited cases, the Appellate Body considered that the panel had the authority to decide on the measure in dispute without any need for a second panel and modification of the terms of reference. If the DSB were to take the decision requested by the United States at the present meeting the question would be if Members would be compelled or stimulated to, in possible future situations similar to the ones just described by Brazil, ask the DSB to establish an additional panel and, later on, to merge the two panels and revise their terms of reference.

91. The representative of Canada said that the request of the United States was interesting and given that the EC had indicated that it was not going to give its consent to the merger of the two, he wondered if any further intervention would be useful. Canada noted that there were some systemic concerns about having different panel proceedings in respect of overlapping measures and almost identical legal provisions. While of course one expected that the Secretariat would provide appropriate advice to panels, one also hoped that panels would act independently and in fact there was considerable danger that two different sets of panel proceedings on the basis of the same law and reviewing similar measures would end up with contradictory findings. This would not be in anybody's interest. In similar circumstances in the Panel on "Wheat Board" case, where the United States had also requested a different panel with a different panel request, the parties had managed to agree to a single panel and the panel had managed to deal with the situation in its own way. In the end, Canada found that that solution was satisfactory and in this respect, while in this particular instance, it seemed that the decision requested by the United States might not proceed. Canada certainly encouraged the EC and the United States to try to avoid a situation where one could have differing, perhaps contradictory panel findings in respect of the same measures under the same laws.

92. The representative of the United States said that his country thanked Brazil and Canada for their constructive interventions on this topic. The United States appreciated their willingness to engage on the issues presented by this request for a decision. The United States would refer to capital their comments and questions, and would be pleased to discuss these issues with them, and with any other Member, bilaterally or perhaps at a future DSB meeting. With regard to the EC's comments, it was remarkable that the EC would assert that merger at this point in the process was not possible. The United States and the EC had mutually agreed in February 2006 to pause their respective disputes precisely in order to allow time to work out the procedural issues that would arise from the existence of the first and second panel requests (some of which the Canadian representative noted in his intervention). As a consequence, the existing Panel had taken no steps other than to establish its working procedures. The Panel had done nothing that would be affected by a modification of its terms of reference. It had not yet begun addressing any of the parties' claims, and no written submissions had yet been filed, so merger was simply a matter of adjusting the panel's terms of

reference so that a single panel could address all of the US claims. As the US request made clear, the merger would as a substantive matter be quite straightforward. The DSB would take the decision that the United States had requested. The EC's approach, by contrast, would raise substantial issues, such as whether the panellists in the two disputes should be the same, the possibility of two panels examining the same measures coming to divergent results (another issue the Canadian representative alluded to), issues in terms of compliance such as different reasonable periods of time and different recommendations and rulings, etc. As the United States had previously noted, the DSB had in the past referred a new panel request to an existing panel, pursuant to Article 9.1 of the DSU. The United States would refer the EC and other Members, for example, to the Indonesia Autos dispute, which also involved subsidies and claims of serious prejudice, and to which the EC was a complaining party. There the terms of reference of the panel had been amended to merge with a panel that had been established after the original panel had been composed. In the interest of efficiency, this was the most logical approach. The United States invited the EC to reflect on the views expressed at the present meeting, and to reconsider its approach to this issue.

93. The DSB took note of the statements.

94. The Chairman said that since the DSB was not able at the present meeting to agree to the request by the United States contained in document WT/DS316/5, he would propose to take up sub-item b under this agenda item. He drew attention to the communication from the United States contained in document WT/DS316/6 and invited the representative of the United States to speak.

95. The representative of the United States said that his country was disappointed that the EC had been unable to permit the DSB to take the decision the United States was seeking under the previous sub-item. The United States did not propose to reiterate now its comments on the EC's position. In any event, in light of the EC's decision to block referral of the matter in the US panel request to the existing panel in DS316, the United States was obliged to pursue establishment of a panel in the ordinary way. Under the previous sub-item, the United States had also discussed in brief the reasons why it had brought this matter to dispute settlement, and it did not wish to repeat those reasons at this point either. The United States requested that the DSB establish a new panel with respect to the matter contained in the US panel request, pursuant to DSU Articles 6 and 7. The United States further requested that the panel have the terms of reference provided for in Article 7.1 of the DSU.

96. The representative of the European Communities said that the EC took note of the US request for the establishment of a Panel in this dispute and objected to its establishment. With regard to the substance of the US request, needless to say that it was the prerogative of the United States to seek to pursue its rights under the WTO Agreements. However, this did not entail a right for the United States to use the dispute settlement system for purely speculative claims. Indeed, in the recent Upland Cotton dispute, the United States itself protested vigorously and prevailed against the inclusion of a measure that had not existed at the time the Panel request had been made and considered by the DSB. Regrettably, that was precisely what the United States itself continued to attempt to do as regards alleged measures relating to the Airbus A350 aircraft. As was well understood by all, neither the DSU nor the SCM Agreement allowed WTO Members to use it against a perceived threat of subsidisation. A measure subject to WTO dispute settlement must be subject to consultations and also exist at the time of the Panel request. No such alleged support existed for the A350, neither at the time the United States had asked for additional consultations on this matter, nor now. No commitment had been taken on whether or not EC member States wished to invest in this project. The EC, therefore, strongly objected to the inclusion of this non-existing measure in the Panel request. The EC reserved its right to raise this and any other objections later before the Panel. The United States was, once again, seeking the establishment of a Panel against the EC and certain Member States. He noted that the EC continued to be the proper and correct respondent, also for acts of its individual Member States.[5] The member States co-operated closely with the EC which was the sole

[5] EC – LAN; EC – Shipbuilding.

and proper respondent for all measures attacked by the United States. The EC objected to the suggested case name, and noted that the United States had previously accepted that the EC was the proper and correct respondent. Finally, he emphasized that the EC was fully determined to defend its legitimate interests and ensure that conditions of fair competition prevailed in the production of civil aircraft. The EC objected to the establishment of a Panel at the present meeting.

97. The representative of the United States said that his country was, of course, disappointed by the EC's decision not to permit the DSB to establish the panel at the present meeting. The United States wished to comment on one statement made by the EC during its intervention that was unusual for a statement objecting to establishment of a panel, namely the EC's objection to the title of this dispute and its comments on who the proper responding parties were. The United States had requested consultations, and the establishment of a panel, with respect to the governments of Germany, France, Spain, and the United Kingdom, in addition to the EC. Therefore, all five of those WTO Members were properly respondents in this dispute. While it might be that the EC would be representing the interests of the member States in this dispute, that representation did not change the legal status of member States as respondents.

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

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

(a) Initiation of the procedure for developing information concerning serious prejudice under Annex V of the SCM Agreement and designation of Mr. Mateo Diego-Fernández as the DSB representative referred to in paragraph 4 of that Annex for the development of evidence to be examined by the Panel in DS317 established on 17 February 2006 in the form of written responses by the United States to written questions from the DSB representative to the United States pursuant to Annex V, paragraph 1 and Annex V, paragraph 2 of the SCM Agreement (WT/DS317/5)

99. The Chairman said that this item was on the agenda of the present meeting at the request of the EC. In this connection, he drew attention to the communication from the European Communities contained in document WT/DS317/5, and invited the representative of the European Communities to speak.

100. The representative of the European Communities said that the EC was disappointed that the United States had repeatedly blocked the EC's request for the initiation of an Annex V procedure. The terms of the SCM Agreement were quite unambiguous. It provided for an automatic initiation of the Annex V procedure at the request of either party together with the designation of a Facilitator. The continued blockage by the United States was also inconsistent with the general obligation to co-operate set out in paragraph 1 of Annex V. The United States simply could not hide behind the fact that in 2005 the EC had insisted – for real and practical reasons – that both parties should consult and co-operate on modalities of the Annex V procedure before actually initiating the Annex V process in this complex proceeding. This was just common sense because numerous issues, such as confidentiality and timing had to be duly addressed. The EC had stated that very clearly in the DSB meetings. The EC had never taken the position that the initiation of the Annex V procedure as such was subject to the agreement of the defending party. The United States itself was clearly on the record for considering the initiation of the Annex V process to be automatic. As stated a moment ago, this was clearly spelled out in and supported by the SCM Agreement. Annex V played an important role in gathering the necessary facts in subsidy disputes to enable the Panel to conduct the ensuing analysis in the most efficient manner.

101. He also wished to clarify that the EC was not seeking a resumption of the "old" Annex V procedure, as the United States had stated at the previous DSB meeting. This should be quite clear

from the airgram, where one clearly referred to the DS317 Panel established on 17 February 2006. The EC had requested the designation of Mr. Mateo Diego-Fernández as the DSB representative referred to in paragraph 4 of that Annex for the development of evidence to be examined by the panel in DS317 established on 17 February 2006. Indeed, the EC had the right to have the facilitator appointed. This was clearly spelled out in paragraph 4 of Annex V, pursuant to which the "DSB shall designate a representative to serve the function of facilitating the information-gathering process". In short, the EC was merely invoking its rights under the "DS317*bis*" case. The EC Annex V Questions were ready for immediate transmission to a DSB designated facilitator. Finally, he emphasised, once again, that the EC continued to be prepared to discuss practical arrangements on how to conduct this new Annex V procedure in the most expeditious and efficient manner for all parties involved.

102. The representative of the United States said that his country was surprised that the EC was seeking a separate Annex V information-gathering process for the panel established on 17 February. The EC had initially stated that it had sought establishment of that panel to "resolve a number of procedural imbroglios that had arisen" with regards to the terms of reference and Annex V process for the panel established in this dispute on 20 July 2005.[6] By seeking now to have a separate Annex V process for the 17 February panel, the EC would achieve the opposite. It would leave in place the 20 July Panel and create an independent panel with a separate record, addressing claims that overlapped in several areas. The "imbroglios" in the 20 July Panel's proceedings that the EC had stated it wished to resolve would remain unresolved, and would be exacerbated by new uncertainties with regard to the relationship between the 20 July and 17 February panels. The United States also noted that, as the title of this agenda item indicated, the EC was seeking to unilaterally determine the identity of the representative of the DSB under paragraph 4 of Annex V of the SCM Agreement, as well as the particular procedures for its proposed information-gathering process. Nothing in Annex V or the DSU gave the EC that authority. For these reasons, as well as the reasons that the United States had raised at past DSB meetings, the United States was not in a position to agree to the EC's request.

103. The representative of Brazil said that, for the sake of brevity, his country would not repeat its views on this issue. However, Brazil wished to refer Members to its statements on the invocation of Annex V of the SCM Agreement in the context of the Aircraft disputes between the EC and the United States that had been made at the DSB meetings on 3 August 2005 as well as at the DSB meetings on 14 and 17 March 2006.

104. The DSB took note of the statements.

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

105. The Chairman drew attention to document WT/DSB/W/316, which contained additional names proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/316.

106. The DSB so agreed.

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[6] WT/DSB/M/205, para. 69; WT/DSB/M/204, para. 3.