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MINUTES OF MEETING

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on 22 October 2007

Chairman: Mr. Bruce Gosper (Australia)

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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.59)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.59)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.34)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the three 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.59)

2. The Chairman drew attention to document WT/DS176/11/Add.59, 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 October 2007, in accordance with Article 21.6 of the DSU. As noted in the status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US administration continued to work with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, month after month, delegations had listened to the United States reiterating its strong commitment to the TRIPS Agreement and to a strong and non-discriminatory protection of intellectual property rights. But, delegations were still waiting to see a reconciliation of statements and acts. Not only in the present dispute, but also in the dispute on Section 110, the United States had ignored for years fundamental obligations embodied in the TRIPS Agreement. No matter how strongly the United States might deny this, such outright neglect of its obligations under the TRIPS Agreement and the DSU undermined the authority of the TRIPS Agreement and of WTO rulings. The EC hoped that the introduction of bipartisan bills that would, *inter alia*, repeal Section 211 showed a renewed and genuine interest of the United States to finally bring itself into compliance with its TRIPS obligations. It was in the interest of all, including of the US Industry, that the United States finally complied with its obligations under the TRIPS Agreement.

5. The representative of Cuba said that, for five years now, the United States had been saying that it was working to comply with the DSB's recommendations and rulings. Every month, before the DSB, the United States reiterated its speech. Cuba's concern about the lack of progress, and about a deadlock in implementation, was shared by other WTO Members who had spoken in the DSB meetings regarding the seriousness of the situation. By its action, the United States was disregarding the objective of the dispute settlement mechanism, namely, to guarantee prompt compliance with the DSB's recommendations and rulings, and to preserve the rights and obligations of all Members. The United States was among the countries that had submitted and had received the most cases in the

framework of this dispute settlement system. Delegations had witnessed the US alleged concern at other Members' failure to respect intellectual property rights. It was strange that the United States should request the DSB to settle disputes concerning compliance with the TRIPS Agreement while it had not taken into account recommendations and rulings addressed to it in this area, in this and other cases. It would seem that Members were in a situation – not, be it noted, the first – in which that country required others to comply with an obligation with which it had not itself complied. If every Member were to adopt the same attitude, chaos would ensue and the rules that benefited only the most developed players would instantly be dispensed with.

6. Section 211 was causing serious harm to a powerful Cuban-French joint venture company. Its application would prevent the CUBAEXPORT company, currently the owner of the Havana Club trademark in the United States, from renewing its registration in that territory. Furthermore, owing to the unilateral economic trade and financial blockade imposed on Cuba by the United States, the Cuban-French company could not market Cuban rum in the United States. The attitude of the United States sent out very negative signals to other WTO Members and called into question the effectiveness of the dispute settlement mechanism and the credibility of, and confidence in, the multilateral trade system, at a crucial time for the WTO as it negotiated the Doha Round. Cuba called for the immediate repeal of Section 211, with all the adverse consequences it entailed for Cuba, and hoped that the United States, the defender of property rights in this and other areas, would recognize serious implications of the precedent it was setting by its conduct in every case in which it made a dead letter of what had been agreed to.

7. The representative of China said that, like others, his country, once again, wished to express its concerns on protracted implementation in this case. Five years had passed and the implementation issue pertaining to this case was still before the DSB for discussion and, while noting the development within the United States on this matter, there was yet no clear indication when this matter would hopefully be resolved. Bearing in mind the systemic impact that the undue delay of full implementation of the DSB's rulings would cause to the integrity and efficiency of the dispute settlement system, China urged the United States to double its effort to fully implement the decision of the DSB in this case.

8. The representative of Thailand said that his country thanked the United States for its status report and the statement made at the present meeting. Like previous speakers, Thailand wished to express its concern over the systemic implications of this dispute. Non-implementation of the DSB's rulings and recommendations undermined the rules-based multilateral trading system. Thailand, therefore, called on the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

9. The representative of Bolivia said that, like previous speakers, her delegation wished to state yet again that Bolivia was disappointed with the course of events and the way the dispute settlement mechanism was working. The situation of non-implementation of recommendations and rulings set a serious precedent regarding the functioning of the system. Bolivia wished to join other speakers requesting that the United States respect the DSB's recommendations and rulings, so as to be able to preserve the credibility of the dispute settlement mechanism.

10. The representative of the United States said that his country regretted that the EC was again suggesting that US actions in this dispute had undermined the authority of the TRIPS Agreement. Once again, the United States failed to understand how its commitment to implement the DSB's recommendations and rulings in this dispute and its efforts to comply could undermine the "authority" of the TRIPS Agreement. Indeed, the EC itself had noted the introduction of bipartisan bills in the current US Congress that would implement the DSB's recommendations and rulings. To the contrary, these efforts affirmed Members' commitments to the TRIPS Agreement. Finally, the United States regretted very much that some Members – including some whose record of protecting intellectual

property rights might appear to be less than robust – continued to criticize the US commitment to intellectual property rights. These criticisms were completely unfounded. It was of course true that the United States remained a strong advocate of substantial protections for intellectual property internationally. However, the United States was also second to no one in providing strong intellectual property protection within its own territory.

11. The representative of Cuba said that legislations had been submitted to the US Congress, but there was no guarantee that this dispute would be resolved as required by the DSB's recommendations and rulings. Different legislations and acts had been proposed in the past, but none of them had reached the final stage. The Republican leadership and the governing party had manoeuvred in the US Congress to avoid the approval of such legislations and acts. Furthermore, the US President had stated publicly that he would veto any legislative measures which would benefit directly or indirectly Cuba. In this case, it would be just rendering justice by protecting the rules on intellectual property, which had been violated for many years. This dispute had become very well known since it had been ongoing for a number of years. In fact, more than five years had gone by without implementation of the DSB's recommendations and rulings. Members were in a state of limbo because no concrete steps had been taken beyond rhetorical statements.

12. 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.59)

13. The Chairman drew attention to document WT/DS184/15/Add.59, 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.

14. The representative of the United States said that his country had provided a status report in this dispute on 10 October 2007, in accordance with Article 21.6 of the DSU. As Members would recall, as of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration would work with the US Congress with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

15. The representative of Japan said that his country thanked the United States for its statement and the latest status report in this dispute. Japan also acknowledged that in November 2002 the United States had taken the measure to implement the part of the DSB's recommendations, as reported by the United States. However, the fact remained that, while it had been more than six years after the DSB had adopted the recommendations, the issue of implementation in this case was still on the DSB agenda, because the remaining part of the recommendations had not yet been implemented. For instance, the United States had not made the necessary legislative amendments to the relevant provisions of its Tariff Act of 1930, which still required the inclusion of dumping margins established for the sampled companies based only in part on "facts available" in calculating "all-others rate". As a result, these WTO-inconsistent provisions could still apply to future anti-dumping investigations that would involve the calculation of "all other rate". As Japan had repeatedly stated before the DSB, a full and prompt implementation of the recommendations and rulings of the DSB was essential for maintaining the credibility of the WTO dispute settlement system. Japan noted that, in its statement and the status report, the United States had stated that the US administration was working with the new Congress to pass specific legislative amendments that would implement the DSB's recommendations and rulings. In this regard, Japan wised the United States to indicate when such

amendments would be introduced in the new Congress. Finally, Japan wished to renew its hope that the United States accelerate its work to come to full compliance without further delay.

16. 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.34)

17. The Chairman drew attention to document WT/DS160/24/Add.34, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

18. The representative of the United States said that his country had provided a status report in this dispute on 10 October 2007, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and would continue to confer with the European Communities, in order to reach a mutually satisfactory resolution of this matter. In this regard, the United States appreciated the EC's statement at the 25 September 2007 DSB meeting that it remained prepared to work with the United States to seek a resolution to this dispute. The United States too shared the EC's goal of discussing how such a mutually satisfactory solution could be achieved.

19. The representative of the European Communities said that the EC thought it had exhausted all ways of saying that this dispute had dragged on for too long, that it wanted to see it resolved, and that it was prepared to work with the United States to do so. Rather than going through the monthly exercise of looking for marginally different ways to say those things, the EC would prefer if the United States modified the legislation in question so that the DSB could be spared further discussion of this case.

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

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

(a) Statements by the European Communities and Japan

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

22. The representative of the European Communities said that, since 1 October 2007, imports subject to anti-dumping or countervailing duties entered the United States without the duties collected on them being distributed later on. This was a positive step that the EC had already had the opportunity to welcome. However, the Continued Dumping and Subsidy Offset Act would continue to produce trade distorting effects for a number of years as duties collected on imports that had entered before 1 October would still be distributed. The Congressional Budget Office had foreseen that distributions under the CDSOA would continue until 1 October 2009. On 1 October 2007, the United States had started a new distribution and provisional amounts published earlier in the course of the year indicated that it was likely to be the most important thus far. The EC was still waiting for a convincing explanation as to how to reconcile the United States' assertion month after month that it had taken all actions necessary to bring itself in compliance with its WTO obligations and the continuation of CDSOA distributions which were in violation of Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement. 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 to its

industry. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit implementation reports in this dispute.

23. The representative of Japan said that although his country recognized that a duty collected on entries entered as from 1 October 2007 was no longer subject to the distributions, "the distribution process will continue until all entries made before [that date] are liquidated and the duties are collected".[1] Under the US system, such liquidation and collection could take years to come. Thus, contrary to the repeated US assertion that it had taken all necessary steps for implementation in this case, these latest US actions rendered further support to the view that the United States had still failed to fully implement the DSB's recommendations and rulings in this case. In fact, the distribution process under the CDSOA was currently underway for the Fiscal Year 2007. Japan, once again, urged the United States to immediately terminate the illegal distribution and to repeal the CDSOA, not just in form, but also in substance. Until then, Japan considered that the US compliance was incomplete and the issue of implementation in this dispute must be under surveillance by the DSB pursuant to Article 21.6 of the DSU. In this connection, Japan reiterated that the United States was under obligation to provide the DSB with a status report, pursuant to Article 21.6 of the DSU. Japan reserved all its rights under the DSU until the United States came into full compliance.

24. The representative of Canada said that his country thanked the EC and Japan for including this item on the agenda of the present meeting. Canada was pleased that duty deposits collected by the United States after 30 September would no longer be subject to the Byrd Amendment. While this was a significant step forward, duty deposits collected by the United States, before 1 October 2007, would, nevertheless, continue to be subject to the Byrd Amendment. Until the United States ceased to administer the Byrd Amendment, Canada shared the view that surveillance by the DSB would continue.

25. The representative of Brazil said that his country wished to thank the EC and Japan for maintaining this matter on the DSB's agenda. The United States had begun another round of disbursements under the Byrd Amendment, pursuant to which US domestic industry would receive as much as US$279 million as a result of a WTO-inconsistent measure being still operative in defiance of the repeated assertion by the United States that full compliance had been achieved in this case. In fact, the trade-distorting effects of the Byrd Amendment would still be felt for years since anti-dumping and countervailing duties collected on products entered into the United States up to 30 September 2007 would still be handed out to the US domestic industry at the expense of foreign producers and exporters and of WTO Members' rights. Brazil wished to reiterate that full compliance on the part of the United States would only come through the complete elimination of all disbursements under the Byrd Amendment. Until such condition was met, WTO Members should be able to exercise any rights related to the non-compliance situation in this case.

26. The representative of China said that his country thanked the EC and Japan for, once again, raising this matter before the DSB. China shared the view of the previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings.

27. The representative of India said that her country thanked the EC and Japan for raising this matter at the present DSB meeting once again. India shared their concerns. As mentioned earlier, India remained concerned about the US continued illegal disbursement of anti-dumping and countervailing duties to its industry. India, therefore, wished to reiterate that full compliance on the part of the United States would only come through the complete elimination of all disbursement under the Byrd Amendment. Until such condition was met, WTO Members should be able to exercise any rights related to the non-compliance situation it faced in this case.

[1] 71 Federal Register at 31336 et seq. (dated 1 June 2006).

28. The representative of Thailand said that his country wished to join previous speakers in thanking the EC and Japan for bringing this matter before the DSB once more. As noted at previous DSB meetings, Thailand remained disappointed at the US continued illegal disbursement of funds under the CDSOA. Thailand also remained disappointed at the US continued lack of status reports on its outstanding implementation in this dispute. Therefore, Thailand again urged the United States to cease its WTO-inconsistent disbursements, to repeal the Byrd Amendment with immediate practical effect, and to resume providing status reports until such actions were taken and this matter had been fully resolved.

29. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States was surprised to hear that the EC and Japan made the statement that the United States had not implemented the DSB's recommendations and rulings and would remain in breach of its WTO obligations. The United States wished to remind the EC and Japan that, pursuant to the Deficit Reduction Act, anti-dumping duties and countervailing duties that were being collected on goods now entering the United States would not be distributed to domestic firms. With respect to comments regarding further status reports in this matter, those two Members who had inscribed this item on the agenda of the present meeting were, of course, free to do so, but the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States made in the implementation of the DSB's recommendations and rulings.

30. The DSB took note of the statements.

3. Colombia – Indicative prices and restrictions on ports of entry

(a) Request for the establishment of a panel by Panama (WT/DS366/6)

31. The Chairman recalled that the DSB had considered this matter at its meeting on 28 September 2007, and had agreed to revert to it. He drew attention to the communication from Panama contained in document WT/DS366/6, and invited the representative of Panama to speak.

32. The representative of Panama said that as his country had informed the DSB at its meeting on 28 September 2007, since June 2005 Panama had been experiencing serious difficulties in gaining access to Colombia's market as a consequence of the entry into force of a number of customs measures imposed on goods originating in, or coming from, Panama, which had had a negative impact on the country's export activities, and in particular on those taking place in the commercial free zone operating in Panama's territory, known as the Colon Free Zone, which served as a centre for the collection and distribution of goods from various world suppliers ultimately destined for Latin American markets. Colombia was one of the main destination markets of the Colon Free Zone and had been so since its creation, so that these measures had directly affected the legal security of those re-exportation activities carried out by domestic and international suppliers, the final destination of which was Colombia. He reiterated that Panama had spent two years trying to resolve this problem. Unfortunately, in spite of the pact between Panama and Colombia to put an end to this dispute, through the repeal by Colombia of the customs restrictions in question and the implementation of a Protocol of Cooperation and Exchange of Customs Information which had yielded results, Colombia had now decided unilaterally and unexpectedly to disregard this amicable solution, which had even been notified to the WTO, and once again to introduce measures with effects similar to those that were the subject of Panama's initial query last year. It was for that reason that, following a consultation process in July 2007, Panama was now requesting the establishment of a panel to settle once and for all a dispute that was seriously affecting the advantages derived by Panama from the

WTO Agreements, as was indicated in Panama's panel request, which was submitted for consideration by the DSB for the second consecutive time.

33. The representative of Colombia said that his country regretted that Panama had decided to request the establishment of a panel to resolve this dispute. On 31 July 2007, Colombia had attended the consultation meeting where it had provided a response to the questions raised by Panama. On that occasion, Colombia had explained the scope of the measures and their compatibility with the WTO rules and, at that time, Panama had not reacted to Colombia's response. Colombia was at the disposal of Panama's authorities to continue this dialogue. Colombia regretted that the parties had not been able to reach a mutually agreed solution, but was ready to demonstrate the legality of the measures called into question and prove that they were WTO-consistent.

34. 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.

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

4. China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products

(a) Request for the establishment of a panel by the United States (WT/DS363/5)

36. The Chairman drew attention to the communication from the United States contained in document WT/DS363/5, and invited the representative of the United States to speak.

37. The representative of the United States said his country was concerned about certain Chinese measures that affected market access for films for theatrical release; for audiovisual home entertainment products, such as DVDs and video cassettes; for books, periodicals, journals, and other publications; and for sound recordings. These measures appeared to raise a number of WTO concerns. The United States and China had been discussing these matters bilaterally for quite some time. Three sets of issues were before the DSB at the present meeting. First, China only permitted certain Chinese state-designated enterprises to import these products into the customs territory of China. This restriction acted as a bottleneck for those products at the border. Second, China restricted the rights of foreign entities to engage in the business of distributing publications, audiovisual home entertainment products and sound recordings within China. For some of the industries at issue, distribution was limited to Chinese state-owned enterprises. Others faced restrictive requirements not imposed on domestic enterprises. In yet other cases, only joint ventures under Chinese control were permitted to engage in distribution. Third, China imposed restrictions on distributing imported publications, sound recordings, and films for theatrical release. These were restrictions that Chinese products did not face. For example, of the dozens of distributors of films for theatrical release in China, only two were allowed to handle imported films. Distribution of imported publications and the digital distribution of imported sound recordings also faced discriminatory restrictions.

38. China's measures appeared to be inconsistent with several provisions of the WTO Agreement, including provisions in the GATS, the GATT 1994, and China's Protocol of Accession. The US panel request described these matters in greater detail. In addition, the United States was also concerned about the relationship between the measures at issue and the protection of intellectual property rights in China. China's barriers to market access for these copyright-dependent products were keeping legitimate products away from the Chinese consumer. These barriers, in turn, benefited copyright pirates who operated in the Chinese market. In other words, the protection of intellectual property

and market access for legitimate copyright-dependent products were bound together. As he had mentioned a few moments ago, the United States had discussed all of these issues extensively with China, including in the consultations that had been held in June and July. While those consultations had provided some helpful clarifications, regrettably, they had not resolved this dispute. The United States, therefore, requested that the DSB establish a panel at the present meeting to examine the matters set forth in the US panel request.

39. The representative of China said that his country respected the rights of the United States under the DSU. However, China regretted that the United States was requesting for the establishment of a panel in the case under consideration. Since its accession, China had been sincerely and faithfully fulfilling its WTO commitments, including those pertinent to this case. Currently, China annually imported and distributed dozens of revenue-sharing films as committed, half a million publications of different types and countless audiovisual products of various sources. Thus, a good access into the marketplace of China for such products of other Members had already been provided. Regardless of those facts and China's explanations at various occasions, including the consultation under the DSU, as well as China's wish to resolve this dispute through consultations, the United States came forward with its request, which China regretted. Having said that, and in accordance with the DSU provisions, China did not agree to the establishment of a panel at the present meeting.

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

5. Turkey – Measures affecting the importation of rice

(a) Report of the Panel (WT/DS334/R)

41. The Chairman recalled that at its meeting on 17 March 2006, the DSB had established a panel to examine the complaint by the United States pertaining to this matter. The Report of the Panel, contained in document WT/DS334/R had been circulated on 21 September 2007 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

42. The representative of the United States said that his country wished to sincerely thank the members of the Panel and the Secretariat for their hard work in this dispute. The Panel Report was in most respects thorough and well-reasoned, and the United States was pleased to propose its adoption. In this dispute, Turkey had acted inconsistently with its WTO obligations by requiring importers to obtain licenses known as certificates of control to import rice and by failing to grant licenses to import rice at or below Turkey's bound duty rate. The United States was pleased with the Panel's finding that Turkey's import licensing regime for rice constituted a quantitative import restriction and discretionary import licensing inconsistent with Article 4.2 of the Agreement on Agriculture. Turkey had also acted inconsistently with its WTO obligations by requiring importers to purchase domestic rice as a condition for importing rice under a tariff-rate-quota system. The United States was also very pleased that the Panel had found Turkey's domestic purchase requirement to be in breach of Article III:4 of the GATT 1994. The Panel's analysis of both of these measures was sound, and the United States recommended it to Members' attention.

43. The United States also wished, however, to bring two systemic concerns relating to the Panel's final Report to the attention of Members. First, the United States noted that in the final Report, the Panel had chosen not to make a recommendation that Turkey bring the domestic purchase requirement into conformity with Turkey's WTO obligations. This failure by the Panel was very troubling. Article 19.1 of the DSU stated that, when a panel concluded that a Member's measure was inconsistent with a covered agreement, the panel "shall recommend that the Member concerned bring the measure into conformity with that agreement". This requirement was unconditional. It applied

regardless of events that might occur during the panel proceeding, including any changes made to the measure after panel establishment. The Panel in this dispute had found the domestic purchase requirement within its terms of reference and had found that measure to be WTO-inconsistent. Therefore, under DSU Article 19.1 the Panel was required to make a recommendation. In other words, panels did not have the option to decline to make a recommendation.

44. Second, the United States was troubled by the Panel's addition of an entirely new section in the final report that had not been included in the interim report. Because the new section was not included in the interim report, neither party had a chance to review it during the interim review period. Furthermore, during the course of the panel proceeding, neither party had requested the findings made in that section. The Panel's decision to make new findings in a new section of its report at the final stage of the proceeding, and after interim review by the parties, could not be reconciled with the provisions of Article 15 of the DSU. The United States believed that all Members should be concerned by the systemic implications of such an addition and so the United States had prepared a paper that explained its concerns in more detail. The United States was making a copy of that paper available in the room and would be pleased to provide it to any interested delegation.[2]

45. In conclusion, putting these systemic issues to one side, the United States had sought for many years to reach a mutually agreed solution with Turkey to the issues raised in this dispute. The United States hoped this report would assist in resolving the dispute and that Turkey would promptly bring its measures into compliance with its WTO obligations.

46. The representative of Turkey said that his country wished to take this opportunity to acknowledge the hard work of the Panel and the Secretariat in preparing the Report. At the same time, Turkey also wished to make a number of observations regarding the Report. First of all, Turkey was disappointed with the Panel's finding of inconsistency with Article 4.2 of the Agreement on Agriculture. Turkey did not share the Panel's conclusion in paragraph 8.1 of the Report regarding Certificates of Control on rice imports. Turkey believed that the instrument of Certificate of Control was not inconsistent with any of its WTO obligations. Moreover, Turkey wished to inform the DSB that it was currently exploring what steps might need to be taken to comply with the recommendation of the Panel in this case in compliance with Turkey's rights under the WTO. Turkey would revert to this issue at the next DSB meeting. Turkey was also willing to engage in constructive discussions with the United States on this matter.

47. As regards the tariff-rate-quota (TRQ) issue, Turkey was not satisfied with the Panel's decision to make findings on any of the measures relating to the TRQ regime. In that respect, again Turkey could not endorse the content of paragraph 8.3 of the Report. As Turkey had underlined during the Panel's proceedings, the TRQ regime had expired and Turkey had made repeated assurances that it would not re-introduce any similar measure in the future. Therefore, Turkey considered that the Panel's decision to make a finding on this issue was not appropriate. But, Turkey welcomed the Panel's decision to refrain from making any specific recommendation to the DSB on this matter.

48. The representative of Australia said that her country had participated as a third party in this dispute and wished to join the parties in thanking the Panel and the Secretariat for their work in this case. Australia welcomed the findings of the Panel, which confirmed that a WTO Member could not resort to non-tariff barriers to circumvent WTO tariffs and other access commitments. Australia had a continuing commercial interest in access to Turkey's rice market and looked forward to Turkey's early implementation of the DSB's recommendations. Australia would, however, like to register its concern at the consideration by the Panel of matters in its final Report which had not been addressed in the interim report and which had not been raised by either party during the interim review. In Australia's

[2] The US paper was subsequently circulated in document WT/DS334/9.

view this raised systemic issues which were potentially prejudicial to the predictability of the dispute settlement system.

49. The representative of Canada said that his country agreed with the United States that a panel should refrain from including in the final report findings that did not appear in the interim report. Parties were to be given the opportunity to make comments on all draft findings as provided for in Article 15 of the DSU. The Panel had not included its findings on special and differential treatment in the interim report and, therefore, the Panel had not offered the United States an opportunity to comment on these findings as provided for in Article 15.2 of the DSU.

50. The DSB took note of the statements and adopted the Panel Report contained in WT/DS334/R.

6. Korea – Anti-dumping duties on imports of certain paper from Indonesia: Recourse to Article 21.5 of the DSU by Indonesia

(a) Report of the Panel (WT/DS312/RW)

51. The Chairman recalled that at its meeting on 23 January 2007, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Indonesia concerning the implementation by Korea of the recommendations and rulings of the DSB pertaining to this dispute. The Report of the Panel contained in document WT/DS312/RW had been circulated on 28 September this year as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Indonesia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

52. The representative of Indonesia said that her country thanked the Panel and the Secretariat for their work on this dispute. Indonesia was satisfied with the outcome of the Article 21.5 proceedings. The Panel had confirmed Indonesia's view that Korea had failed to implement the recommendations and rulings adopted by the DSB. Indonesia recalled that at the 28 November 2005 DSB meeting at which the original Panel Report had been adopted, Korea had declared that its implementation proceedings would "provide an example of the conduct of anti-dumping investigations in a manner consistent with the highest standards of procedural and substantive fairness".[3] The Article 21.5 Panel Report, to be adopted at the present meeting, established beyond doubt that Korea's confidence was misplaced and that its investigating authority had failed to meet that standard.

53. On the primary issue before it, the Panel had found that Korea had not complied with the rulings and recommendations of the original panel regarding the exercise of special circumspection in utilizing secondary information to calculate the dumping margins for the largest Indonesian exporter. Consequently, the anti-dumping measure remained inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. The Panel had also ruled that the Korean Trade Commission had failed to respect the procedural rights of the Indonesian exporter during the implementation process by refusing to give it any opportunity to submit its views on the injury re-determination. Thus, not only had Korea failed to bring itself into compliance, it had also introduced fresh violations of Article 6.2 of the Anti-Dumping Agreement during the implementation process. It was now up to Korea to bring itself into compliance with its treaty obligations. Indonesia expected Korea to do so by immediately withdrawing the anti-dumping measure.

54. As Indonesia had previously explained, proper implementation by Korea of the Panel's rulings and recommendations regarding Article 6.8 and Annex II of the Anti-Dumping Agreement would lead to *de minimis* margins and, therefore, termination of the measure for the exporter in question.

[3] Korea's statement made at the 28 November 2005 DSB meeting (WT/DSB/M/200; para. 52).

Moreover, the appropriate means for Korea to comply with the rulings and recommendations regarding its failure to conduct the implementation proceedings in accordance with Article 6.2 of the Anti-Dumping Agreement was to terminate the anti-dumping measure. In this regard, Indonesia noted that in a recent Article 21.5 case involving a measure taken by the United States, Korea had stated that "all the obligations contained in Article 6" were "fundamental due process rights" and where these rights were not respected in an implementation proceeding, "the only way to bring the measure into conformity with relevant provisions of the covered agreements is to revoke it".[4]

55. Indonesia assumed that Korea considered itself bound by the same standards under the WTO Agreements to which it would hold the United States and other WTO Members. In circumstances where Korea had been found to have acted inconsistently with the fundamental due process obligations under Article 6 of the Anti-Dumping Agreement, Indonesia hoped that Korea would act promptly on the basis of its own stated position that the "only way to bring the measure into conformity" in such circumstances "is to revoke it". Indonesia also noted that, as a practical matter, in every other instance in which an Article 21.5 Panel had found that a WTO Member had failed to bring an anti-dumping measure into compliance with previous panel rulings, the anti-dumping measure had then been terminated or withdrawn as part of a settlement with the complaining Member. This included the US measure at issue in the case just mentioned. If, therefore, Korea failed to now terminate the measure at issue, it would become the first WTO Member to cling to an anti-dumping measure that had twice been found to be inconsistent with the Anti-Dumping Agreement. Indonesia now had the right to take retaliatory action under Article 22 of the DSU. Korea's WTO-inconsistent measure had been in place for almost four years, improperly restricting Indonesia's access to the Korean market. Indonesia would have no choice, but to request authorization to take retaliatory action, if Korea continued to enforce this WTO-inconsistent measure.

56. The representative of Korea said that his country appreciated this opportunity to make a statement before the DSB in discussing the adoption of the Panel Report in this dispute. In evaluating the redetermination issued by the Korea Trade Commission ("KTC"), the Panel had dismissed two out of the four claims raised by Indonesia as failing to meet the *prima facie* standard. The Panel's decision, however, found two errors in the KTC's implementation of the prior Panel Report: First, the Panel had found that, while the KTC had demonstrated that the "facts available" interest expense figure it adopted was consistent with "information from other independent sources at [its] disposal," the KTC had failed to provide an adequate explanation why that information was more reasonable than other "facts available" that might have been used. Second, while the Panel had found no substantive errors in the KTC's revised explanation of its injury analysis (and Indonesia did not allege that any such errors existed), the KTC had improperly failed to allow the Indonesian respondents to comment on the revised explanation of the injury determination before it was adopted.

57. Korea was puzzled by certain aspects of the Panel's decision. Korea did not doubt that the Panel had attempted to address the issues raised in this dispute in good faith. However, the Panel had inexplicably failed to consider a number of arguments presented by Korea, and it had also based its ruling in part on incorrect assumptions and misinterpretations of the actual determination by the KTC. Korea was confident that, if the Panel had fully considered the arguments presented by Korea and had interpreted the determination by the KTC in accordance with the clear meaning of the relevant passages, the outcome would undoubtedly have been different. Korea also believed that the Panel's decision regarding the selection of "facts available" represented a significant departure from the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement. The fundamental fact of this investigation was that the Indonesian respondents had refused to cooperate – more particularly, they had deliberately refused to provide necessary information to the KTC and had misled the KTC

[4] Panel Report: "United States - Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina: Recourse to Article 21.5 by Argentina", WT/DS268/RW, Third Party Written Submission of the Republic of Korea, 26 April 2006, Annex B-4, page B-27, para. 18.

about the extent to which critical information would be made available during the on-site verification. The Panel's suggestion that the KTC was nonetheless required to explain why it had chosen "facts available", that was "less favourable" to the Indonesian respondents than information from other sources could not be reconciled with the final sentence of paragraph 7 of Annex II – especially in view of the Panel's holding that there was no reason to prefer the information that was "more favourable" to the Indonesian respondents. In any event, given that the information used by the KTC was actually more favourable to the Indonesian respondents than the information they had themselves reported, there simply was no basis for faulting the KTC.

58. The Panel's analysis of the KTC's revised explanation of its injury determination was equally flawed. The original Panel's decision faulted the KTC's injury analysis only for failing to provide an adequate explanation of the various factors described in Article 3.4 of the Anti-Dumping Agreement. The Panel had not found any error in the KTC's substantive analysis. The KTC therefore understood that implementation of the Panel's decision required only that it revise its explanation. While the Panel had not rejected that claim, the Panel had based its decision on the unsupported assertion that "it was ... entirely possible, if not to be expected," that the KTC would change its analysis as well as its explanation in the implementation proceeding. The issue, however, was not what was "possible" or even what was "to be expected". Instead, the issue was what the KTC had actually done. Since the KTC had not, in fact, changed its analysis, but instead had only provided a more comprehensive explanation of the analysis already adopted in its original determination, the Panel's decision was clearly flawed. In light of the fact that Indonesia had not raised any substantive objections to the KTC's revised explanation, the logic of the Panel's decision frankly escaped Korea. Nevertheless, despite these errors in its analysis, the Panel had explicitly rejected Indonesia's claim that the KTC was required to use a "facts available" figure for interest expenses that would reward the Indonesian respondents for their non-cooperation and would require Korea to revoke the anti-dumping duties it had imposed.[5] Instead, the Panel had held only that yet further explanation was needed from the KTC. While Korea believed that all of the explanation that might reasonably be needed had already been set forth in the KTC's determination and in Korea's submissions to the Panel, it seemed to Korea that the interests of efficient and expeditious resolution of this dispute would best be served by a prompt implementation of the Panel's ruling to correct the alleged lack of explanation, rather than by an appeal to prove that the Panel had based its decision on incorrect and unsupported assumptions, or that it had failed to properly consider the explanations and arguments proffered by the KTC and Korea.

59. As a final matter, Korea wished to note that the determination that was the subject of this dispute had largely been rendered moot, in light of a subsequent finding of dumping by the KTC in the sunset review of this anti-dumping duty, and the negotiation of a price undertaking with the Indonesian exporters. Nevertheless, Korea was prepared to provide additional explanations and opportunities to comment required by the Panel's decision. Korea looked forward to discussing with Indonesia an appropriate schedule to implement the recommendations of the Panel Report.

60. The DSB took note of the statements and adopted the Panel Report contained in WT/DS312/RW.

7. Appointment of Appellate Body members

(a) Statement by the Chairman

61. The Chairman, speaking under "Other Business", said that as he had announced at the outset of the meeting, he wished to make a statement regarding the ongoing process for selecting four new Appellate Body members. He said that the Selection Committee had now completed its interviews

[5] Final Panel Report, para. 6.51.

with the nine candidates nominated for the four upcoming Appellate Body vacancies. The interviews had been held on 26 and 27 of September and on 11 and 15 of October. The Selection Committee had also concluded its consultations with interested delegations to hear their views on the candidates. Those consultations had been held on 16, 17 and 18 October 2007. Forty-four delegations had met with the Selection Committee. In addition, written comments had been received by the deadline of 18 October from five delegations. He recalled that, pursuant to the procedures agreed by the DSB on 20 June 2007, a decision on the four vacancies had to be taken by the DSB at its meeting on 19 November 2007. In order for the DSB to be able to do so, the Selection Committee had to provide its recommendations regarding the four vacancies by no later than 8 November, which was also a deadline for submitting items for the agenda of the 19 November DSB meeting so that the airgram could be issued on 9 November. While it was the Selection Committee's original intention to provide its recommendations by no later than 5 November, he had recently been advised that, due to various scheduling difficulties, the Selection Committee would now only be able to provide its recommendations on or shortly before 8 November, rather than on 5 November as originally planned. The Selection Committee regretted any inconvenience that this short delay might cause for delegations. He hoped that this slightly revised time-table would be agreeable to all delegations and thanked them for their understanding.

62. The DSB took note of the statement.