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Dispute Settlement Body
19 July 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 July 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.44)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.44)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.19)

(d) European Communities – Customs classification of frozen boneless chicken cuts: Status report by the European Communities (WT/DS269/15/Add.1 – WT/DS286/17/Add.1)

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.44)

2. The Chairman drew attention to document WT/DS176/11/Add.44, 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 July 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 US 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 the persistent ignorance by the United States of the DSB's ruling and recommendations in respect of Section 211 seriously undermined the authority of the TRIPS Agreement and the credibility of the US commitment towards WTO obligations and the US duty to promptly comply with the DSB's rulings and recommendations. The United States should also consider the "collateral damage" that this attitude caused. The TRIPS Agreement was a keystone in achieving effective and non-discriminatory protection of intellectual property rights worldwide. By ignoring it persistently in several disputes, the United States played against that objective and thus compromised the interests of its industry at large to preserve legislation that benefited the limited interests of very few companies. The eventual repeal of the grandfathering provision in the FSC dispute showed that the US Congress was perfectly able to work promptly towards compliance when it so wished. This could be repeated in the present dispute as several repealing bills were pending in the US Congress and would, by their adoption, bring a satisfactory end to the dispute. The EC also called on the US administration to exercise its discretion and grant the specific licence that would allow the renewal of the current registration of the Havana Club mark, which was due to expire at the end of the month. Such renewal would not give away or grant rights.

It would not decide as to who was the rightful owner of the mark in the United States. It would only preserve the status quo and it would thus allow the on-going proceeding before US courts to come to their term as well as the US court decide who was the legitimate owner of that mark. Granting the renewal would illustrate to perfection the US attachment to the principle that ownership of intellectual property rights should be decided in courts on the basis of the law. On the contrary, refusing the renewal of the registration, and thus the very possibility to defend potential rights to the mark, would not only aggravate this particular dispute, but would also generally undermine the efforts to promote rules-based protection of intellectual property rights. There was no more convincing argument than living up to the standards that one wanted to promote.

5. The representative of Cuba said that it had been four and a half years since the adoption by the DSB of the rulings and recommendations in the dispute: "United States – Section 211 Omnibus Appropriation Act of 1998", but the United States had yet to comply with them. That made this dispute to be one of the oldest unresolved disputes on the DSB's agenda. Fives times during that period, the United States had been granted generous deadlines to implement the recommendations. The last of these deadlines had expired on 30 June 2005. At that point, the EC and the United States had reached an understanding whereby the EC had undertaken not to request "at this stage" authorization to suspend concessions *vis-à-vis* the United States until the EC "at some future date decided to request DSB authorization to suspend concessions ...". This understanding, which was vague and imprecise, had not imposed any deadline for compliance by the United States with its obligations.

6. In spite of all the time that had passed, the only difference in the status reports submitted by the United States month after month was their date of circulation: the reports did not offer the slightest indication that the US Government was making any effort to implement the DSB's decisions and hence that it would comply with its obligations as a WTO Member. Faced with a report like the one presented at the present meeting, a repetition of what the United States had been submitting for years, one should perhaps ask whether these reports had met the requirements of Article 21.6 of the DSU. What the United States had been doing for more than four years was to make a mockery of the DSB, postponing implementation of its decisions indefinitely with false promises that it was working with the US Congress to amend its legislation. In fact, the US Government and its allies in Congress had merely been manoeuvring to prevent consideration of bills aimed at remedying this breach of international law, bills that could not even be discussed in the US Congress. There was an explanation for this excessive delay in complying with the WTO rules: the delay was an attempt to prevent the renewal of the renowned rum label, Havana Club, which had been legally registered by a Cuban company with the US Patent and Trademark Office, in order to enable its powerful competitor Bacardi, with its well-known links to the Miami-based anti-Cuban organization, to control the brand.

7. He noted that on 27 July 2006, the deadline for the legitimate owner to renew this trademark would expire. At that point, the joint Cuban-French company that currently marketed Havana Club rum throughout the world would be arbitrarily deprived, for political reasons, of its legitimate rights in the territory of the United States, and as a result, it would not be able to sell the product in that country. But the loss would be even greater to the WTO since its prestige and credibility in the international community would be undermined and it would lose the confidence of its Members by failing to provide any guarantee that the DSB's rulings and recommendations would be implemented. This would bring to light, once again, the flaws of a system based on rules that were far from fair and equitable because they favoured the most powerful Members that could afford the luxury of violating them without any fear that their rights could be nullified or impaired. And it was not as if this was the only dispute where recommendations had yet to be implemented by the United States. The conduct of the United States had shown a consistent pattern of disregard for multilateral agreements and the WTO, which could have serious systemic implications. Such a persistent conduct set a dangerous precedent that might have implications for other Members in the future, in particular less developed countries. The conduct of the United States in this and other disputes cast doubt on the DSU and

eroded the very foundations underlying not only the TRIPS Agreement, but all of the WTO Agreements, namely, the principles of national treatment and most-favoured-nation treatment. Cuba wondered whether any credibility could be associated with a multilateral trading system based on rules and on allegedly equal obligations for all participants when one of its major players maintained an attitude of persistent and open defiance. Cuba reiterated its appeal to Members to take rapid and effective steps to secure observance of the letter of the WTO Agreements and compliance with the WTO decisions by demanding that the United States comply immediately, unconditionally, and without further delay with all of the DSB's rulings and recommendations, and in particular those pertaining to this dispute, by repealing Section 211, which was unjust and discriminatory.

8. The representative of Brazil said that, in view of the systemic relevance of the matter, his country wished to reiterate its concerns about the continuation of the non-compliance situation in this dispute. The Panel and the Appellate Body Reports pertaining to this dispute had been adopted by the DSB in January 2002, more than four and a half years ago. However, no implementing action had been taken by the United States thus far. Based on the status report provided by the United States, it appeared to be no tangible sign that the matter would be resolved soon. This situation could not be reconciled with the principle of prompt implementation of the DSB's rulings and recommendations, a cornerstone of the multilateral trading system. It also impaired the credibility of the dispute settlement mechanism as an effective means to solve trade problems, irrespective of the parties involved. The present non-compliance situation was also incongruent with the positions advocated by the United States in the area of intellectual property rights. The impact of such a lack of actions on the legitimacy to promote the protection and enforcement of the intellectual property rights were not negligible. In light of these considerations, Brazil urged the United States to take the necessary and urgent steps to implement the relevant DSB's rulings and recommendations.

9. The representative of the Bolivarian Republic of Venezuela said that her country thanked the United States for its report of 19 July on the implementation of the DSB's recommendations and rulings in the case: "United States – Section 211 Omnibus Appropriations Act of 1998". Her country wished to be fully associated with the statement made by Cuba on this matter. It considered that the indefinite postponement of compliance with the recommendations and rulings merely supported the application of Section 211, a piece of legislation which the Appellate Body had considered to be inconsistent with WTO rules. Her country was concerned about the systemic implications of this issue: the status report submitted by the US delegation – and this was unprecedented in this case – offered no certainty as to the adoption of the DSB's recommendations and rulings in the near future, and moreover, there was a lack of transparency. The need to respect the DSB principles was of concern and interest to all WTO Members, and the principle of prompt compliance with the DSB's rulings and recommendations was the cornerstone of the dispute settlement mechanism. Her country urged the United States to make every possible effort to implement, immediately and without delay, the DSB's rulings and recommendations by repealing Section 211.

10. The representative of Argentina said that his country wished to reiterate its systemic concern about the delays in the implementation of the DSB's recommendations and rulings more than four years ago. Prompt compliance with the DSB's rulings and recommendations was a key element of the WTO dispute settlement system. Protracted delays, and above all the lack of progress in implementation had a negative impact not only on the efficiency, but also on the credibility of the system. This could only harm WTO Members, and in particular developing countries, for whom the dispute settlement system represented an instrument of particular importance. Argentina, therefore, urged the United States to redouble its efforts to comply with the DSB's recommendations and rulings in this dispute.

11. The representative of China said that his country first wished to thank the United States for its status report and the statement made at the present meeting. Due to systemic interests, China wished to express its continued concern regarding this dispute. More than four years had passed since the

adoption by the DSB of both the Panel and the Appellate Body Reports pertaining to this dispute. However, it was very regrettable that there was no indication when the matter would be resolved to the satisfaction of the parties and other Members. Such delays caused systemic concerns about the efficacy of the dispute settlement system. China believed that prompt and full implementation of the DSB's rulings and recommendations was one of the major cornerstones of the WTO dispute settlement. China also believed that prompt implementation in this dispute would not only be beneficial to other Members, but also to the United States, who was the advocate of intellectual property rights at all forums. Once again, China urged the United States to implement the decision of the DSB in this dispute as soon as possible.

12. The representative of Bolivia said that after having heard the status report by the United States and noting the lack of progress in the implementation of the relevant DSB's recommendations, Bolivia could only reiterate its regret already expressed at the 19 June DSB meeting about the failure to comply with the rulings of a WTO judicial body, which was intended to provide Members with certainty. Various social actors currently monitored, among other things, how disputes were being settled in the WTO, and whether the multilateral judicial system had been functioning properly. Therefore, repeated postponements of implementation of the DSB's ruling for more than four years was unjustifiable and undermined the credibility and stability of the system. It was clear that this non-compliance was detrimental not only to the DSB, but that it also had an impact on the intellectual property rights, which had been agreed by all Members under the TRIPS Agreement. Once again, Bolivia wished to join the other Members that had supported Cuba's call on the United States to implement the DSB's ruling in this dispute.

13. The representative of Uruguay said that her country recognized the legitimate right of the parties to the dispute to seek a mutually acceptable solution that was consistent with the covered agreements. Nevertheless, Uruguay shared the systemic concerns expressed by previous speakers in relation to the importance of ensuring that Members complied promptly with the DSB's recommendations. This was an essential factor in ensuring the smooth operation and credibility of the dispute settlement system as well as the legal certainty and the effective balance of rights and obligations provided under the multilateral trading system. Members must, therefore, do their utmost to comply promptly with the DSB's recommendations.

14. The representative of India said that his country continued to have concerns that due consideration principle of prompt compliance with the DSB's rulings and recommendations, which was essential to effective resolution of disputes to the benefit of all Members, appeared missing in this dispute. Although a solution mutually acceptable to the parties was preferred, it was important that parties kept the DSB informed of progress towards such a resolution. This was not apparent from the statements made by the parties, even four years after the adoption of the DSB's recommendations and rulings, thus ignoring the systemic concerns in general. India urged the parties to this dispute to be more responsive to these systemic concerns and to shed some light on the way they intended to fulfil the objective of prompt settlement and the actions they proposed to take to achieve that objective.

15. The representative of the United States said that with respect to Members' comments suggesting that the United States should grant a license to renew the "Havana Club" trademark registration, none of the DSB's recommendations and rulings in this proceeding related to the renewal of specific trademark applications, so this was not an issue related to the implementation of the DSB's recommendations and rulings. That said, the United States had taken note of the statements of those Members who had addressed this point, and wished to point out that the request for a license authorizing payment of the renewal fee for the trademark registration was pending before the relevant agencies of the US government, which would make a decision in due course. On a different point, the United States regretted that the EC and other Members had, once again, reverted to suggesting that US actions in this dispute had somehow undermined the authority of the TRIPS Agreement. The United States failed to understand how its commitment to implement the DSB's recommendations and

rulings in this dispute and its efforts to comply could undermine the "authority" of the TRIPS Agreement. To the contrary, these affirmed Members' commitments to the TRIPS Agreement. The United States appreciated that the EC and other Members who had spoken at the present meeting joined the United States in calling for effective protection of intellectual property rights worldwide.

16. 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.44)

17. The Chairman drew attention to document WT/DS184/15/Add.44, 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.

18. The representative of the United States said that his country had provided a status report in this dispute on 6 July 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 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 such amendments.

19. The representative of Japan said that his country noted the statement made by the United States along with its latest status report. Japan appreciated that the US administration would continue to work with the US Congress to enact legislation H.R. 2473. However, Japan regretted that it had not seen any progress for a long time. A full and prompt implementation of the DSB's recommendations and rulings was a principal element for ensuring the credibility of the WTO dispute settlement system. Japan would like to renew its strong hope that the United States would make further efforts to implement the DSB's recommendations and rulings at the earliest possible date.

20. 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.19)

21. The Chairman drew attention to document WT/DS160/24/Add.19, 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.

22. The representative of the United States said that his country had provided a status report in this dispute on 6 July 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 conferring with the EC, to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Communities said that, like at the previous DSB meeting, the EC regretted the lack of progress in solving this long-standing dispute. The Panel Report in this dispute had been adopted in July 2000 and the reasonable period of time for implementation had expired in July 2001. Therefore, for five years now the United States had failed to take any tangible steps to amend a piece of legislation that violated intellectual property rights and hurt the interests of music creators. Furthermore, the United States had provided no specific information to the DSB on

its intentions regarding implementation. The EC believed that this matter should be of serious concern to the entire Membership. The EC urged, once again, the United States to provide information on the specific steps that it had taken or intended to take to solve this dispute. This situation of non-compliance had already lasted for too long. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration proceedings on retaliation.

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

(d) European Communities – Customs classification of frozen boneless chicken cuts: Status report by the European Communities (WT/DS269/15/Add.1 – WT/DS286/17/Add.1)

25. The Chairman drew attention to document WT/DS269/15/Add.1 – WT/DS286/17/Add.1, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's customs classification of frozen boneless chicken cuts.

26. The representative of the European Communities said that, in conformity with its commitments expressed in the first status report submitted before the DSB at its meeting on 19 June 2006, the EC had submitted its second status report immediately following compliance. The EC was pleased to report that Commission Regulation (EC) No 949/2006 of 27 June 2006 "amending Annex I to Council Regulation (EEC) No 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff" had been adopted and had entered into force on 27 June 2006. The EC had thus fully implemented the relevant DSB's rulings and recommendations in this case. Furthermore, and in the spirit of its commitment to the WTO, and despite the enormous procedural difficulties encountered, the EC had undertaken extra efforts to implement the relevant DSB's rulings and recommendations within the reasonable period of time, which had been fixed by the arbitrator. This proved not only the EC's commitment to full implementation, but also the fact that certain concerns expressed by the complainants at the DSB meeting on 19 June had not been founded. The EC remained ready and willing to respond to any questions regarding the implementing regulation bilaterally.

27. The representative of Brazil said that his country wished to thank the EC for its status report and for its statement regarding the adoption of Commission Regulation 949/2006 of 27 June 2006 as an action towards the implementation of the DSB's rulings and recommendations. Considering that Commission Regulation 949/2006 had been adopted on the very last day of the reasonable period of time, on 27 June 2006, and had been published a day later, Brazil was still assessing the scope and effects of that provision and whether its application was in full conformity with the DSB's recommendations. Brazil would point out, preliminarily, that, while the findings of the Panel and the Appellate Body comprised all products contained in heading 0210 of the EC Schedule, Commission Regulation 949/2006 had apparently provided classification guidelines exclusively in relation to chicken cuts (0210 99). Thus, the EC seemed to have adopted the most restrictive interpretation of the DSB's recommendations. Brazil was following closely the EC's implementation actions and expected that the EC would fully comply with its obligations under the WTO Agreements. However, Brazil was not in a position to agree, at the present meeting, with the EC's statement that it had fully complied with the DSB's recommendations.

28. The representative of Thailand said that his country noted and thanked the EC for the status report. Because Thailand was still considering the level of compliance of the measures that the EC had taken to implement the DSB's rulings and recommendations in this dispute, and because it continued to consider all options in this regard, on 14 July 2006 Thailand had concluded with the EC an agreement to preserve its procedural rights. Thailand appreciated the cooperation of the EC in

concluding that agreement, which in the spirit of transparency had been notified to the WTO. Thailand expected it to be circulated shortly to all Members.

29. The DSB took note of the statements.

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"[1] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

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

31. The representative of Honduras said that his delegation wished to make a brief statement at the present meeting. He then referred to previous statements made by Honduras, which noted that this issue fell within the purview of the DSB and had explained why it was appropriate that it should be included on the agenda of the DSB meeting. The EC continued to state before the DSB that its tariff, which had more than doubled, and ACP profits, which had increased enormously, must be "put to the test of the market" and reserved for "monitoring" discussions. For the record, he noted that the "test of the market" had merely confirmed Honduras' worst fears. Since January, Latin American traditional suppliers had already collectively lost some of their market shares in comparison to the same period of the previous year, while ACP suppliers had made virtually equivalent gains in market shares. These MFN losses and the corresponding ACP gains were expected over time to become substantially more pronounced if the 176 €/mt rate was maintained, if the new African plantations continued to generate increased exports, and if ACP preferences increased. No traditional MFN supplier could expect to be spared. This was not "trade neutrality", it was discrimination that violated the rulings and recommendations pertaining to the Bananas III case. Nor was there any comfort to be derived from the "monitoring" discussions. According to all reports, the EC's monitoring proposal would institutionalize the autonomous tariff of 176 €/mt, for a number of years it would offer no prospect for improvement in access, and over time it would enable the ACP to improve its profits. Honduras considered this to be more of a call for capitulation than an attempt to provide a remedy. If the EC could not offer a remedy that was mutually satisfactory to all interested suppliers, including Honduras, additional steps would be needed.

32. The representative of Nicaragua said that as Honduras had already made quite clear, the EC's contention that the new tariff was set at the right level was not confirmed by the EC market. Not only were traditional MFN suppliers losing their market position to ACP suppliers, but prices in the EC-25 had totally collapsed. The press was reporting that f.o.t. prices in Europe for Latin American bananas now barely covered the cost of the US$4.10/box tariff, plus freight. The price collapse in the EC-25 had caused an equivalent price collapse in all secondary markets. This situation was being referred to by some as the "Banana Apocalypse". The EC's response to this market crisis was to ask Nicaragua to simply disregard it. The EC had proposed that the following be accepted: (i) a bound tariff that would be set at a rate *higher* than the current autonomous rate; (ii) an autonomous rate of €176/mt that would not be lowered for several years; and (iii) considerable advantages for ACP countries that, in less than a year and five months, would be further increased. Nicaragua, like other Members, did not consider this to be an appropriate framework for settling the dispute. Countries like Nicaragua had no future under such an arrangement. His country must, therefore, continue its discussions with interested parties on the next steps to be taken.

[1] WT/DS27.

33. The representative of Panama said that, like Honduras, Panama did not agree with the persistent attempts by the EC to characterize its banana import regime as "trade neutral". More than doubling of the MFN tariff and the margin of preference could not under any circumstances be described as "trade neutral". That had been confirmed by this year's up to date statistics. Bearing in mind that the EC's regime had changed significantly at the beginning of the year, a market share analysis was extremely revealing. A comparison of shares in the EC market with those of 2005 revealed that six of the eight traditional Latin America suppliers had lost ground. The other two suppliers had declared gains of less than 1 per cent which, in one of the two cases, could be entirely attributed to low production in 2005. On the other hand, African ACP suppliers were declaring discernable increases in market shares. The only exception involved a supplier that was recovering from damage caused by storms, but had already notified its intention of doubling its production over the next five years. With the increases in African production that had been extensively reported in the press, there was all the more reason to believe that the ACP gains, which were already obvious in the EC market, were set to multiply over time. Consequently, in Panama's view, allowing the current arrangements to continue over the next few years, far from providing a remedy, would simply add to the injury. Like Honduras, Panama was seeking a comprehensive and mutually satisfactory solution for all interested suppliers, and if it was unable to achieve that solution, Panama would have to take the necessary measures.

34. The representative of the European Communities said that the EC had, once more, listened carefully to the statements made on this matter. The EC wished to refer to its prior statements on its objection to categorisation of this matter as an "implementation issue" relevant to Article 21 of the DSU. The EC remained open to addressing the concerns of Latin American suppliers in relation to the new import regime in the appropriate fora. The EC was well aware of the importance of the banana industry for Latin American countries (as well as the ACP countries) and had always taken these interests into consideration. A solution was currently being pursued under the good offices of Norway. The EC was in regular contacts with the WTO Members involved to discuss this issue, including the rebinding of the MFN tariff. Such discussions had most recently taken place in the context of the DDA negotiations. The EC remained committed to maintaining access to the EC market by all banana supplying countries. He added that the work under the auspices of the Minister of Norway demonstrated everything else but a "Banana Apocalypse", to which Nicaragua had referred. The figures seemed to demonstrate that MFN importers all together had not fared badly under the new system.

35. The representative of the United States said that his country was disappointed that the EC had still not resolved this issue, despite the important and pressing concerns that Members had voiced at the past six DSB meetings. The United States was continuing its informal discussions with interested Members in this regard. The United States believed that it was imperative that the EC work with interested Members to resolve this dispute as quickly as possible.

36. 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

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

38. The representative of Canada said that his country had repeatedly expressed its appreciation with the steps the United States had taken towards implementing the DSB's rulings and recommendations in this dispute. However, the United States had prospectively repealed the Byrd

Amendment. As Canada understood the operation of the repealing legislation, anti-dumping and countervailing duties collected after 30 September 2007 would be deposited in the US Treasury, rather than being disbursed to US producers. Of particular concern with this method of repeal, however, was that anti-dumping and countervailing duties collected before that date would continue to be disbursed to US producers for many years after 1 October 2007. In fact, on 1 June 2006 US Customs had published a notice of its intent to continue disbursing anti-dumping and countervailing duties under the Byrd Amendment later in the course of the year. It was in this context that Canada continued to be puzzled with the US claim – in its last status report from over five months ago – that it had "taken the actions necessary to implement the rulings and recommendations" in this dispute. The US assertion that it had implemented the rulings and recommendations in this dispute would not be accurate until disbursements under the Byrd Amendment had ceased completely. This so-called approach to compliance – this method of prospective "repeal" of a measure found to be in violation of the WTO Agreement – raised important commercial and systemic concerns. Canada called on the United States to resume the submission of status reports and to immediately repeal the Byrd Amendment.

39. The representative of the European Communities said that, at the previous DSB meeting, the United States had reiterated its position that it had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute. He recalled that the CDSOA had been found in breach of WTO rules for transferring anti-dumping and countervailing duties to the US industry. As long as those transfers continued, there would be no full implementation. By denying its obligation to take further actions, the United States had actually granted itself the right to comply with the DSB's ruling at some undetermined date in the future regardless of Members' duty to comply promptly with the DSB's rulings. The US Congressional Budget Office had foreseen that the repeal of the Byrd Amendment would not produce any effects before fiscal year 2010 starting on 1 October 2009. And, currently, the United States was taking the preparatory steps to make a sixth distribution under the CDSOA. As the EC had mentioned at the previous DSB meeting, this distribution to start on 1 October would most likely be more significant than in the previous year and would cause further nullification and impairment to the whole WTO membership. This was, in addition, not an isolated case. The FSC dispute or the 1916 Anti-Dumping Act dispute to which the DSB would revert under the next agenda item were other examples where the United States had equally extended unilaterally and considerably the implementation period by way of transition or grandfathering provisions. The FSC dispute, where the US Congress had finally put an end to WTO-illegal grandfathering clauses periods, showed that the United States could revisit the delayed termination of the Byrd Amendment, if the political will was there. A very recent Court decision offered the perfect opportunity to complete the implementation process and finally stop the transfer of anti-dumping and countervailing duties without further delay. On 13 July 2006, the US Court of International Trade had indeed found that the CDSOA was violating the US Constitution. Finally, the EC renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

40. The representative of Japan said that his country had to reiterate its disappointment that the United States had not, once again, submitted a status report in July in spite of the statements made at previous DSB meetings. Although Japan welcomed the enactment of the Deficit Reduction Act of 2005, the illegal distribution under the CDSOA would still continue under the transitional clause of the CDSOA. The United States should provide the DSB with information on how actual disbursements would work and should take the necessary steps to implement the complete repeal of the CDSOA. Japan urged the United States to comply fully with the DSB's recommendations and rulings without further delay and to provide its status report. Japan reserved all the rights under the DSU until full implementation was obtained by the United States.

41. The representative of India said that his country, once again, wished to thank Canada, the EC and Japan for raising this matter at the present meeting. India joined other Members who had spoken

previously in expressing its disappointment on the lack of any progress report by the United States even though it had not yet fully complied with its obligations based on the DSB's recommendations and rulings in this dispute. There was no response from the United States to the question put by India at the previous DSB meeting as to how continued disbursements of duties collected on imports entering the United States squared up with its compliance obligations. Clearly, the United States needed to do more than reiterate a clearly indefensible position on compliance. Such a unilateral action undermined the WTO dispute settlement system. India urged the United States again to inform the DSB of the steps it proposed to take to ensure full compliance. India also requested again that the United States resume submitting status reports in this dispute.

42. The representative of Thailand said that at the outset he wished to take the opportunity to thank Canada, the EC and Japan for bringing this item before the DSB yet again. And yet again, Thailand wished to join previous speakers in expressing disappointment that the United States still continued to illegally disburse funds under the CDSOA, and that it still refused to submit a status report on its outstanding implementation in the case: "US – Continued Dumping and Subsidy Offset Act of 2000". Thailand, therefore, again, reaffirmed its views expressed in DSB meetings since February 2006, and urged the United States to continue providing status reports 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.

43. The representative of Brazil said that his country wished to thank Canada, the EC and Japan for their effort to bring once again this matter to the attention of the DSB. He reiterated that Brazil did not take issue with the repeal of the Byrd Amendment as such. This was a rather late, but still welcome action by the United States. Brazil could not, however, accept the statement that this prospective repeal alone meant that the United States had fully complied with the DSB's rulings and recommendations in the present dispute. Brazil and others had been urging the United States to present the rationale behind its statement that the issue had been resolved within the meaning of Article 21.6 of the DSU. But no reply had been offered by the United States. In particular, no explanation at all had been given about the fact that the repeal would allow illegal disbursements to continue until, at least, October 2007. By persistently refusing to provide any explanation to sustain its allegation of compliance, the United States might be understood to be confirming that its assertion had no legal basis. Brazil invited the United States to clarify the reasons why it believed that full implementation had been achieved in this case and how the next Byrd Amendment disbursements could constitute WTO-consistent actions in light of the relevant DSB's recommendations.

44. The representative of the United States said that, as the United States 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. And, given that the United States had taken all actions necessary to implement the recommendations and rulings in these disputes, the United States failed to see what purpose would be served by the submission of status reports repeating the progress the United States made in the implementation of the DSB's recommendations and rulings. In addition, as the United States had explained at the 17 May DSB meeting, the United States was surprised to hear Canada intervene under this item. Next, with regard to the EC's criticism concerning future actions that might be taken under the CDSOA, the United States noted with interest the EC's statement made at the 19 June DSB meeting in connection with the Sugar dispute. In claiming that it had already come into compliance, the EC had described that – on an *annualized* basis – its revised measure would place it in a position to maintain its subsidized exports within its commitments only from the marketing year 2006/2007. Nevertheless, the EC had asserted it was already in compliance. The United States reiterated that it had taken all steps necessary to implement the recommendations and rulings in the CDSOA dispute. Finally, with respect to one Member's comment about the FSC

dispute, the United States questioned the wisdom of re-opening congressional debate over the Continued Dumping and Subsidy Offset Act.

45. The representative of Canada said that he wished to make a second intervention in the light of the comments just made by the United States. He noted that every violation of a WTO obligation had, at a minimum, two components. One was the direct harm that that violation inflicted upon Members. The other one was a systemic concern that derived from that violation, and in particular where there were repeated findings against the Member and that Member failed to bring itself into compliance.

46. It was the case that a court in the United States had found that the CDSOA ought not to have applied to Canada. His authorities were still trying to determine the implications of that court decision. It was the case also that the Court of International Trade had found that the CDSOA was unconstitutional because, under the CDSOA, payment of a subsidy was conditioned on the expression of a public policy position, which was contrary to the First Amendment of the United States Constitution. These were important facts inside the United States. At the same time, there were systemic concerns within the WTO regardless of any specific impact on Canada by these court decisions. There were specific concerns that Canada had about the method of implementation by the United States, and that was the point that his delegation had been trying to make in its statements. First, that prospective repeal did not amount to repeal and, therefore, the United States continued to have an obligation to provide status reports. Second, for that reason the United States could not claim to be in compliance, and therefore to claim that it continued to be in compliance created systemic concerns in respect of every other dispute. That was why his delegation was making statements on this subject.

47. The representative of the European Communities said that he wished to make a comment concerning a reference made by the United States in relation to the Sugar dispute. He thought that it was one thing to average out over one year where the end of the reasonable period was in the middle of that year, but that it was another thing to do this over a long period of time.

48. The DSB took note of the statements.

4. United States – Anti-Dumping Act of 1916: Implementation of the recommendations adopted by the DSB

(a) Statement by Japan

49. The Chairman said that this item was on the agenda of the present meeting at the request of Japan, and invited the representative of Japan to speak.

50. The representative of Japan said that his country had placed this item on the agenda of the present meeting, because it had considered it appropriate to draw the DSB's attention to a disturbing development relating to this dispute. A series of events witnessed recently illustrated how the United States had failed to fully comply with the DSB's recommendations and rulings, despite the contrary contention it had made years ago. He then briefly recalled the history of the case. In September 2000, the DSB had adopted the Reports of the Panel and the Appellate Body that had found that the 1916 Anti-Dumping Act was inconsistent with the WTO Agreements. Specifically, the DSB had ruled that "by providing for the imposition of fines or imprisonment or for the recovery of treble damages", the 1916 Anti-Dumping Act constituted impermissible responses to dumping and subsidy under the WTO Agreement.[2] The United States had been granted a reasonable period of time to comply with the DSB's recommendations and rulings, that had been determined to expire in

[2] Appellate Body Report: "United States – Anti-Dumping Act of 1916", WT/DS136/AB/R, WT/DS162/AB/R, adopted on 26 September 2000, paras. 137-138.

July 2001. Upon request by the United States, that period had been extended until December 2001. The United States had failed to act within that extended period and thereafter. In the meantime, a lawsuit had been filed against a Japanese company under the 1916 Anti-Dumping Act. In December 2003 and June 2004, the Federal District Court in the State of Iowa had rendered judgment of more than US$31.6 million for treble damage plus more than US$4.1 million for attorney's fees and costs against the Japanese company. The Japanese company had appealed.

51. In December 2004, three years after the expiry of the reasonable period of time, the US Congress had finally repealed the 1916 Anti-Dumping Act. At the DSB meetings held on 24 November and, again, on 17 December of 2004[3], the United States had declared that, with this repeal, it had implemented the DSB's recommendations and rulings in this dispute. However, as Japan had explained in the same meetings, the repeal was prospective only and thus had no effect on the pending cases. Japan had further responded to the US claim, by expressing its serious concern with the pending cases under the Act that threatened to inflict damage to Japanese companies and also by reiterating its position that, without retroactive effect, the implementation was still partial. Thus Japan had urged the United States "to do its utmost in order to effectively prevent damages being inflicted upon Japanese companies". Before the DSB, Japan had also expressly reserved all its rights under the DSU in this matter.

52. He then turned to the aftermath and the consequence of the partial compliance by the United States. The litigation against the Japanese company pending at the time of repeal continued and, despite the repeated calls by Japan to take appropriate action available to it to prevent any damage from being inflicted; upon the Japanese entity under the 1916 Anti-Dumping Act, the United States had failed to do so. In January 2006, the US Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court. The Japanese company had eventually filed a petition to the US Supreme Court for a writ of certiorari. In June 2006, that petition had been denied and the judgment of the District Court became final. As a result, the Japanese company had been forced to pay more than US$35 million of treble damage plus attorneys' fees and costs of suit under the 1916 Anti-Dumping Act. In other words, despite the US contrary claims, the repeal of the 1916 Anti-Dumping Act was only in form; the fact was that the Act had continued to be in force and applied, and had actually caused the nullification or impairment of benefits accruing to Japan, even one and a half year after the United States had declared the completion of its implementation.

53. Moreover, while the Japanese company that had been forced to pay damages under the 1916 Anti-Dumping Act sought to recover its damages attributed to the Act in Japan's court pursuant to a Japanese municipal law, the adversary party of that company in the lawsuit made yet another legal move to file a motion for preliminary and permanent anti-suit injunctions to the District Court of Iowa in order to prevent the Japanese company from filing a lawsuit in Japan. The District Court had recently granted this motion partly as it related to a preliminary injunction.

54. Japan wished to express its deep regret and disappointment that the Japanese company had thus been forced to pay a huge amount of damages pursuant to the 1916 Anti-Dumping Act, which had been found to be inconsistent with the WTO Agreement and, the United States claimed, had been repealed years ago. He said that the story that he had shared with Members at the present meeting and the predicament endured by the Japanese company called into question the self-claimed implementation of the DSB's recommendations and rulings by the United States. Rather, they demonstrated that in substance the illegal 1916 Anti-Dumping Act still applied at least partially and caused an adverse impact on Japan, in the form of a damage award against the Japanese entity pursuant to final court judgment for the civil claim under the Act. Consequently, Japan maintained its position that this dispute had not yet been settled, despite the US claims to the contrary.

[3] See minutes of the DSB meeting on 24 and 26 November 2004, WT/DSB/M/179, paras. 2-6; see also minutes of the DSB meeting on 17 December 2004, WT/DSB/M/180, paras. 59-62.

55. Japan recalled that Article 3.4 of the DSU provided that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter ...". Similarly, Article 3.7 states "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Japan believed that a unilateral declaration of full compliance by the Member concerned hardly served these objectives, when it was evident that the compliance was only partial. Japan also noted that Article 3.10 of the DSU commanded that "all Members will engage in these [dispute settlement] procedures in *good faith* in an effort to resolve the dispute."[4] Japan reiterated its call to the United States to take appropriate action in good faith to address Japan's concerns so as to "achiev[e] a satisfactory settlement of [this] matter".

56. The representative of the United States said that his country wished to thank Japan for its statement. His delegation would refer Japan's comments to its authorities. For now, he wished to note several facts regarding the US court litigation to which Japan had referred. First, the court litigation in question – which was not itself covered by Japan's "as-such" challenge – had begun several years ago, and in fact predated the DSB's rulings and recommendations in this dispute. The legislation the United States adopted to repeal the 1916 Act had not affected this ongoing litigation, which had proceeded to a fairly advanced stage. Second, the court proceeding had revealed that the Japanese company in question had not only engaged in dumping, it had, in the words of the 1916 Act, done so with "the intent of destroying or injuring an industry in the United States." The company's US competitor had been forced to close plants and to lay off employees during this period – and a manager for the Japanese company had stated that he was "very pleased" with that outcome. In this regard, Japan's position in the US court litigation appeared to be at odds with its position in the WTO dispute over the 1916 Act. Specifically, during the WTO proceedings Japan had asserted that the Act was an anti-dumping statute, and not an antitrust statute; in the US court litigation, Japan encouraged the court to require "specific predatory intent", a requirement found not in anti-dumping statutes, but at the core of US antitrust law. Third, the court litigation had also revealed that the Japanese company in question had engaged in very troubling activity. For example, to make it appear as if it had not been engaged in dumping, the company had created secret rebates on its sales in the United States. The company's lawyer had recognized that putting the rebate in writing would be "incriminating" and had urged the company's US subsidiary to falsify and destroy its business records to conceal the secret rebates, advice which the company had followed. Finally, he noted that the US court's decision to enjoin the Japanese company from taking advantage of Japan's "claw-back" law was not related to the recommendations and rulings adopted in this dispute.

57. The representative of the European Communities said that the EC had also brought a WTO dispute against the Anti-Dumping Act of 1916 and had expressed its concerns at the DSB meeting of 24 November 2004 on the incomplete implementation of the DSB's ruling condemning the US legislation. It had always been and it was still the EC's position that a proper solution to the WTO dispute on the 1916 Anti-Dumping Act called for a repeal of the Act and a termination of the on-going court cases. It was now more than four years after the implementation deadline and the United States was still taking WTO-incompatible actions in application of the 1916 Anti-Dumping Act. This was again an outright neglect of the duty to comply promptly with the DSB's rulings and recommendations. The EC fully supported Japan's position.

58. The representative of Japan said that his delegation appreciated the reaction of the United States that Japan's statement would be transmitted to capital. In any event, Japan was prepared to further discuss this matter with the United States. He said that regarding the details of the court proceedings in the United States, he did not have any detailed information at this stage. He would convey the US statement to capital and would check what was ongoing in the US court. If Japan had any comments or questions in this regard they would raise them with the United States bilaterally. He also had one preliminary comment with regard to the point raised by the United States that the US

[4] Emphasis added.

court proceeding was not covered by this dispute. He noted that this dispute was related to the claim on Anti-Dumping Act of 1916 as such and any action which involved the application of the Anti-Dumping Act of 1916, which was judged inconsistent as such, would be covered by the recommendations and rulings reached in this dispute. Therefore, he could not agree with the statement made by the United States on this point. It was his intention to convey the discussion at the present meeting to Tokyo and, if necessary, his delegation would revert to it.

59. The DSB took note of the statements.

5. United States – Anti-dumping measure on shrimp from Ecuador

(a) Request for the establishment of a panel by Ecuador (WT/DS335/6)

60. The Chairman recalled that the DSB had considered this matter at its meeting on 19 June 2006, and had agreed to revert to it. At the present meeting, he drew attention to the communication from Ecuador contained in document WT/DS335/6, and invited the representative of Ecuador to speak.

61. The representative of Ecuador recalled that on 8 June, his country had submitted a request to the DSB for the establishment of a panel to resolve its dispute with the United States regarding the US Department of Commerce's policy that applied the so-called "zeroing" of negative anti-dumping margins in original investigations. The request had been blocked by the United States at the DSB meeting held on 19 June. On 6 July, Ecuador had submitted a second request for the establishment of a panel to resolve this dispute. As had been stated previously, the United States had applied the policy of "zeroing" in its investigation of certain frozen warm water shrimp from Ecuador. Had the US not applied this policy, the Department of Commerce would not have issued an anti-dumping order in February 2005, since it would not have found dumping by any Ecuadorian shrimp exporter.

62. The anti-dumping order had had an extremely negative impact on Ecuador's shrimp industry. Shrimp was Ecuador's principal private-sector export to the United States and its second most important private-sector exports overall, accounting for more than 10 per cent of the country's total exports in 2005, with a value of over US$450 million. The shrimp industry generated significant employment opportunities in many impoverished areas of his country where few employment opportunities were available. Ecuador, therefore, requested that the DSB establish a panel at the present meeting, as it strongly believed that the practice of "zeroing" was inconsistent with the Anti-Dumping Agreement, bearing in mind that the Appellate Body had twice before found "zeroing" to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The first finding related to a complaint by Canada regarding softwood lumber and the second involved a case brought by the EC concerning a variety of steel products. Ecuador was, therefore, quite confident that its position was correct and that it would be recognized as such by the panel. Ecuador had held consultations with the United States on a number of occasions over the past few months. These consultations had been useful for narrowing their differences. However, the parties had not yet been able to reach a mutually satisfactory settlement and, for that reason, Ecuador was submitting its panel request for the second time.

63. The representative of the United States said that as his country had mentioned at the 19 June DSB meeting, the United States had been working with Ecuador in an effort to resolve this dispute. The United States hoped to continue to work with Ecuador in this regard, notwithstanding that a panel would be established at the present meeting.

64. The representative of Thailand said that his country wished to express its full support for Ecuador’s request to establish a panel for this dispute. Thailand strongly believed that the Anti-Dumping Agreement did not permit the use of "zeroing" in any circumstance, and more

importantly, that the "zeroing" methodology was intrinsically unfair. Indeed the Appellate Body had rightly denounced this practice, most recently in the case: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins". Therefore, in light of its substantial interest in this matter, Thailand wished to reserve its right to participate as a third party in this dispute.

65. The representative of India said that, like Thailand, his country also wished to reserve its third-party rights.

66. 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.

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

6. United States – Measures affecting the cross-border supply of gambling and betting services

(a) Recourse to Article 21.5 of the DSU by Antigua and Barbuda: Request for the establishment of a panel (WT/DS285/18)

68. The Chairman drew attention to the communication from Antigua and Barbuda contained in document WT/DS285/18, and invited the representative of Antigua and Barbuda to speak.

69. The representative of Antigua and Barbuda said that his country was requesting the establishment of a compliance panel under Article 21.5 of the DSU to evaluate the status and sufficiency of compliance by the United States with the recommendations and rulings of the DSB pertaining to the case: DS285. In his country's view, the United States had not made any efforts to comply with the rulings at all, offering now only a statement of a government official as an act of compliance after, having insisted almost a year ago that compliance was going to be difficult, and that it would involve legislation and take at least 15 months. In the event, Antigua and Barbuda had received a statement from a government official, exactly like a prior statement by another government official that had been found unpersuasive by the Panel and the Appellate Body. In the meantime, the United States had been busy passing legislation that was directly and unequivocally contradictory to the rulings of the DSB in this case, and out of the entire universe of remote gaming offered to Americans not only globally but lawfully from within the United States in the past months the US Department of Justice had just chosen to indict the principals of two Antiguan licensees, including the latest just two days ago. Under the agreed procedures between the United States and Antigua & Barbuda, the United States had agreed not to object to the establishment of the panel, and so his country respectfully asked the DSB to establish a panel under Article 21.5 of the DSU.

70. The representative of the United States said that his country had explained in its April status report and during the 21 April DSB meeting, and as the United States had discussed with Antigua and Barbuda during bilateral consultations, the United States had complied with the DSB's recommendations and rulings. The issue of compliance in this dispute was limited, clear, and straightforward. According to the DSB's recommendations and rulings, the only remaining issue related to whether US federal criminal law, which prohibited remote gambling, included a discriminatory carve out that allowed remote gambling on horse racing. More precisely, the DSB had found that the United States had not shown that US legal prohibitions applied to both foreign and domestic suppliers of remote betting services for horse racing. The US chief law enforcement agency, the US Department of Justice, had explained that US federal criminal statutes did in fact prohibit the remote transmission of bets or wagers on horse races; and that an unrelated civil statute known as the Interstate Horseracing Act had made no changes in the relevant criminal statutes. Accordingly, the United States was now in a position to show that US legal prohibitions applied to both foreign and

domestic suppliers of remote betting services for horse racing. The United States also understood that it might be Antigua's view that the only possible means of compliance was by making changes to US law. Legislative action was one possible means of compliance, but the United States had never agreed, as Antigua had suggested, that legislative action was the only means. For these reasons, the United States was disappointed that Antigua was nonetheless seeking the establishment of a panel under Article 21.5 of the DSU. However, pursuant to its procedural agreement with Antigua, which had been circulated to the DSB in document WT/DS285/16, the United States would accept the establishment of a panel at the present meeting.

71. 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 Antigua and Barbuda in document WT/DS285/18. The Panel would have standard terms of reference.

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

7. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/325)

73. The Chairman drew attention to document WT/DSB/W/325, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he wished to propose that the DSB approve the name contained in document WT/DSB/W/325.

74. The DSB so agreed.