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Dispute Settlement Body
17 March 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 March 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.40)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.40)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.15)

(d) European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs: Status report by the European Communities (WT/DS174/25/Add.2 – WT/DS290/23/Add.2)

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

1. The Chairman said that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the five 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.40)

2. The Chairman drew attention to document WT/DS176/11/Add.40, 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 6 March 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, both in the US Senate and the US House of Representatives. The US administration was working with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, once again, the United States could not but repeat its status report which basically had not changed for a year. The United States was a key promoter of the TRIPS Agreement and remained strongly committed to pursue strong and non-discriminatory protection of intellectual property rights worldwide. This stood in sharp contrast with the passivity of the United States when found in breach of its TRIPS obligations, not just in this case but also in the Section 110 dispute, which would be discussed later in the course of the present meeting. Effective protection of intellectual property rights worldwide was essential for the development of international trade, which was a shared objective of the EC and the United States. Repealing bills were pending in the US Congress. Their adoption would remove this discriminatory legislation that was driven by specific interest and would bring a satisfactory solution to this dispute in conformity with the shared objective.

5. The representative of Cuba said that, once again, his country was reviewing the implementation of the DSB's recommendations in the dispute: "United States – Section 211 Omnibus Appropriations Act of 1998". He noted that this item had been on the DSB's agenda for more than four years and should really be called a non-compliance review. The United States had repeatedly submitted status reports which were identical except for the date and failed to indicate anything about the measures the United States should be taking in order to comply with its WTO obligations. The United States could not make any such statement simply because nothing was in fact being done other than deceiving and making a mockery of the DSB.

6. It was quite clear that the United States was now protected by the "Understanding" reached with the EC, which set no deadline for US compliance with its obligations while guaranteeing that the United States would not be subject to retaliation for non-compliance. It had become customary practice to see the United States continually failing to comply with its WTO obligations whilst questioning and putting pressure on other countries to honour their obligations. This was a clear case of double standards. Cuba wondered whether one could have faith in the multilateral trading system based on rules which required compliance and on the supposed equality of obligations for all participants when the attitude of one of its main actors was that of constant and blatant defiance. By contrast, developing countries had gone out of their way to respect the principle of prompt compliance provided for in the DSU and had implemented the DSB's recommendations without delay, in spite of difficulties and efforts.

7. Cuba did not relinquish nor would it relinquish its right to have recourse to the dispute settlement mechanism whenever it considered this to be appropriate. Cuba was concerned about the systemic implications of such understandings reached by the parties since any decision taken by the DSB constituted an obligation on Members. Compliance with such rulings was in the general interest and could not and must not be circumvented by any Member. Cuba, once again, called upon Members to enforce the multilateral trade agreements as well as their own decisions and requested the United States to comply immediately, unconditionally and without further delay with all of the DSB's rulings and recommendations, in particular those relating to the dispute in question by abolishing the unfair and discriminatory Section 211.

8. The representative of China recalled that his delegation had made a statement on this matter at the previous DSB meeting and, due to systemic implications, wished to express continued concern about the lack of progress in this dispute. He recalled that the DSB had adopted both the Panel and the Appellate Body Reports pertaining to this dispute on 2 February 2002. The Reports had concluded that Section 211 was inconsistent with US obligations under the relevant WTO Agreements. Since then, more than four years had passed. China appreciated the efforts made by the United States during these four years towards the implementation of the DSB's rulings, but regretted that concrete implementation measures were still not in sight, and there was no indication when the matter would be resolved to the satisfaction of the parties to the dispute and other Members. China noted that the measure taken by the United States in this dispute had nullified not only the interest of the EC under the WTO covered agreements, but also the interests of many other WTO Members, such

as Cuba, although it was not a party to this dispute. It was true that every WTO Member had the right to recourse provided for under the dispute settlement mechanism, but in practice for many developing countries it was a very heavy burden to do so. Therefore, it was understandable that Cuba expected to benefit from the full implementation of the DSB's rulings in this dispute and paid attention to the pending implementation status. In the meantime, the prompt implementation in this dispute was not only beneficial for other Members, but also for the United States, who was the advocate of intellectual property rights in other fora. Besides, 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 provide a degree of certainty and predictability in international trade to all Members. Once again, China wished to join the EC and Cuba in urging the United States to implement the decision of the DSB in this dispute as soon as possible.

9. The representative of Brazil noted that, by stating twice in Articles 3.3 and 21.1 that prompt compliance was essential to the proper functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members, the DSU was absolutely clear that prompt compliance was one of the cornerstones of the WTO dispute settlement mechanism. Situations like the one faced by Members in the present case were evidently not in line with that fundamental principle. Moreover, non-compliance situations lacking perspective of solution altered the carefully negotiated balance of rights and obligations to the detriment not only of the complaining party, but also to the whole Membership. Brazil urged the United States to take the necessary and urgent steps to put an end to the violations found in this dispute.

10. The representative of India said that, as stated by his country in the past two DSB meetings, it was a matter of great concern to India that this item had been on the DSB's agenda for such a long period of time without any indication when the matter would be resolved. Status reports being received on this agenda item had given no information about when the matter would be resolved. India reiterated that Members needed to reflect upon the systemic concerns regarding efficacy of the dispute settlement system.

11. The representative of the Bolivarian Republic of Venezuela said that his delegation wished to be fully associated with the statement made by Cuba since the US legislation in question was WTO-inconsistent. His country had, in the past, expressed its concern about the lack of solid evidence before the DSB of any serious intention on the part of the United States to remedy the state of non-compliance. His country was also concerned about the EC's decision not to request authorization to suspend concessions *vis-à-vis* the United States for an indefinite period. The failure to act undermined the effectiveness of the TRIPS Agreement and plunged Members into a state of uncertainty. While it was true that the EC was sovereign in suspending concessions, this situation was a dangerous exercise of discretion and had given rise to suspicion and distrust. The continued non-compliance of the United States cast doubt on the credibility of the DSU and the WTO Agreements. It appeared that the United States was assuming the unilateral right to comply with the DSU thus failing to recognize its obligation. This undermined the sovereignty of both the DSB and the Appellate Body. As had been stated at the past two DSB meetings, such arbitrariness and discretion made other Members very reticent towards negotiating and undertaking new commitments within the framework of the DSU or the Doha Round negotiations. His country urged the United States to find a proper solution to this matter within the framework of the WTO Agreements.

12. The representative of Canada said that his country thanked the United States for its status report in this case. 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 met 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, in which 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 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 they sought, at any stage of the proceedings, to settle their disagreements and disputes, parties to a dispute should be encouraged in their efforts.

13. 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.40)

14. The Chairman drew attention to document WT/DS184/15/Add.40, 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.

15. The representative of the United States stated that his country had provided a status report in this dispute on 6 March 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 at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments. The US administration would continue to work with the US Congress to enact legislation to implement the DSB's recommendations and rulings.

16. The representative of Japan said that his delegation had noted the statement by the United States along with its latest status report stating that the US administration would continue to work with the US Congress to enact legislation H.R. 2473. Japan renewed its strong hope that Bill H.R. 2473 would soon be approved in the US Congress. Any further delay in implementation would undermine the credibility of the WTO dispute settlement system. Japan would like to request, once again, that the United States make sincere efforts to implement fully and promptly the DSB's recommendations and rulings.

17. 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.15)

18. The Chairman drew attention to document WT/DS160/24/Add.15, 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.

19. The representative of the United States stated that his country had provided a status report in this dispute on 6 March 2006, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration was working closely with the US Congress and was conferring with the EC in order to reach a mutually satisfactory resolution of this matter.

20. The representative of the European Communities said that, once again, the EC wished to express its deep regret about the lack of progress by the United States to solve this dispute. He recalled that the Panel Report in this dispute had been adopted in July 2001, but the United States had done little to address the problems arising from a piece of legislation that violated intellectual property rights and hurt the interests of music creators. The EC, therefore, called upon the United States to

take the necessary action to end the situation of non-compliance that had already lasted for too long. The EC reiterated its request to the United States to obtain information on concrete initiatives of the US administration *vis-à-vis* the US Congress. Finally, the EC recalled that it had reserved its right to reactivate, at any point in time, the arbitration proceedings on retaliation.

21. 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.2 – WT/DS290/23/Add.2)

22. The Chairman drew attention to document WT/DS174/25/Add.2 – WT/DS290/23/Add.2, 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.

23. The representative of the European Communities stated 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, this proposal was still under discussion within the Council of the European Union and the European Parliament. The EC was confident that the proposal would be adopted within the agreed reasonable period of time. With regard to the concerns raised by certain Members, he wished to refer to the clarifications provided by the EC at the 17 February 2005 DSB meeting. In addition, the EC wished to note that the proposal was likely to undergo a number of changes in the course of on-going legislative procedure. The EC expected that those changes would address the concerns expressed by other Members.

24. The representative of the United States said that his country thanked the EC for its status report concerning its proposed revised GI regulation, as well as for its statement. As stated in past meetings, the United States wished to highlight its concerns that, in a number of respects, the proposed GI regulation appeared to introduce further encroachments on TRIPS-protected trademark rights beyond those in the current GI regulation. There also appeared to be a number of ways the proposed regulation would not provide foreign nationals the same access to the EC GI system as EC nationals enjoyed. This was the case both with respect to the registration and protection of GIs and with respect to objections to the registration of EC GIs. The United States also noted its continued concern about whether, under the proposed regulation, all WTO Members would have even-handed access to the EC's GI registration system. For instance, it appeared that only producers and processors might apply for a GI registration in the EC. Yet, in some Members, producers and processors might not be in a position to own the GI in their country of origin, and might not be permitted to establish the specifications of the GI. The United States would welcome a dialogue with the EC to clarify that the proposed regulation would make GI registration available to nationals of Members whose system of GI protection differed from that of the EC. The United States heard that the EC had mentioned that the proposed regulation might undergo a number of changes. The United States expected that the EC would take the concerns that had just been outlined on trademark rights and the even-handed treatment of non-EC GI right holders into account in issuing its final GI regulation.

25. The representative of Australia said that her country thanked the EC for its status report in this case and for its statement made at the present meeting on this matter. Australia noted that this was the last regular DSB meeting before the expiry of the reasonable period of time for implementation in this dispute on 3 April 2006. Australia further noted that the EC's Agriculture and Fisheries Council was, as her country understood, to consider adopting a revised GI regulation on Monday, 20 March 2006. Australia looked forward to reviewing the revised regulation. In terms of

its specific concerns, Australia recalled its comments made in relation to previous EC status reports on this matter. Australia also joined the United States in welcoming the comments from the EC that the EC would undertake changes to the GI draft regulation to take account of concerns raised previously by Australia on this case.

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

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

27. The Chairman drew attention to document WT/DS285/15, 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.

28. The representative of the United States stated that his country had provided a status report in this dispute on 6 March 2006, in accordance with Article 21.6 of the DSU. The US administration, in consulting with the US Congress, had been working on appropriate steps to resolve this matter.

29. The representative of Antigua and Barbuda stated that his delegation wished to make a few comments in connection with the statement just made by the United States regarding the status of compliance with the DSB's recommendations and rulings in this matter. As his delegation had anticipated, the statement provided little in the way of useful information to the DSB and to his country as to when and how the United States would come into compliance with the DSB's recommendations and rulings. With an implementation deadline approaching on 3 April 2006, less than three weeks from now, his delegation believed that it might be forgiven for having some anxiety at a complete lack of information from the United States on this most important matter facing the small and delicate economy of Antigua and Barbuda. This was his country's first experience with dispute resolution at the WTO, but his country had perhaps naively expected that the United States would wish to engage with Antigua and Barbuda on devising an equitable solution to the dispute that would take into account the benefits accorded Antigua under the recommendations and rulings, but also reasonably and comprehensively address the concerns raised by the United States during the course of the dispute as its justification for prohibiting the provision of services from Antigua to US consumers.

30. To great disappointment and in spite of numerous attempts on his country's part, the United States had shown absolutely no interest in engaging with Antigua and Barbuda in this regard. The official silence from Washington on this matter was deeply troubling. What was equally troubling was what had actually been happening in the United States since his country had won its hard-fought and costly dispute. Legislation had indeed been introduced in the US Congress addressing the difficult topic of remote and Internet gambling (H.R. 4411; H.R. 4777). In fact, two Bills had been introduced separately in the US Congress which were substantively quite similar. This legislation, one Bill entitled the "Unlawful Internet Gambling Enforcement Act of 2005" and another entitled the "Internet Gambling Prohibition Act," was the only legislation introduced into the US Congress since the determination of the reasonable period of time for implementation in the case under consideration. Unfortunately, each proposal was about as directly contrary to the recommendations and rulings of the DSB as could possibly be imagined. Not only had these Bills done nothing to provide Antiguan operators with any access whatsoever to the vast American gambling market, but in fact each would further entrench the anti-GATS nature of US gambling law by expressly exempting from its application domestic internet gambling on horse racing. Internet gambling conducted by Native American tribes and, most significant of all, Internet gambling that occurred entirely within the border of a particular state. His country had maintained all along that the American prohibition was really based upon the cross-border nature of the services rather than any true "evils" associated with "remote" gambling and this pending legislation emphatically confirmed that his country was correct.

31. In addition to this legislation, Members should know that the ubiquitous American-based money transfer service, Western Union, had ceased in January 2006 providing money transfer services to and from Antigua and Barbuda. Ironically then, his country, with a strong, tightly regulated and overseen financial services sector, an enviable record of mutual assistance in cooperating with other countries around the globe to detect, deter and prevent financial crimes, and the only country to confront the United States over its anti-competitive gaming practices, was one of the very, very few countries in the entire world to which one could not send or from which one could not receive funds via Western Union. Finally, all Members were aware of the difficult questions facing many countries, particularly developing countries, when considering the costs and benefits of signing on to a multinational trade organization such as the WTO. Antigua had voluntarily complied with the demands of trading partners, including particularly the United States, based upon its commitments to its trading partners under the various WTO Agreements. Some of these things had clearly had an adverse impact on its own efforts to enrich and achieve some autonomy in its small economy. But his country had been encouraged by the dominant economies that this multilateral set of agreements would accrue to the benefit of all. That his country could compete with larger economies and, in the case of a dispute, achieve a fair and balanced hearing which would provide it with a meaningful remedy despite its limited global economic consequence. It was with considerable concern that his country had learnt that the US Trade Representative had used his country's weakness as an express reason why gaming and other interests in the United States should not be concerned about his country's victory at the WTO. As reported on a website of an interest group in the United States, the USTR had assured the participants at a conference held in late 2005 that "as they see it, the most Antigua can do is to levy tariffs on US imports equal to the damage done by the US failure to comply with the WTO ruling. Antigua is a tiny economy and imports little from the US. Imposing additional duties would simply make American goods more expensive there".[1] Further, at the same meeting, USTR representatives had been quoted as saying that "if the WTO does not agree [with American compliance efforts], the issue will likely be litigated for at least another year."[2] His country believed that the time had come for the United States to demonstrate whether it was willing to be a responsible stakeholder in the WTO. Whether the WTO Agreements were to work for all, equally, or whether the WTO was indeed a "one-way street" for the large economies to further enrich themselves at the expense of lesser ones. It was one thing to play by the rules on a purely literal basis, and quite another to play by the rules in order to attain the objectives the rules had been designed to achieve.

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

2. 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"[3] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

33. The Chairman said that the above-mentioned 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.

34. The representative of Honduras said that at the 17 February 2006 DSB meeting, the EC had stated that its new banana regime did not constitute an implementation issue, pursuant to Article 21 of the DSU. Honduras was surprised by such an assertion given that it contradicted other statements made by the EC. In its November 2005 press release, the EC had linked the new measures to the

[1] "An Overview of the WTO and Online Gambling", Carl Bechtold, 12 October 2006 (http://www.ncalg.org/WTO%20Threat.htm, visited 30 October 2005."

[2] *Idem*

[3] WT/DS27.

agreements concluded with the United States and Ecuador in order to implement the recommendation in the Bananas – III dispute. That press release read as follows: "[i]n an effort to put an end to the long-standing banana dispute, the EU agreed with Ecuador and the United States in 2001 to move ... to a regime solely based on a tariff by 1 January 2006." In 2002, in a statement before the DSB, the EC had reiterated that link. As recorded in the minutes of the DSB meeting of 1 February 2002, the EC had confirmed that, in order to implement the recommendations resulting from the Bananas – III dispute, it would move to a tariff-only regime as of 1 January 2006. The statement by Honduras was recorded in the minutes of the same meeting: "The representative of Honduras expressed his country's expectation that in order to implement the Understandings on Bananas... the EC would not impose a prohibitive tariff that would make it impossible for Honduran bananas to enter the EC market. Honduras hoped that this agreement would be honoured in good faith. ... Honduras wished to reserve its rights, including the right to request that this matter be placed on the DSB agenda in the future."

35. He noted that the EC had reaffirmed in other statements that there was in fact a link between its new measures and the implementation of the DSB's rulings. Given that the EC had often underscored this connection, Honduras failed to understand this attempt to disassociate the two matters. The EC had repeatedly insisted that this new arrangement was fair and WTO-consistent and that it clearly provided legal certainty. If the EC was indeed convinced that this was the case, the logical thing would be for it to accept jurisdiction under Article 21 of the DSU with no fear. Honduras was firmly convinced that where there was disagreement as to the existence or consistency with a covered agreement of measures, such as the measures adopted by the EC on 1 January 2006, there was no legal certainty. In consultation with other Members, Honduras continued to discuss its rights under Article 21.5 of the DSU and requested the DSB to support such efforts. In accordance with the objectives set forth in Article 21 of the DSU, Honduras would continue to seek "prompt compliance" by the EC, whilst paying particular attention to its rights as a developing country, rights which were currently being violated.

36. The representative of Panama noted that, in addition to the mistaken claim made by the EC at the 17 February 2006 DSB meeting, namely, that the matter concerning the EC's banana regime should not be categorized as an implementation issue, the EC had insisted that the matter under consideration should not even be discussed in the DSB. Panama had to disagree with that statement. In order to remove the issue from the DSB's agenda, the EC had contended that Honduras, Nicaragua and Panama had already held Article 21.5 consultations on 19 January 2006 and had maintained that "if necessary", arrangements could be made to continue these consultations. For the record, Panama wished to note the statement by the European Commission made during the consultations in January 2006, which the EC had repeated in another context, namely that: (i) the EC did not have the power to change the existing arrangements; (ii) the EC did not, in any case, consider that the new arrangement needed to be changed; and (iii) as long as there was no clear sign of how the market was responding, the EC was not ready even to specify the bound MFN tariff.

37. If the EC was suggesting that the DSB's surveillance must be replaced by the consultations that had been held previously, or that the possibility of holding consultations in future had the same effect, the EC would have to state clearly whether its position had changed and explain why the consultations should prevent the DSB from carrying out its surveillance function. The EC maintained, moreover, that the DSB surveillance was not appropriate because a process was under way to monitor the impact of both the new MFN tariff, which was more than double the previous one, and of the ACP quota. For the record again, Panama wished to note how the EC had conceptualized these monitoring procedures: (i) it might take years to complete these procedures; (ii) Latin America must show the damage caused at a later unspecified date; (iii) the result obtained would by no means be certain, even assuming that Latin America could show the damage; and (iv) while this ambiguous procedure was being developed, Latin America would not be able to resort to any kind of legal remedy.

38. Panama noted that the EC had stated that it was prepared to prevent the participation of Honduras, Nicaragua and Panama in the monitoring exercise because of the Article 21.5 consultations that had been held in January 2006. Panama could not imagine how the process, which merely involved checking information with the right to participate which depended on subjective criteria and with no legal framework could stop it from having recourse to the DSB. Since the consultations and the monitoring exercises had failed, DSB surveillance had become a necessity. Panama, a substantial supplier to the EC market, was already being harmed by these inconsistent measures and the damage was expected to be even more serious in the coming months. In order to ensure that its interests as a developing country did not suffer irreparable damage, it was absolutely essential for the DSB to help the countries in question to find the solution that was needed.

39. The representative of the European Communities stated that the EC had, once more, listened carefully to the statements made by Honduras and Panama on this matter. However, the EC had to insist on two points, which had been raised at the 20 January 2006 DSB meeting. First, the EC did not consider the DSB meeting to be an appropriate forum to discuss this matter. The issues being raised at the present meeting had already been discussed at length with Honduras, Nicaragua and Panama pursuant to the DSU consultations held on 19 January at 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 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 meeting had taken place on 16 February 2006 and the process was well underway. The EC regretted that Honduras, Nicaragua and Panama had thus far opted for the litigation route rather than dialogue.

40. Second, the EC had to note, once more, its disagreement 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 in the context of the WTO consultations held on 19 January. The matter under discussion could not be considered an issue of "implementation of DSB recommendations and rulings" in the sense of Article 21 of the DSU for two main reasons: (i) the EC had already amended the regime that had been found inconsistent with the DSB's recommendations and rulings in the so-called "EC – Bananas III" case (DS27) in accordance with the recommendations of the Article 21.5 Panel, which had been requested by Ecuador. The new EC banana import regime introduced by Council Regulation 1964/2005 and in force since 1 January 2006 was, therefore, not "a measure taken to comply with" those recommendations and rulings. In addition, the EC noted that Nicaragua and Panama had not even been parties to the EC – Bananas III proceedings; (ii) the arbitration Awards referred to by Honduras, Nicaragua and Panama had been issued pursuant to an "ad hoc" arbitration agreed in the context of the adoption of the Doha Waiver on the Cotonou Agreement, and not pursuant to the DSU provisions, and therefore the EC's reaction to those awards was not a question of implementation of the DSB's rulings and recommendations. 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 fora.

41. The EC noted that Honduras and Panama had not expressed any interest thus far in participating in the monitoring and review process. On the contrary, they seemed to have favoured the litigation route, which was their legitimate choice as WTO Members. The door was open to any producer that was willing to engage in "good faith" in the process. However, the monitoring and review process and the WTO Panel proceedings could not be run in parallel with the same countries. Therefore, Honduras, Nicaragua and Panama had to make a choice.

42. The representative of the United States noted that as Members would know from the US statements made at two recent DSB meetings, the United States was monitoring this matter closely, and also had serious concerns about the EC's bananas regime. Since the 17 February DSB meeting, the United States had also had the opportunity to discuss this matter informally with a number of

interested Members. The United States would again urge the EC to work with interested Members to reach a mutually satisfactory resolution of this dispute as expeditiously as possible.

43. The representative of Honduras said that his country had already expressed its point of view regarding the monitoring mechanism and thanked the EC for recognizing in its intervention, the rights of Honduras under Article 21.5 of the DSU.

44. The DSB took note of the statements.

3. 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

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

46. The representative of Japan said that his country was disappointed and puzzled by the fact that the United States did not submit a status report to the DSB in the month of March regarding the implementation of the DSB's recommendations and rulings in this case, in accordance with Article 21.6 of the DSU. Japan welcomed the enactment by the United States of the Deficit Reduction Act of 2005, which included provisions to repeal the CDSOA. This was an important step forward in a right direction. However, the transitional clause included in the repealing provisions of the CDSOA stipulated that duties collected on imports entered prior to 1 October 2007 would continue to be distributed to the US domestic industries. As stated at the 17 February DSB meeting, Japan was concerned that the CDSOA had been repealed only in form, but that it would effectively be maintained while these disbursements would be made. The United States had, therefore, failed to fully implement the DSB's recommendations and rulings. At that DSB meeting, Japan had asked the United States to provide a sufficient explanation as to why the United States considered that the implementation of the DSB's recommendations and rulings had been completed. Japan had also requested information on how actual disbursements would work under the transitional clause. No explanation had been offered by the United States thus far. Japan wished to renew its request for a proper explanation by the United States. In that light, Japan called for the United States to make further efforts to terminate the illegal distribution under the CDSOA. Until the CDSOA was repealed completely, Japan reserved all its rights under the DSU.

47. The representative of the European Communities stated that the EC, together with Canada and Japan, had requested the inscription of this item on the agenda of the present meeting following the US failure to submit a status report on its progress in implementation of the DSB's rulings and recommendations. Despite US assertions to the contrary during the previous DSB meeting, the issue of implementation of the DSB ruling had indeed not yet been resolved in the present dispute. The adoption of provisions to repeal the Byrd Amendment was a significant and much welcome step in the right direction, but this repeal would not be effective before several years as duties collected on imports made before 1 October 2007 would still be transferred to the US competing industries. As long as this transfer continued, the violation of Article 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement would persist and the United States would not be in compliance with WTO rules. Article 21.6 of the DSU clearly provided that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings ... shall remain on the DSB's agenda until the issue is resolved". It also provided that "... the Member concerned shall provide the DSB a status report in writing of its progress in the implementation of the recommendations or rulings". Both obligations clearly continued to apply and the EC regretted that the United States had not responded to the calls by the EC and other Members during the previous regular DSB meeting to continue submitting a status report on implementation. In the absence of such a report, the EC asked 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 status reports in this dispute.

48. The representative of Canada recalled that, at the previous DSB meeting, Canada and a number of other Members had noted their disagreement with one element of the status report of the United States with respect to the Byrd Amendment. While Canada welcomed the prospective repeal of the Byrd Amendment, it also noted that this latest development had not brought the United States into compliance with its obligations under the WTO Agreement. Accordingly, the matter remained unresolved under Article 21.6 of the DSU. He noted that the DSB should remain seized of the issue, until such time as the Byrd Amendment and all disbursements under it were fully terminated. Canada and other Members had, therefore, urged the United States to continue submitting status reports relating to the Byrd Amendment. The United States had not done so. The US position raised two concerns for Canada, and these had prompted its decision to request the inclusion of the Byrd Amendment issue on the agenda of the present meeting. The first was a systemic concern. As Canada had stated before, and as it had reiterated just now, as long as the issue remained unresolved among the disputing parties, under the DSU, the DSB ought to remain seized of the matter. And, under the DSU, it was the responsibility of the Member found to have been in violation to provide regular reports on the status of its implementation. The United States had not disputed the responsibility of the DSB in this respect. Nor could it. Article 21.6 of the DSU was clear on this issue. So, as a general matter, the DSB must assert its right to be informed of the status of implementation in disputes where the issue remained unresolved.

49. The second concern was specific to the facts of the Byrd Amendment dispute. The issue did not simply involve assertions by the complaining Members that the United States remained in violation of its obligations under the WTO Agreement. Rather, the terms of prospective repeal confirmed that the United States remained in violation, and would remain in violation for some time to come. The Byrd Amendment was still in force. The United States did not dispute this. Cash deposits collected until 30 September 2007, 15 months hence, would be subject to disbursement. The United States did not dispute this. Disbursements under the Byrd Amendment that had been found illegal would nevertheless continue to be made long after 1 October 2007, the ostensible date of repeal. The United States did not dispute this. In closing, he underlined that Canada welcomed the passage of legislation to finally repeal the Byrd Amendment even if the repeal was prospective. Canada recognized the efforts by the US administration, certain members of the US Congress and US domestic groups to secure this repeal. However, in light of the considerations that Canada and other Members had identified, Canada, once again, called upon the United States to resume submitting status reports with a view to continuing to inform all Members of the progress towards implementing the rulings and recommendations in this dispute.

50. The representative of Chile said that there were unfortunately no new facts to report under this agenda item. Chile wished to place on record its deep concern about the adverse effects of the current situation on the dispute settlement system, which was based on rules agreed by all Members. Chile recognized the progress inherent in the US adoption of measures to repeal the Byrd Amendment, but, given the length of time that would take for the adverse effects of this legislation to cease, this could not be considered effective compliance with the existing WTO rules. The situation was clearly detrimental to the effective functioning of the dispute settlement system, which was the very keystone of the multilateral trading system, and called its credibility into question. Chile urged the United States to put an end to this situation as soon as possible and expressed hope that Members would not have recourse to such practices in the future once they would be required to comply with their WTO obligations.

51. The representative of Brazil said that his country thanked Canada, the EC and Japan for raising this issue at the present meeting. This was the appropriate forum to discuss a matter – compliance or non-compliance – that was of concern to all Members. Brazil shared the view of those

three Members that the "issue" had not been resolved in this dispute within the meaning of Article 21.6 of the DSU. The repeal of the Byrd Amendment was a significant and welcome event, but the conditions under which such repeal would operate did not support the assertion that the United States had implemented the relevant DSB's recommendations. Brazil reiterated that there would be no full compliance on the part of the United States until and unless all disbursements under the Byrd Amendment ceased. As a consequence, the co-complainants should not be deprived of any right conferred by the DSU with respect to this situation of non-compliance by the mere passing into law of the "Deficit Reduction Omnibus Reconciliation Act".

52. The representative of Mexico stated that his country, as a party to this dispute, wished to support the previous speakers. This was an ongoing dispute and thus it was important for the DSB to continue to follow the matter closely.

53. The representative of Thailand stated that his country wished to join previous speakers in expressing disappointment that the United States had not submitted a status report on its outstanding implementation in the dispute: "United States – Continued Dumping and Subsidy Offset Act of 2000" at the present meeting. He, therefore, wished to affirm Thailand's views expressed previously during the 17 February 2006 DSB meeting, and urged the United States to continue providing status reports in DSB meetings until it brought its actions into full conformity with the DSB's rulings and recommendations in this dispute, and until this matter had been fully resolved.

54. The representative of Hong Kong, China said that her delegation thanked the EC, Canada and Japan for raising this item at the present meeting. She expressed her delegation's disappointment and concern over the removal of this matter from agenda item 1 of the DSB meeting, and the discontinuation of the submission of status reports by the United States on this item. It was clear that a legislative provision providing for prospective repeal of the WTO-inconsistent Byrd Amendment in October 2007, did not mean that compliance had already taken place. To treat the prospective repeal of a WTO-inconsistent measure as equal to immediate compliance would greatly undermine any requirement under the DSU on prompt compliance. It would, in fact, mean that a Member would be able to take whatever WTO-inconsistent measure it liked, so long as its legislation provided for the measure to expire after a certain period. This raised serious systemic concerns, which WTO Members should not overlook. Hong Kong, China, therefore, requested that this item remain under agenda item 1 of the DSB meeting, and called upon the United States to continue to provide status reports on this item in order to ensure the effective surveillance by the DSB of the progress of implementation, until the Byrd Amendment was finally repealed.

55. The representative of India stated that since the United States had not achieved full compliance with the DSB's recommendations and rulings in this matter, India was disappointed that the United States had preferred not even to provide a status report in the matter to this meeting. As stated by India at the past DSB meetings, duties being collected on imports entering the United States would continue to be subject to disbursements under the repealed CDSOA in contravention of the US WTO obligations. India preferred full compliance by the United States to suspending concessions under the covered agreements *vis-à-vis* the United States under the authority 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.

56. The representative of Indonesia stated that his delegation wished to join other Members in expressing concern over the failure of the United States to provide the status report in the Byrd Amendment case at the present meeting. As he had stated at the previous DSB meeting, Indonesia and the United States had extended their bilateral agreement on this case, on the understanding that the United States would soon implement the DSB's decisions. However, to date, the United States had not achieved full compliance with the DSB's recommendations and rulings. Therefore, like other Members, Indonesia once again wished to request that the United States fully comply with its

obligations by appealing the Byrd Amendment for the sake of the credibility of the multilateral trading system.

57. The representative of China stated that his delegation wished to join the previous speakers who had strongly urged the United States to comply fully and promptly with the DSB's rulings. This was of critical importance to the credibility of the dispute settlement system.

58. The representative of Korea stated that his delegation wished to join previous speakers that this matter should remain on the DSB agenda until this dispute was finally resolved by complete elimination of disbursements. Korea urged the United States to take an appropriate action to this effect.

59. The representative of the United States stated that as he had explained at the 17 February DSB meeting, the US President had signed the Deficit Reduction Act into law on 8 February 2006. The United States noted that a number of speakers at the present meeting welcomed that legislation. As Members were aware, 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 rulings and recommendations in these disputes. Therefore, the United States had also failed to see what purpose would be served by the submission of status reports repeating the progress that the United States had made in the implementation of the DSB's rulings and recommendations and rulings. The status was clear.

60. The DSB took note of the statements.

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

(a) Statement by the European Communities

61. The Chairman said that the above-mentioned item was on the agenda of the present meeting at the request of the European Communities and invited the representative of the European Communities to speak.

62. The representative of the European Communities stated that, once more, the EC had deplored the fact that the United States had failed to submit a status report this time as well. During the 20 January DSB meeting, the EC had expressed its disappointment over that 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 WTO Members to survey the implementation progress of the relevant DSB's rulings and recommendations. While deploring the US unwillingness to submit detailed status reports, the EC at the 28 November 2005 DSB meeting and more recently at the 17 February 2006 DSB meeting, had submitted a number of questions for which it wished to receive replies. At both meetings the US representative had replied that his delegation would refer the questions to capital for review. Unfortunately, no replies or clarifications had been given to the DSB thus far. For the information of the DSB, the EC wished to repeat that the USTR had reopened 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 had replied to six questionnaires from the US authorities, and were in the process of replying to three more. Further to the questions raised at previous DSB meetings, the EC would be particularly interested in receiving 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 the hope to receive the preliminary findings soon and to 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 the Article 21.5 panel's findings by repealing these very old, unjustified and WTO-incompatible measures without delay.

63. The representative of the United States recalled that his country had made a statement at the 27 September 2005 meeting when the DSB had adopted the Article 21.5 Panel Report pertaining to this dispute. At the meeting held on 28 November, the United States had followed up on that statement with a report to the DSB on the status of its implementation. In that connection, 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 the United States had stated at the previous DSB meeting in February, it would be happy to discuss with the EC their views on this issue. With respect to the EC's request for information at the present meeting, it could inform the EC that the Department of Commerce had received responses to the questions that had been issued to the respondents in the two proceedings and that the Department of Commerce was currently in the process of analyzing those responses.

64. The DSB took note of the statements.

5. European Communities – Customs classification of frozen boneless chicken cuts

(a) Statements by Brazil and Thailand

65. The Chairman said that the above-mentioned item was on the agenda of the present meeting at the request of Brazil and Thailand and invited the representatives of the respective countries to speak.

66. The representative of Brazil stated that on 20 February 2006, the Arbitrator in the proceeding under Article 21.3(c) of the DSU had circulated his Award in the context of the dispute "European Communities – Customs Classification of Frozen Boneless Chicken Cuts" (DS269). The Arbitrator had established a reasonable period of time of nine months for the EC to implement the DSB's recommendations at issue. The EC had until 27 June 2006 to meet this obligation. Brazil welcomed the award and wished to highlight some key elements contained therein. The Arbitrator had endorsed some principles already enshrined in previous awards, such as: (i) the Members' discretion to determine their means of implementation; and (ii) the recommendation that the implementing Member resorted, in principle, only to means entirely within its lawmaking procedures in order to implement the DSB's decisions. These considerations by the Arbitrator were necessary in view of the eccentric and inappropriate claim by the EC that, as a pre-condition to any action within its domestic legal system, it would need to obtain a decision by the World Customs Organization (WCO) on the interpretation of a heading of the Harmonized System related to chicken meat. In the EC's view, that step would account for 18 months out of the 26 months requested as the appropriate reasonable period of time. On that point, the Arbitrator had affirmed that, although Members generally had discretion to select the means of implementation, "this prerogative is not without bounds", and "is not at all the same as saying that 'anything goes'". (Paragraph 56 of the Award (WT/DS269/13, 20 February 2006).

67. The Arbitrator had correctly concluded that the consultation with the WCO "has the potential to create a perceived obstacle to the necessary implementation of the recommendations and rulings of the DSB in this dispute", since "such recommendations will not be implemented by a classification decision by the WCO" and since the European Communities had stated that it would not take any action internally until it received a WCO decision (Paragraph 55 of the Award). According to the Arbitrator, "a finding of the WCO on tariff classification in response to a request ... by the European Communities could have the effect of prolonging this dispute rather than contributing to its resolution through implementation of the recommendations and rulings of the DSB" (Paragraph 55 of the Award). However, more important was the note taken by the Arbitrator as to the actual intentions of the EC in this dispute. The Arbitrator had registered that: "in response to my questions, the European

Communities declined to commit absolutely to implementing the recommendations and rulings of the DSB irrespective of the content of a decision by the WCO" (Paragraph 54 of the Award). That response spoke for itself. Brazil was, of course, deeply concerned with the degree to which one of the major players was committed to implementation of the decisions arising out of the dispute settlement mechanism in this dispute. Brazil considered that it would be very important for the system that the EC unequivocally clarify its position about the implementation – until 27 June 2006 – of the DSB's recommendations in this dispute.

68. The representative of Thailand stated that his country had joined its co-complainant – Brazil – in welcoming the Award of the Arbitrator in the case: "EC – Customs Classification of Frozen Boneless Chicken Cuts", which had been issued on 20 February 2006. As noted, the Arbitrator had determined that the reasonable period of time for the EC to implement the DSB's recommendations and ruling in this dispute was nine months until 27 June 2006. Thailand wished to highlight an important issue that it considered to be of particular significance to the DSB, which was that of the unconditional acceptance by WTO Members of the DSB's rulings and recommendations. The EC had argued that it would require 26 months for implementation in this case, and that 18 months of that period would be devoted to obtaining a classification decision from the WCO "confirming the interpretation of [the [Harmonized System] provided by the panel and the Appellate Body". On that point, Thailand had endorsed the Arbitrator's view that an implementing Member's proposed recourse to processes external to its legal system; i.e. a decision by the WCO on the tariff classification of frozen boneless chicken cuts, should not be taken into account to determine the period of time for implementation. This was particularly true where external recourse would hinder implementation, and was not even required in implementing Member's domestic legal system. As a result, Thailand commended the Arbitrator's decision to exclude 18 months from the determination of a reasonable period of time, which the EC had claimed necessary for its WCO consultation procedures. Thailand shared Brazil's concern about the fact that, as noted by the Arbitrator, the EC had declined to commit itself absolutely to implementing the recommendations and rulings of the DSB irrespective of the content of a decision by the WCO. The EC had implied that it would condition its acceptance of the DSB's recommendations and rulings pending the review by the WCO of an issue already decided by the WTO. Article 17.14 of the DSU clearly stated that Appellate Body reports, as the last stage in dispute settlement, must be accepted unconditionally by the disputing parties. Such acceptance was at the very heart of the DSU. In that light, the statement made by the EC suggesting that the EC would condition its implementation of the DSB's rulings and recommendations upon the verification by another international body should be of concern to all WTO Members. Thailand looked forward to a clear statement by the EC that it intended to implement unconditionally the DSB's rulings and recommendations by 27 June 2006.

69. The representative of the European Communities stated that the EC was obviously disappointed over the fact that the Arbitrator had not accorded to it the full requested reasonable period of time. The EC would have preferred a much longer reasonable period of time that would have taken into account its intention to discuss this issue in the appropriate instance of the WCO before taking concrete steps to adopt implementing measures internally. That would have been in line with the aim of uniform interpretation and application of the Harmonized System, recognition of obligations of WTO Members under other international organizations, the presumption against conflicts and the principle that the choice of the means of implementation was the prerogative of the implementing WTO Member. The EC wished to state unequivocally that it was its intention to ensure that it would act in conformity with its WTO obligations within the reasonable period of time accorded to it.

70. The DSB took note of the statements.

6. Mexico – Anti-dumping duties on steel pipes and tubes from Guatemala

(a) Request for the establishment of a panel by Guatemala (WT/DS331/2)

71. The Chairman recalled that the DSB had considered this matter at its meeting on 17 February 2006, and had agreed to revert to it. He drew attention to the communication from Guatemala contained in document WT/DS331/2, and invited the representative of Guatemala to speak.

72. The representative of Guatemala said that in his country's view the DSB was one of the cornerstones supporting the structure of the multilateral trading system and the critical element with regard to verifying Members' compliance with their obligations under the WTO. He recalled that on 17 February 2006, Guatemala had made its first request for the establishment of a panel in the dispute under consideration. At that time, Mexico had objected to the establishment of a panel, maintaining that it needed more time to analyse the request with the authorities in the capital, *inter alia*. His delegation had since stood ready to hold discussions with a view to finding a mutually satisfactory solution to this dispute. Unfortunately, no solution had been reached thus far and his delegation had instructions from the capital to move forward with the dispute settlement procedures, in accordance with Guatemala's rights under the WTO Agreements. In the light of the above, his country reiterated its request for the establishment of a panel, pursuant to the request in document WT/DS331/2, which had been circulated to all Members.

73. The representative of Mexico stated that his delegation regretted the fact that Guatemala had already decided to reiterate its request for the establishment of a panel. Mexico believed that, in accordance with Article 6.1 of the DSU, the panel would be established at the present meeting. Mexico's only alternative was to reiterate the observations which it had made to Guatemala in the course of the consultations. As had been mentioned at the 17 February DSB meeting, Mexico was open to continued dialogue with Guatemala to find a negotiated solution to this problem despite the fact that it had not managed to reach an agreement in consultations thus far. Mexico welcomed Guatemala's expressed willingness to continue with discussions and hoped that this matter could be settled through dialogue.

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

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

7. Turkey – Measures affecting the importation of rice

(a) Request for the establishment of a panel by the United States (WT/DS334/4)

76. The Chairman recalled that the DSB had considered this matter at its meeting on 17 February 2006 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS334/4, and invited the representative of the United States to speak.

77. The representative of the United States stated that, as he had explained at the DSB meeting on 17 February 2006, his country had serious concerns regarding Turkey's restrictions on the importation of rice. Turkey required importers to purchase large quantities of domestic rice in order to be permitted to import rice under tariff-rate quotas. Importers could not import rice without domestic purchases. Turkey would not permit importation without an import licence and would not grant an import licence without domestic purchase. These measures, which had restricted the import of rice to Turkey from the United States and many other Members, appeared to be inconsistent with several

provisions of the WTO Agreements. Therefore, the United States again requested that the DSB establish a panel pursuant to Article 6 of the DSU, with standard terms of reference, to examine the matters set forth in the US panel request.

78. The representative of Turkey stated that first of all his delegation wished to thank the Chairman for his sincere efforts prior to the present meeting aimed at finding a common understanding on Article 12.10 of the DSU by bringing the parties together. Since November 2005, when the United States had first requested consultations with Turkey, discussions had proved positive and encouraging towards finding a mutually agreeable solution. On 17 February 2006, however, after the United States had requested the establishment of a panel, Turkey had became cognizant of the fact that its trading partner was willing to pursue a different track rather than to continue with the consultation process. Turkey recognized that the cooperation between the parties could also continue during further dispute settlement stages, but Turkey's preference had always been to settle this matter mutually as early as possible. With that feeling, Turkey had explored the ways to use the right of developing countries provided under Article 12.10 of the DSU. Turkey would have wished that there was legal precedent on that, but unfortunately this issue had not yet been raised by Members. Turkey believed that Members must shed some light on this matter and work out a common understanding to make that Article more operational for developing countries. This would also be in line with the spirit of the current development round of negotiations. At this stage, Turkey regretted that the United States had decided to re-introduce its request for the establishment of a panel in this dispute. Turkey looked forward to the Chairman's ruling on Article 12.10, which would set an important precedent that would affect future cases involving developing countries.

79. The representative of India stated that his country wished to be associated with Turkey's request to make Article 12.10 more operational.

80. The representative of the United States stated that he wanted to comment briefly on Turkey's intervention. It was regrettable that discussions with Turkey at both the technical and ministerial levels for the past five and a half years, had not resolved this dispute and the United States had, therefore, requested a panel which the DSB would establish at the present meeting. However, it was the long-standing position of the United States that discussions to reach a mutually agreed solution could continue at any stage of dispute settlement proceedings. He noted that the Turkish representative had referred to that possibility as well and indeed that had been referred to by a delegation under the previous agenda item as well. And in fact a provision such as the last sentence of Article 12.7, the DSU contemplated that possibility expressly. The United States was certainly open to having further discussion with Turkey and was in fact awaiting new ideas from Turkey as to how it would propose to resolve this dispute.

81. The Chairman stated that for the information of the DSB, he wished to note that he had been in consultations with the parties on this matter over the past week and had explored with them various options for proceeding in light of the Turkish request under Article 12.10 of the DSU. The situation had been made more difficult by the fact that there was no past practice in the DSB for dealing with Article 12.10 requests and no guidance in the text of the DSU itself on how to proceed in the current circumstances in which Members found themselves – where, before the Article 12.10 request was filed with the Chairman, the complaining party had already requested the establishment of a panel, the DSB had considered the request once, and a second panel request was pending before the DSB. By the evening of 16 March, it had become clear that his consultations with the parties had unfortunately not led to a mutually agreeable solution to this particular issue, despite the good faith efforts on both sides. Accordingly, with regard to the US request, he believed that, at the present meeting, the DSB would be obliged to follow the provisions of Article 6 of the DSU. Given the timing of the request by Turkey, the situation in which Members found themselves in these proceedings and the current circumstances in which Members found themselves, it was not his intention to rule *per se* on the Turkish request at this point. He would be responding in writing to the letter sent to him on this matter by Turkey on 27 February 2006.

82. The representative of Turkey thanked the Chairman for his explanation. His delegation wished to state for the record that Turkey had not been aware of the fact that the consultations had been completed until the complainant, the United States, had formally declared that, and the filing of a panel request was the only way for Turkey to become aware of that. As indicated during the consultations held in the course of the week, Turkey wished to firmly state that it would go along with the Chairman's decision and would continue to collaborate in the course of further proceedings.

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

84. The representatives of Australia, China, the European Communities, Korea and Thailand reserved their third-party rights to participate in the Panel's proceedings.

8. United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina

(a) Recourse to Article 21.5 of the DSU by Argentina: Request for the establishment of a panel (WT/DS268/16)

85. The Chairman drew attention to the communication from Argentina contained in document WT/DS268/16, and invited the representative of Argentina to speak.

86. The representative of Argentina thanked for the opportunity to introduce the matter of disagreement concerning the measures adopted by the United States to implement the DSB's recommendations in this dispute. Argentina did not wish to reiterate the content of its request for the establishment of a panel under Article 21.5 of the DSU and paragraph 2 of the bilateral understanding regarding procedures under Articles 21 and 22 applicable to this dispute, contained in document WT/DS268/16, or to go over the details of the background to the dispute. However, Argentina wished to highlight the following points. In spite of its statements before the DSB, the United States had not implemented the recommendations adopted in this dispute. The recommendations adopted by the DSB had established that the United States breached its obligations under Article 11.3 of the Anti-Dumping Agreement when, in 2001, it had issued a determination to continue imposing duties on imports of oil country tubular goods (OCTG) from Argentina as a result of the sunset review.

87. The Anti-Dumping Agreement prohibited Members from maintaining anti-dumping duties for more than five years in the absence of strict compliance with the requirements of Articles 11.1, 11.3 and 11.4 thereof. In that respect, the United States had implemented new procedures under Section 129 of the Uruguay Round Agreements Act, as a result of which it had maintained that it had partly brought its measure into compliance with the DSB's recommendations in the dispute. The new determination of likelihood of continuation or recurrence of dumping had been issued in December 2005. The attempt by the United States to bring its determination into conformity with the Anti-Dumping Agreement 11 years after the imposition of the original order and five years after it should have been abolished was clearly inconsistent with the rules and spirit of the WTO. This had compounded in 2005 by the attempt to justify the determination of dumping, which should have expired. Facts such as these deprived the multilateral trading system of security and predictability and must not be permitted. Nevertheless, the factual basis developed in 2005 to justify the measure adopted in 2000 was inconsistent with the WTO Agreements. The basis lacked the evidence required by Article 11.3 of the Anti-Dumping Agreement to determine the likelihood of continuation or recurrence of dumping. Furthermore, by carrying out the new determination procedures, the United States had breached significant obligations under Article 6 of the said Agreement. In 2006, Argentina thus found itself in the absurd position of having to undergo the second sunset review of the anti-dumping order on its exports of OCTG to the United States, when the DSB had already established that the 2000 sunset review was inconsistent with the WTO obligations of the United States under the Anti-Dumping Agreement.

88. Moreover, the United States had not brought the "waiver" provisions, contained in the Tariff Act of 1930 and the US Department of Commerce Regulations, into conformity with the DSB recommendations and the WTO Agreements. The consultations held in Washington on 7 February 2006 and by teleconference on 22 February 2006 had failed to resolve the dispute. Under these circumstances, Argentina had no choice, but to request the establishment of a panel under Article 21.5 of the DSU and paragraph 2 of the bilateral understanding regarding the procedures under Articles 21 and 22 of the DSU applicable to this dispute, on the understanding that this would secure a positive solution thereto.

89. The representative of the United States stated that his country was disappointed that Argentina was seeking the establishment of a panel. However, pursuant to the understanding with Argentina, which had been circulated in document WT/DS268/14, the United States would accept the establishment of a panel at the present meeting. As the United States had explained to Argentina during bilateral discussions, the United States had complied fully with the DSB's recommendations and rulings. The United States was confident that the panel would so agree. The United States also would like to note that the USTR had directed the Department of Commerce to implement the determination conducted to bring the United States into compliance with the recommendations and rulings of the DSB. Inasmuch as Argentina had stated that its claim under Article 13 of the Anti-Dumping Agreement was premised on the fact that USTR had not directed the Department of Commerce to implement, the United States considered that Argentina's basis for making such a claim not longer existed.

90. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Argentina in document WT/DS268/16. The Panel would have standard terms of reference.

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

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

(a) Initiation of the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement and designation of the representative referred to in paragraph 4 of that Annex (WT/DS317/5)

92. The Chairman said that the above-mentioned item was on the agenda of the present meeting at the request of the European Communities. He then 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.

93. The representative of the European Communities said that the EC had requested the inclusion of this item on the agenda of the present meeting in view of the position of the United States at the past two DSB meetings. The United States had responded each time that it could not agree to the resumption of the Annex V process. He stressed that the reason for raising this point was that the United States had rejected the resumption of the information-gathering exercise in principle. This position was not acceptable. As the EC had stated at the previous DSB meeting, blocking the initiation of an Annex V process for reasons of inconvenience was not an option. As had already been expressed at the previous meeting and on previous occasions, the EC had repeatedly expressed its readiness to explore pragmatic solutions to various issues arising from this situation, including limiting the Annex V process in scope and time, and the relationship with any Annex V in the DS316 case. The United States had not indicated that it would be interested in these discussions. The EC would, therefore, take action to preserve its rights. The EC would request the facilitator to invite the United States to reply to those of the Annex V questions to which the United States had refused to reply for alleged procedural reasons which were now, in light of the new panel request and

establishment, without any basis. The EC was by no means seeking to rewrite Annex V of the SCM Agreement. Rather, it was merely proposing a way to allow the facilitator to complete the existing factual record, ultimately for the benefit of the panel in this dispute, despite US attempts to thwart the effectiveness of the Annex V procedure and thereby the Panel process.

94. The representative of the United States stated that it was unclear what the EC was attempting to accomplish by placing this item repeatedly on the agenda. In fact, the more the EC had tried to explain its actions, the more it simply contradicted itself. The United States could begin with the EC's labeling of its request as for the "initiation" of Annex V procedures, a phrase which could be found in the last paragraph of the panel request, which the Secretariat had helpfully reproduced in the documents for the present meeting. This was evidently an attempt to invoke paragraph 2 of Annex V of the SCM Agreement, which provided for the DSB to "initiate" a procedure to gather information on alleged subsidies. However, the EC had made clear at the 14 March DSB meeting and again a few moments ago, that what it had really sought was not what it had written in its panel request, but something else entirely: to "resume" the information-gathering procedures that had begun on 23 September 2005, and had ended on 22 December. This was a very different matter, as Annex V did not contemplate the resumption of a completed information-gathering process. In fact, it limited that process to a 60-day period.

95. He then provided another example: the EC had asserted at the 14 March DSB meeting that it could simply resume the Annex V process that had ended in December based on the rules developed for that process. But the EC had ignored the fact that those rules – which resulted from an agreement between the United States and the EC – did not allow this result. The EC only required the submission of information on two occasions: "at the latest on 11 November 2005" for responses to initial questions and "at the latest on 22 December 2005" for responses to follow-up questions. There was no obligation to answer Annex V questions after those dates, and no provision for resuming information gathering. The EC shared this view, or at least it used to. It had told the facilitator in a submission on 29 September that "the EC does not accept" the concept that a party could "be required to continually provide updated information after the deadlines for production of documents and information." The EC had now made clear that what it really sought was not to abide by the agreement it made with the United States, and not to abide by the procedures set up by the facilitator, but instead to rewrite that agreement, and those rules, unilaterally.

96. Most recently, the EC had asserted at the 14 March 2006 DSB meeting that "[t]here is no positive consensus rule to start an Annex V procedure and the EC never took such a position." In fact, at three successive DSB meetings, the EC had taken the position that initiation of Annex V procedures was not possible without agreement from the EC (WT/DSB/M/196, para. 45; WT/DSB/M/195, para. 24; WT/DSB/M/194, para. 52). For example, the EC had explained this position at the 31 August 2005 DSB meeting by asserting that "consistent with WTO jurisprudence, an Annex V procedure could not be initiated unilaterally by only one party to a dispute, but required a meeting of the minds; an actual agreement between the parties" (WT/DSB/M/196, para. 45). What the EC had made clear at the 14 March DSB meeting was that what it really wanted was not to abide by the position that it had taken in the very recent past, or in fact even to describe that position accurately, but to try to rewrite the minutes of the DSB meeting to suit its current objectives.

97. In sum, the problem was not, as the EC had asserted at the 14 March DSB meeting, that it was unable to obtain information to which it was entitled. As the United States had noted repeatedly, the United States had already provided huge quantities of information on various NASA and Defense Department programmes, and the EC had demonstrated no "entitlement" to obtain more. Rather, the problem was that the EC was seeking to obtain something to which it was not entitled; i.e. to resume the Annex V process to cover programmes that it could have included initially, but had chosen not to. He then wished to review how this point had been reached. As the EC had conceded at the 14 March DSB meeting, at the first DSB meeting to consider the DS317 panel request, the United States had alerted the EC that 13 programmes in the request had not been subject to consultations. At that time,

at the EC's insistence, the parties had been involved in negotiations to reach an agreement on procedures for the Annex V process in this dispute. The time consumed by those lengthy negotiations had given the EC a chance to fix its defective panel request. But the EC had decided to do nothing, either before or during the Annex V process, to fix its request. The EC apparently regreted its inactivity now, and was seeking to rewrite the rules of the SCM Agreement, to rewrite the procedural agreement it had reached with the United States, and even to rewrite the minutes of three DSB meetings in an effort to "resume" the Annex V process. In so doing, it would unilaterally prolong that process beyond the 60 days provided in the SCM Agreement, and beyond the 90 days that it had agreed upon with the United States. The rules did not provide what the EC sought and the United States was not in a position at the present meeting to agree to the EC's request.

98. The representative of Canada recalled that, at the 14 March 2006 DSB meeting, the EC had stated that under the SCM Agreement, the initiation of Annex V procedures by the DSB was automatic, upon request of a complaining Member. Canada was pleased to note that the EC's position on this issue was now consistent with the plain language of Annex V. He noted that Annex V, paragraph 2, required that "the DSB shall, upon request, initiate the procedure" provided for in Annex V. Nowhere in the SCM Agreement, or in the DSU, or in the entirety of the WTO Agreement, was there a suggestion that this "shall" was an exhortation rather than an obligation. When a matter had been referred to the DSB and a Member requested an Annex V procedure, the DSB must initiate the procedure and designate a representative to facilitate the information gathering process. Nothing in the WTO Agreement gave any Member the right to block initiation, or gave the DSB the authority to decline to initiate the procedure.

99. The representative of Brazil recalled that the same item had already been discussed at the 14 March 2006 DSB meeting; i.e. three days ago. The issue underlying the EC's request, though, had a longer history, with the main actors ever changing their roles depending on who put the item on the DSB's agenda. Brazil could not allow for the erosion of the security and predictability that the WTO dispute settlement system was expected to ensure by the deliberately erratic behaviour of two of the main players in this system. Brazil could neither allow for any interpretation whereby, through the invention of additional conditions or requirements for the initiation of the Annex V procedures, WTO Members could attempt to deprive this important fact-finding tool of its usefulness for the development of a solid factual basis for the panel to render the most accurate verdict. Brazil could not but regret that the United States and the EC had engaged in such a harmful exercise.

100. Brazil wished to reiterate that the provisions of Annex V were clear and unconditional. Paragraphs 2 and 5 set out no additional requirement for the establishment of the fact-finding procedure but the request itself and the "referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement". As for the designation of the facilitator, paragraph 4 of that Annex was even more straightforward: "The DSB shall designate a representative to serve the function of facilitating the information-gathering process". None of the paragraphs mentioned included any reference whatsoever to a consensus rule. There was no need for mutual agreement between the parties to a dispute as a pre-condition for establishing the fact-finding procedure. There was no need for designating the facilitator for the information-gathering process. The only requirements for the development of evidence under the mentioned procedures were the request for the initiation of the process and the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement.

101. The DSB took note of the statements.