# WORLD TRADE ORGANIZATION

RESTRICTED

**WT/DSB/M/176**
19 October 2004

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**Dispute Settlement Body**
**27 September 2004**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 27 September 2004

*Chairperson: Ms Amina Mohamed (Kenya)*

Subjects discussed: Page

**1. Surveillance of implementation of recommendations adopted by the DSB**

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.30 – WT/DS162/17/Add.30)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.23)

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.23)

(d) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.8 – WT/DS234/24/Add.8)

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

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.30 – WT/DS162/17/Add.30)

2. The Chairperson drew attention to document WT/DS136/14/Add.30 – WT/DS162/17/Add.30 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

3. The representative of the United States said that her country had provided an additional status report in these disputes on 16 September 2004, in accordance with Article 21.6 of the DSU. As noted in the report, legislation repealing the 1916 Act was pending in both the US Senate and US House of Representatives. On 29 January 2004, HR 1073, which would repeal the 1916 Act, had been reported favorably out of the Committee on the Judiciary of the US House of Representatives. On 30 June 2004, Ambassador Zoellick had written a letter to the leadership of the US House of Representatives urging the passage of repeal legislation "at the earliest opportunity". The US administration would continue to work with Congress to achieve further progress in resolving these disputes with the EC and Japan.

4. The representative of the European Communities said that the Reports of the Panel and the Appellate Body with regard to the US 1916 Anti-Dumping Act had been adopted four years ago. During those four years, the United States had not shown any serious efforts to comply with the DSB's ruling and recommendations. Again, the most recent status report could be summarized in two words: "no progress". This outright failure by the United States to respect its obligation to implement the DSB's ruling had set a dangerous precedent which was damaging to all Members, including the United States. The EC called on the US administration to convey to Congress the urgency of complying with the WTO decision and to report to the DSB at its next meeting on the steps undertaken to ensure compliance without further delay. It would be a very worrying signal of lack of commitment to the WTO system, if the US Congress were to finish its work without repealing the 1916 Anti-Dumping Act. The EC wished to recall that it might adopt, anytime, a specific anti-dumping legislation applicable to US products pursuant to its right to suspend the application to the United States of its obligations under the GATT 1994 and the Anti-Dumping Agreement.

5. The representative of Japan noted that, as of 28 September 2004, four years had lapsed since the adoption by the DSB of the recommendations and rulings in these cases. The fact that the United

States had not been able to secure the implementation of the DSB's recommendations and rulings for such a long period of time was no doubt a source of extreme concern to Japan since its companies suffered from the consequences of the US inability to respect its obligations. Any prolongation of such situation would only tarnish the credibility of the WTO dispute settlement mechanism. The US status report contained hardly anything new. Nevertheless, Japan noted with keen interest the steps taken by the United States and hoped that they would lead to tangible results. These steps were the US administration's explicit support of the legislation repealing the 1916 Act in the 2004 "Report to the Leaders on the United States – Japan Regulatory Reform and Competition Policy" and a letter of Ambassador Zoellick to the leadership of the US House of Representatives. In order to honour these efforts on the part of the US government, Japan urged the US administration to re-double its efforts *vis-à-vis* the US Congress, so that these positive signs would lead to positive results by prompting the necessary legislative action during the second session of the 108th Congress. As had been noted previously, not all of legislations pending in the US legislature would have proper retroactive effects, despite Japan's persistent call to do so. As previously mentioned, in May 2004, the Federal District Court had passed its judgment upholding the order imposing on a Japanese company a payment of damages amounting to US$30 million. It was regrettable that the United States had, thus far, failed to take any positive steps to prevent these incidents from recurring, despite Japan's persistent call for actions in order not to aggravate the nullification and impairment. Once again, Japan urged the United States to secure the implementation by way of repealing the 1916 Act with proper retroactive effect. Japan further requested the United States to provide more specific reports on any further developments regarding the status of all the bills repealing the 1916 Act. Should the United States fail to implement the DSB's recommendations and rulings, Japan had no other option than to proceed to reactivation of the arbitration under Article 22 of the DSU, and to exercise its right to suspend concessions or other obligations.

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

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.23)

7. The Chairperson drew attention to document WT/DS176/11/Add.23 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.

8. The representative of the United States said that her country had provided a status report in this dispute on 16 September 2004, in accordance with Article 21.6 of the DSU. As noted in the report, legislation amending or repealing Section 211 was pending in the US Senate and the US House of Representatives, and the Senate had held hearings on this legislation in July. The US administration would continue to work with the US Congress concerning appropriate statutory measures that would resolve this matter.

9. The representative of the European Communities said that the United States had been a strong sponsor of international rules guaranteeing effective and non-discriminatory protection of intellectual property rights in each country. The enactment of the "United States – Cuba Trademark Protection Act" was the opportunity for the United States to show commitment to this objective. This legislation would provide enhanced and effective protection of intellectual property rights both in Cuba and in the United States. In this framework, it would repeal Section 211, a legislation driven by special interests, and resolve this case to the benefit of all. The EC expected that the US administration would support the "United States – Cuba Trademark Protection Act" as an appropriate solution to this dispute.

10. The representative of Cuba said that her delegation wished to reiterate the points concerning Section 211 of the Omnibus Appropriations Act of 1998 as contained in Cuba's statement made at the

31 August 2004 DSB meeting. That statement was entirely valid and pertinent since the situation of non-compliance of the United States remained unchanged. Cuba was deeply concerned to see how the United States had breached and continued to breach its commitments with regard to the settlement of this dispute as well as of other disputes. She noted that now retaliatory measures in the form of suspension of concessions could even be imposed on certain US products due to US non-compliance with the DSB's recommendations in the case on "United States – Continued Dumping and Subsidy Offset Act of 2000". Such actions, once again, undermined and impaired not only the credibility of the United States as a WTO Member, but also the credibility of the WTO itself. On a number of occasions, the United States had stated that bills were awaiting approval in Congress that would allegedly provide a solution to this dispute. In reality these had been empty words since, as yet – even though more than half of the time period for implementation had passed – no settlement had been reached. Her delegation hoped that the United States had made good use of the time that had passed and that it would finally opt for the only solution that could justify the loss of so much time; i.e. the repeal of Section 211. Cuba reminded the United States, once again, that it had time until December 2004 to complete implementation.

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

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.23)

12. The Chairperson drew attention to document WT/DS184/15/Add.23 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.

13. The representative of the United States said that her country had provided a status report in this dispute on 16 September 2004, in accordance with Article 21.6 of the DSU. The US administration would continue to work with the US Congress with respect to the recommendations and rulings of the DSB that had not been already addressed by the US authorities by 23 November 2002.

14. The representative of Japan said that the United States had failed to implement the DSB's recommendations and rulings in this proceeding, despite the fact that it had been granted a plenty of time since the reasonable period of time for implementation had been extended more than twice. It was of serious concern to Japan that not even a bill to amend the relevant US anti-dumping statutes had been introduced to the US Congress for consideration and passage. As Japan had repeatedly stated, such a prolonged non-implementation, let alone inaction, seriously undermined the credibility of the WTO dispute settlement system. At the DSB meeting on 31 August, it had been agreed that the reasonable period of time in this proceeding be extended until 31 July 2005. In the hope that the United States would respect its commitment, Japan strongly urged the United States to take necessary legislative steps without delay, so as to bring about a definitive solution to this dispute. Japan wished to remind the United States of its right to the recourse provided under the DSU, if the United States fell short of fully-fledged implementation during this extended period of time.

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

(d) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.8 – WT/DS234/24/Add.8)

16. The Chairperson drew attention to document WT/DS217/16/Add.8 – WT/DS234/24/Add.8 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

17. The representative of the United States said that her country had provided a status report on 16 September 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003, legislation to bring the Continued Dumping and Subsidy Offset Act (CDSOA) into conformity with the US WTO obligations had been introduced in the US Senate (S. 1299). On 10 March 2004, legislation repealing the CDSOA had been introduced in the US House of Representatives (H.R. 3933). In addition, on 2 February 2004, the US administration had, once again, proposed repeal of the CDSOA, in its budget proposal for fiscal year 2005. The US administration would continue to work with Congress to achieve further progress in resolving these disputes with the complaining parties.

18. The representative of the European Communities said that in August 2004, the WTO Arbitrators had recognized that the United States nullified or impaired the benefits of the other WTO Members by maintaining the CDSOA. First, the EC wished to thank the Arbitrators and the Secretariat for their time and efforts they had devoted to this complex arbitration. Although the EC regretted that the Arbitrators had rejected the approach for the determination of the level of nullification or impairment, which had been suggested by the requesting parties, and had instead decided to rely on the "trade effects" of the measure, the EC welcomed the fact that the Arbitrators had recognized the existence of a direct adverse effect on trade amounting to 72 per cent of the level of disbursements. There was no cast-iron definition of nullification or impairment. The Arbitrators themselves had recognized that the nullification or impairment and the suspension of concessions or obligations were complex and disputed notions. It was still the EC's conviction that the first benefit granted by the WTO was the maintenance of a proper balance of rights and obligations. By breaching WTO rules, the CDSOA upset that balance and nullified or impaired this core benefit of the WTO. To "put a value" on that nullification, one could rely on the disbursements made to the US industry in so far as they were the most direct and immediate economic measures of the CDSOA. Nevertheless, the EC was satisfied that the Arbitrators had rejected the US assertion that the CDSOA did not cause any adverse effect. The EC also welcomed other aspects of the WTO arbitration award which were most valuable for the effectiveness of dispute settlement. First, even if the Arbitrators based their decision on the trade effects of the CDSOA, they had expressly rejected the US position that "nullification or impairment is to be limited in all instances to the direct trade loss resulting from the violation". This appeared to be a welcome confirmation of the Arbitration award in the 1916 Anti-Dumping Act dispute, which was the first to accept that benefits under the GATT and the WTO Agreements on Trade in Goods were not limited to trade benefits, but that the "economic effects" should be taken into account.

19. Second, the award also confirmed that the level of suspension did not need to be established once and for all. With a measure like the CDSOA, the level of nullification or impairment might indeed vary over time. As a result of the award, the EC and seven other WTO Members might now seek and obtain the DSB's authorization to suspend the application of tariff concessions or other obligations to the United States. The EC had always considered that the suspension of concessions or obligations was a solution of last resort. The EC sincerely hoped that this decision would help focus minds to resolve this dispute without the need to impose retaliatory measures. But, if compliance was not achieved within a short period of time, the EC would exercise its rights. He noted that, the United States had had 11 months to comply with the DSB's ruling and nine months had passed since the expiry of the implementation deadline. Yet, no significant steps had been taken and again this month the US status report had failed to show any progress in implementation. The EC called on the US administration to convey to the US Congress the importance for the US credibility in the WTO of respecting the rights of other Members without further delay.

20. The representative of Canada said that his country, once again, noted the status report of the United States and its continued failure to comply with its WTO obligations in regards to the Byrd Amendment. On 31 August, WTO Arbitrators had ruled favourably on the level of retaliation afforded to Canada and seven other WTO Members against the United States for its failure to repeal the Byrd Amendment. Despite the WTO rulings, calls from the international community to repeal the

Byrd Amendment and the conclusions of the Congressional Budget Office report on the matter, the United States continued to violate its WTO obligation by not repealing the measure. Canada would continue to take the necessary steps to protect and defend its interests. Canada again called upon the United States to end this dispute and repeal the Byrd Amendment.

21. The representative of Chile said that the United States had, for the fifth time, provided the DSB with a status report that showed no sign of any move towards compliance with the DSB's recommendations in this dispute. Furthermore, Chile noted with concern that certain members of the US Congress had chosen to ignore the WTO rulings and were encouraging the US administration to continue, through other channels, a practice that had already been declared illegal. Chile called, once again, on the US administration to step up its contacts with the US Congress so that the CDSOA could be repealed at the earliest possible opportunity in the few weeks of legislative work that had been left, before all the bills, including those mentioned in the report, were to expire.

22. At the present meeting, Chile also wished to comment on the recently circulated Arbitrator's decision, which, despite claims made by the United States, had determined that the Byrd Amendment nullified or impaired Chile's benefits. The decision had thus upheld Chile's right to suspend concessions or other obligations in an amount very close to the one originally requested by Chile. His country wished to thank the Arbitrators and the Secretariat for the Report, and to highlight several points, both because of their importance in this particular case and because they had set a precedent for future disputes. First, the Report had reaffirmed that violation of a WTO obligation did not necessarily cause injury and that analysis of the effects of such a violation or inconsistency was not the responsibility of the Panel or the Appellate Body, but of the Arbitrator. Second, although the Arbitrator had not agreed 100 per cent with Chile's stance, in substance the arbitrator had accepted the parameters proposed by Chile, namely that disbursements or "offset payments" constituted a proper and objective basis for establishing the trade effects of the Byrd Amendment, and also that these effects must be calculated on the basis of the duties on products originating in each country and not in relation to exports from other WTO Members. Third, the Report stated that the level of injury could change over time, which meant that so too could trade sanctions, as long as equivalence between the one and the other was maintained. Finally, the Arbitrator had affirmed that "inducing compliance" was not the only purpose of suspending concessions. Chile agreed with that assertion, since, if the opposite were true, to emphasize compliance could endanger the governing principle that there must be equivalence between the sanction applied and the injury caused by the measure. Chile hoped that the decision would serve as an incentive for the US Congress to approve the repeal of the Byrd Amendment without delay, thereby obviating the need for Chile to assert the right that had been reconfirmed by the Arbitrators' decision issued on 31 August 2004.

23. The representative of Brazil said that his country welcomed the Arbitration award, which had clearly reaffirmed the illegality of the Byrd Amendment and its disbursements. It had thus given the right to Brazil to suspend concessions or other obligations *vis-à-vis* the United States in an amount of up to 72 per cent of the disbursements made under the CDSOA and related to anti-dumping and countervailing duties paid on imports from Brazil. It should be noted that, if the Arbitrators had found that 72 per cent of the disbursements caused nullification of impairment, a 100 per cent of all disbursements had been found by the Appellate Body to be incompatible with the Agreements and continued, therefore, to be 100 per cent illegal. Thus, the United States continued to be under the obligation, if it was to respect the multilateral rules, to adjust or repeal the illegal measure. The CDSOA had been described as a "double hit" intended to provide an additional, and clearly illegal, remedy to dumping and subsidy. It had been designed in order to assist US companies at the expense of its foreign competitors. The Byrd Amendment distorted the conditions of competitiveness in favor of US companies and stimulated the proliferation of investigations in the trade remedies area, since the companies were enticed not only by the protection given by anti-dumping or countervailing duties, but also by the monetary reward they became entitled to. This had already been demonstrated in several instances, and presently in anti-dumping investigations against the importation of shrimp originating in several countries, as extensively reported in the international media.

24. With regard to the substance of the award, Brazil noticed that the Arbitrators, while refraining from applying the concept of "inducing compliance" because it was "not expressly referred to in any part of the DSU", had decided to apply the "trade effect" standard, which was equally nowhere to be found in the Agreements. Brazil also recalled that in previous arbitrations, in which it had been involved, the same "trade effect" approach, requested by Brazil, had not been accepted. However, like other requesting parties, Brazil appreciated that the Arbitrators had disagreed with the United States that "nullification and impairment is to be limited in all instances to the direct trade loss resulting from the violation" (para. 3.70). Brazil also appreciated the finding that the present case justified a variable level of nullification or impairment and, consequently, a variable level of suspension of concessions and other obligations. Since the amount of disbursements was likely to increase in the coming years, as the Arbitrators themselves had recognized (para. 4.25), these yearly adjustments might serve to induce compliance on the part of the United States. One could only imagine that, if this was a preoccupation, a level of nullification or impairment of 100 per cent of the disbursements would have also served this purpose. Brazil recognized, however, that this case involved difficult concepts and demanded refined reasoning. Brazil was thankful to the Arbitrators and to the Secretariat for their dedication and effort put into this task. However, it wished to highlight one procedural issue of this arbitration that raised systemic concerns. The organizational meeting had taken place on 13 February 2004 and the issuance of the award had been scheduled for 2 June. The award had been finally released on 31 August, more than six months after the organizational meeting, a situation which was probably unique. Even conceding that Article 22.6 of the DSU and its deadline for arbitrations was not so reasonably crafted, one could at least expect "some" adherence by the Arbitrators to the deadlines specified in the rules. The underlying assumption in that Article seemed to be that Arbitrators should adopt methodologies that fit into the time-frame; after all, the time-frame for arbitration was a negotiated disposition of the DSU and, thus, it would serve as a clear indicator of how complex the methodology should be. If real life and real cases changed that assumption and, for example, economic models were to be used more often as an analytical tool, Members should also act accordingly and give an appropriate response to this novel situation. Otherwise, future arbitrations would tend to be longer and longer, and their results, not always satisfactory. Finally, Brazil expected the United States to meet its multilateral obligations with other WTO Members and adjust or repeal the Byrd Amendment without delay. Given the number of countries that were being affected by that illegal measure and that could still be in the future, WTO Members, and not only the complainants in this dispute, should be concerned about the US lack of implementation.

25. The representative of Hong Kong, China said that Hong Kong, China maintained keen interests in this case due to systemic implications. It had joined as a third party at the panel stage and as a third participant at the appellate stage. While Hong Kong, China noted that the US status report indicated some efforts to implement the DSB's recommendations, such efforts had proved to be highly insufficient. Hong Kong, China regretted that no concrete progress had been made to-date. Now that the Arbitrator had granted authorization to the complaining parties to retaliate, this delegation still believed that suspension of concessions and other obligations was a temporary, second-best option to induce compliance. Hong Kong, China urged the United States to take prompt action to bring its legislation into conformity with its WTO obligations without delay.

26. The representative of Korea said that his country had taken note of the US status report. Korea was, once again, disappointed to find in the US status report that there had been no progress in the implementation. One notable development since the previous DSB meeting was the Arbitration award which had found that the CDSOA and its disbursements were seriously harming trade interests of other Members and had opened the way for suspension of concessions. Korea welcomed the award issued in August and appreciated the Arbitrators' and the Secretariat's hard work to help resolve this dispute. At the same time, Korea shared the regret of other requesting parties expressed at the present meeting concerning some findings and conclusions of the Arbitrators, such as rejecting the requesting parties' valid argument that the nullification and impairment should be considered in terms of the balance of rights and obligations of Members rather than by resorting to the traditional trade effects test, and thereby underestimating the level of nullification and impairment. Now that the Arbitrators'

award was in place, Korea was in a position to seek the DSB's authorization to suspend concessions up to the level of nullification and impairment specified in the award. Korea strongly hoped that the United States would promptly implement the DSB's rulings, so that retaliation would be unnecessary. If compliance was not forthcoming, Korea would consider all options available to it, including a possibility of exercising its rights under Article 22.7 of the DSU.

27. The representative of Japan said that his country wished to join the other complaining parties in expressing appreciation for the work of the Arbitrators and the Secretariat during the proceedings of this case. The Arbitrators had made it clear that the continued failure by any Member to comply with the DSB's recommendations and rulings must have real consequences – in the form of retaliation – to be sustained by that Member. The Arbitrators had also rejected the US claim that, since the CDSOA had been found illegal as such, application of the CDSOA, i.e. the actual offset payments, were outside the terms of reference and should not be considered by the Arbitrators. The Arbitrators had correctly concluded that "a variable level of nullification or impairment and, consequently, a variable level of suspension" would be justified. However, Japan had serious reservations about some of the legal analysis and approaches adopted by the Arbitrators. At the present meeting, his delegation wished to focus on a few points, without prejudice to its rights to express further views on the Arbitrators' decision.

28. First, the Arbitrators had misunderstood the requesting parties' arguments concerning the concepts of nullification or impairment of benefits and had claimed that they confused a violation with its result, i.e. nullification or impairment, or rights with benefits. This was not the case since they had argued that the notions of nullification or impairment as well as benefits were broad and inclusive, and should not be interpreted exclusively in terms of the trade effects. As stated by the EC, the notion "benefits" was a legitimate expectation that all Members would abide by their obligation so that a proper balance between the rights and obligations under the covered agreements was maintained, as provided for in Article XVI:4 of the WTO Agreement. Any illegal measure had "adverse impacts" on, or upset, this very balance of rights and obligations found to be violated under the WTO Agreement. Accordingly, the nature of the illegal measure at issue and the rights and obligations violated by such measure should be the essential basis and must be carefully examined to determine the level of nullification or impairment of the benefits in each individual case.

29. The only basis on which the Arbitrators had decided to apply the trade effect approach to this case was that such an approach "has been regularly applied in other Article 22.6 arbitrations and seems to be generally accepted by Members as a correct application of Article 22 of the DSU", even though the Arbitrator had recognized that there was no textual basis for this approach and previous arbitration decisions "are not binding precedents". While Japan noted the Arbitrator's view that the reasoning and findings in the previous Article 22.6 arbitration decisions should be taken into account, as appropriate, they should not be accepted in a wholesale manner. It must be borne in mind that each case had its own distinctive feature in terms of circumstances involved, nature of measures at issue, rights and obligations violated. While the Arbitrators had agreed that analysis of the effects of the illegal measures should not be confined to "direct trade effect" or "trade loss" and "the broader concept of economic impact" could be warranted depending on the nature of measures at hand, the Arbitrators seemed to conclude that, since the CDSOA offset payments "operate … as subsidies that may generate import substitution production", the nullification or impairment in the present case could be discerned in terms of the trade effect or trade loss (para. 3.41). It must be emphasized, however, that the CDSOA had been found illegal not because it worked as subsidies, but because it constituted "specific action against dumping/subsidy" not allowed under the covered agreements. Again, in Japan's view, the level of nullification or impairment of benefits or the extent of the adverse impact of the violating measure on the proper balance of rights and obligations under the covered agreements must be determined on a case-by-case basis by the quantifiable result of the illegal measure, in light of the nature of the measure, rights and obligations violated and the DSB's findings. The Arbitrators in this case had admitted that "the broader concept of economic effect was more appropriate", since the application of the Act "did not automatically restrict trade". Nevertheless, the

Arbitrators had failed to address Japan's arguments that the disbursement under the CDSOA was a direct economic consequence or result of the CDSOA.

30. Second, Japan had concerns about the Arbitrators' reliance on an economic model as a means of calculating the level of nullification or impairment in disposing the cases like this one. Japan wished to reserve the rights to express its views on this point in the future DSB meetings. Now the award had been issued and all the parties involved in this proceeding were bound by it. The requesting parties might exercise their retaliatory rights at any time as they deemed appropriate, in accordance with the award and requirements of the relevant WTO rules. Japan strongly urged the United States to take the Arbitrators' decision seriously and to act immediately to repeal the CDSOA.

31. The representative of India said that his country had listened carefully to the status report provided by the United States at the present meeting and noted with deep regret that, as in the past few DSB meetings, no progress had been reported. In the meantime, the Arbitrators had given an award under the Article 22.6 arbitration. India wished to thank the Arbitrators and the Secretariat for their time and effort devoted to this arbitration. It was regretted that the Arbitrators had not completely adopted the approach offered by the requesting parties to determine the level of nullification and impairment even though under the specific circumstances that was the most logical approach. Their reliance on the trade effects of the CDSOA not only appeared unwarranted in the circumstances for the reasons it had already been mentioned in India's arguments during the arbitration proceedings, it would also make such proceedings very complicated, in particular for developing countries, thereby affecting their rights under the DSU. Nevertheless, the Arbitrator had at least determined that direct adverse effect on trade equivalent to 72 per cent of the level of disbursements constituted the level of nullification and impairment. India believed that future Arbitrators would recognize that the Arbitrators in this case had rejected the US position that nullification or impairment had to be limited in all instances to the direct trade loss resulting from the violation. As a result of the award, India might now request the DSB to grant authorization to suspend concessions or other obligations. India would urge the United States to repeal the CDSOA without further delay, as compliance remained India's preferred option.

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

## 2. United States – Final dumping determination on softwood lumber from Canada

(a) Implementation of the recommendations of the DSB

33. The Chairperson recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. She recalled that at its meeting on 31 August 2004, the DSB had adopted the Appellate Body Report in the case on: "United States – Final Dumping Determination on Softwood Lumber from Canada" and the Panel Report on the same matter, as modified by the Appellate Body Report. She then invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

34. The representative of the United States said that her country intended to implement the DSB's recommendations and rulings in a manner that respected the US WTO obligations, and it had begun to evaluate options for doing so. The United States would need a reasonable period of time in which to implement. The United States stood ready to consult with Canada regarding a reasonable period of time to implement.

35. The representative of Canada said that, at its meeting of 31 August 2004, the DSB had adopted the Reports of the Panel and the Appellate Body in the case on: "United States – Final Dumping Determination on Softwood Lumber from Canada". In its Report, the Appellate Body had found that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in determining the existence of margins of dumping on the basis of its "zeroing" methodology. Consequently, the DSB had recommended that the United States bring its measure into conformity with its obligations under the Anti-Dumping Agreement. Canada was pleased that the United States had indicated that it intended to implement the DSB's rulings and recommendations. It was Canada's objective to reach an agreement with the United States on a reasonable period of time and Canada looked forward to discussing the specifics of the US intentions in the very near future.

36. The representative of the European Communities said that the EC wished to call again on the United States to carefully consider the wider implications of this important ruling. Even if the Panel's and Appellate Body's findings only pertained to the measure against softwood lumber, there was no doubt that the US practice of zeroing was fundamentally WTO-inconsistent. The United States should do as the EC had done after the ruling on the EC's measures in the "Bed Linen" case and should abolish the practice of "zeroing" as soon as possible.

37. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations in this case.

**3. Korea – Anti-dumping duties on imports of certain paper from Indonesia**

(a) Request for the establishment of a panel by Indonesia (WT/DS312/2)

38. The Chairperson recalled that the DSB had considered this matter at its meeting on 31 August 2004 and had agreed to revert to it. She drew attention to the communication from Indonesia contained in document WT/DS312/2.

39. The representative of Indonesia said that at the 31 August 2004 DSB meeting, Indonesia had made its first request for the establishment of a panel to examine definitive anti-dumping duties imposed by Korea on imports of business information paper and uncoated wood-free printing paper from Indonesia. At that meeting, Korea had opposed Indonesia's panel request. Since then, Indonesia and Korea had not reached a mutually agreeable solution to this dispute. Accordingly, Indonesia requested the DSB to establish a panel to examine the matter as set out in document WT/DS312/2. In Indonesia's view, the imposition of definitive anti-dumping duties was inconsistent with Korea's obligations under Article VI of GATT 1994 and several provisions of the Agreement on Implementation of Article VI of GATT 1994. Furthermore, such imposition frustrated the efforts taken by Indonesia to promote its exports at a crucial stage in the economic development of Indonesia. Korea had imposed these anti-dumping duties in November of 2003. Indonesia's paper exports to Korea had been severely affected since that time. Therefore, it was particularly important for Indonesia that the Panel had completed its task within the six month time-frame envisaged in Article 12.8 of the DSU. In order to facilitate the Panel's work, Indonesia would furnish its first submission to the Panel at the earliest possible time. Indonesia looked forward to a prompt resolution of this matter.

40. The representative of Korea said that his country recognized that, given the fact that Indonesia's panel request was on the agenda for the second time, a panel would be established at the present meeting, in accordance with Article 6.1 of the DSU. Korea still found it inappropriate and premature for Indonesia to pursue this case by requesting a panel, but did not wish to reiterate its detailed statement made at the previous DSB meeting. Korea believed that its anti-dumping measures on certain papers from Indonesia were fully compatible with the WTO rules and would vigorously make its case in the course of the Panel's proceedings.

41. 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.

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

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

(a) Recourse to Article 21.5 of the DSU by the European Communities: Request for the establishment of a panel (WT/DS212/15)

43. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS212/15.

44. The representative of the European Communities said that since all Members were aware of the background of this case, there was no need to enter into details at the present meeting. He only wished to underline that this case concerned the issue of proper implementation by the United States of its commitments following the DSB's rulings and recommendations of 8 January 2003. Contrary to the assurances it had offered to the DSB at its meeting on 27 January 2003 and the time it had at its disposal, the United States had failed to proceed to proper implementation particularly on the three measures cited in the EC's panel request. Despite the EC's repeated efforts to arrive at a satisfactory solution, no result had been reached. The US practices in the particular cases cited in its panel request remained in violation of the WTO rules and the US commitments following the relevant DSB's rulings and recommendations. In fact and as far as these three cases cited in the panel request, the United States had failed either to examine properly the existence, continuation or likelihood of recurrence of subsidization or to examine at all the nature of the privatizations involved and their impact on the continuation of the alleged subsidization. In conclusion, the United States had not properly implemented the DSB's recommendations. Consultations had failed to resolve the matter. Under these circumstances, the EC had no other option than to request a compliance panel, with the hope that its decision would resolve this long-standing dispute once and for all.

45. The representative of the United States said that her country regretted the EC's decision to request the establishment of a panel, because the United States had fully implemented the DSB's recommendations and rulings in this dispute. The DSB had found that the US Department of Commerce's application of its privatization methodology in 12 different countervailing duty determinations was inconsistent with the US WTO obligations. The United States had issued revised determinations in all 12 cases. Significantly, the EC was challenging only three of those determinations. All three determinations involved sunset reviews. In a sunset review, authorities were called upon to determine whether the termination of a definitive countervailing duty would likely lead to a continuation or recurrence of subsidization. In two of the sunset reviews in question, privatization was not even a factor in the determinations, which had been based on the existence of post-privatization subsidies. In fact, the Department of Commerce had assumed that all pre-privatization subsidies had been extinguished. In the third sunset determination, the facts demonstrated clearly that aspects of the privatization transaction in question had not been conducted on an arm's length basis or at fair market value. The Department of Commerce had, therefore, properly concluded – consistent with the DSB's findings – that the privatization transaction had not extinguished the subsidies in question with respect to these aspects. In sum, the United States intended to vigorously defend the challenged determinations.

46. The representative of Brazil said that his delegation wished to make a statement regarding the US implementation of the Panel's and the Appellate Body's Report in the case on "United States – Countervailing Measures Concerning Certain Products from the EC". As a third party in the proceeding and as a target of US countervailing duty actions where privatization was a central issue,

Brazil was monitoring US implementation of this Appellate Body Report very closely. Brazil also intended to follow very closely the new implementation panel requested by the EC. In the original case, the most important conclusion of the Appellate Body was that there existed a rebuttable presumption under the SCM Agreement that a privatization at arm's length and for fair market value would extinguish the benefit of any past subsidy. The effect of such privatization shifted the burden to the administering authority in a countervailing duty investigation to offer proof that a benefit still continued beyond privatization. Absent that proof, an arm's length sale at fair market value was sufficient to compel a conclusion that the benefit was extinguished and countervailing duties should be terminated.[1]

47. In terms of recommendations, the United States had been requested to bring its practices – practices that seldom, if ever, examined whether a benefit continued after privatization – into conformity with the WTO Agreement.[2] In June 2003, the US Department of Commerce had published a Notice of Final Modification of Agency Practice in an effort to bring its privatization methodology into conformity with the United States' obligations under the Agreement.[3] Under the Department's new formulation, the "baseline presumption" was that non-recurring subsidies could benefit the recipient over a period of time normally corresponding to the average useful life of the recipient's assets. However, this presumption might be rebutted by demonstrating that a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.[4] Along with evidence of comparable "benchmark" sales, the Department had indicated it would consider a non-exhaustive list of so-called "profit maximization" factors in rendering a decision on whether a privatization was for fair market value. The Department had also indicated that it would explore other "market distortion" factors that might render an arm's length, fair market value privatization ineffective in extinguishing benefit from past subsidies.[5] As a result of the application of its new practice, the Department had found that out the 12 countervailing duty cases under analysis, in nine cases an arm's length, fair market value privatization extinguished any benefit from past subsidies. In spite of this, Brazil still harbored some concern, however, over the seemingly precarious results of some of these cases under the new practice. Indeed, despite overwhelming evidence of the market-oriented, profit-driven nature of the transactions investigated, the Department had captured what Brazil believed were minor, if not trivial, circumstances to find problems. For example, in some of the Italian privatization cases, the Department had cited the "perception" of one of the bidders that the process placed importance on the presence of Italian bidders. Despite all the other favorable aspects of the process, this presented the Department with a "mixed picture."[6] Overall, one was left to conclude that the outcomes in certain of the cases were far from certain. Brazil hoped the Department's approach did not reflect an overzealous reading of the Appellate Body's report and remained appropriately skeptical. Brazil further believed US implementation would be better gauged in future cases, when the scrutiny of the Members was not so intense as in the 12 cases that were the subject of the dispute settlement proceedings.

48. There was another issue that needed to be addressed and concerned the three other cases in which the Department had failed to examine the privatization transaction. These cases were sunset reviews and involved multiple parties from each country, or other types of subsidies. Based on the

[1] United States – Countervailing Measures Concerning Certain Products from the EC, Report of the Appellate Body, WT/DS212/AB/R, 9 December 2002, para. 126-127.

[2] *Idem* para. 162.

[3] Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment, 68 Fed. Reg. 37125 (23 June 2003) (hereinafter "Final Rule").

[4] Final Rule at 37127.

[5] *Idem*

[6] Issues and Decision Memorandum for the Determination under Section 129 of the Uruguay Round Agreements Act: Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 23 October 2003.

Department's reading of US law and legislative history, the Department had determined that so long as a benefit was found likely to continue or recur with respect to some of the parties or some of the programmes, no finding with respect to benefit and the privatization transaction was necessary.[7] He then quoted from the Appellate Body Report in response: "In our view, the SCM Agreement, by virtue of Articles 10, 19.4, and 21.1, also imposes an obligation to conduct such a determination on an investigating authority conducting a sunset review. As we observed earlier, the interplay of GATT Article VI:3 and Articles 10, 19.4 and 21.1 of the SCM Agreement prescribes an obligation applicable to original investigations as well as to reviews covered under Article 21 of the SCM Agreement to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. Consequently, we see no error in the Panel's finding that, in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies, is obliged to examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers".[8]

49. It seemed that the United States had not followed the Appellate Body's findings since a determination of whether the privatized producers in these three reviews received any benefit from the prior subsidization to the state-owned producers had not been performed. In this regard, the United States had apparently not implemented the Appellate Body's recommendation. Thus, Brazil had two primary concerns, which were apparently shared by the EC. First, whether the United States was implementing its new methodology in a fair manner or simply using this new methodology to perpetuate the problems created by its prior methodologies, both of which had been found to be inconsistent with the SCM Agreement. Second, whether the United States would implement its new methodology in the context of sunset reviews in compliance with its WTO obligations. Brazil hoped these issues would be made clear in the present case.

50. 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 the European Communities in document WT/DS212/15. The panel would have standard terms of reference.

51. The representative of Korea reserved third-party rights to participate in the Panel's proceedings.

## 5. Canada – Measures relating to exports of wheat and treatment of imported grain

(a) Report of the Appellate Body (WT/DS276/AB/R) and Report of the Panel (WT/DS276/R)

52. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS276/17 transmitting the Appellate Body Report on "Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain", which had been circulated on 30 August 2004 in document WT/DS276/AB/R, in accordance with Article 17.5 of the DSU. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. She recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

[7] Section 129 Determination: Final Results of Full Sunset Review of Cut-to-Length Carbon Steel Plate from Germany, 23 October 2003 at 4.

[8] United States – Countervailing Measures Concerning Certain Products from the EC, Report of the Appellate Body, para. 149.

53. The representative of the United States said that her country supported adoption of the Reports before the DSB at the present meeting. The United States wished to begin by thanking the members of the Appellate Body, the Panel, and the Secretariat for their hard work throughout the course of this dispute. Turning to the substance of the Reports, the United States was pleased with the Panel's findings that certain aspects of Canada's grain handling system and its rail revenue cap programme were inconsistent with the national treatment provisions of Article III:4 of the GATT 1994. The United States noted that measures that were both consistent with Canada's national treatment obligation and met Canada's stated policy objectives were clearly available. Such measures could include ones that were based on the intrinsic characteristics of grain, to ensure proper grading of grain. The United States looked forward to hearing more about Canada's plans in this regard soon. And while the United States was also pleased that the Appellate Body had rejected Canada's appeal related to the sequencing of the panel's analysis under Article XVII of the GATT 1994, it regretted the Appellate Body's affirmation of the Panel's findings with respect to the US claim under Article XVII. Not only was the United States disappointed with the substantive outcome, which narrowly interpreted Article XVII, but it had also found the Panel's and the Appellate Body's analytical approach troubling. In any case, the United States believed the Panel's findings regarding the practices of the Canadian Wheat Board reflected the need for stronger WTO disciplines on state trading enterprises. In this regard, the United States was pleased that Members had agreed in July to the elimination of government financing, the underwriting of losses, and export subsidies provided to or by agricultural state trading enterprises like the Canadian Wheat Board. The United States was also pleased that Members had agreed as well that the monopolistic powers of such enterprises were subject to further negotiation in the Doha negotiations. The United States looked forward to working with other Members through those negotiations to create an effective regime to address the unfair practices of state trading enterprises.

54. Finally, the United States wished to mention briefly the Appellate Body's findings on the question of whether Canada had raised its procedural objections with regard to the first US panel request in this dispute in a timely manner. It had been the US understanding that Members should raise alleged procedural deficiencies at the earliest opportunity. In this dispute, Canada could have raised its objections during the two DSB meetings where the US panel request had been considered, but it had not done so. The United States noted with interest that the Appellate Body had now explicitly determined that a preliminary objection – raised for the first time after panel establishment – was considered timely. In sum, while the United States was disappointed with the disposition of its claim regarding the wheat trading practices of the Canadian Wheat Board, it was pleased that the Panel had found that Canada's grain handling system and its rail revenue cap were inconsistent with national treatment principles and discriminated against imported grains. The United States looked forward to prompt implementation by Canada of these findings.

55. The representative of Canada said that his country wished to begin by thanking the members of the Appellate Body, the Panel and the WTO Secretariat for the time and effort they had devoted to helping Canada and the United States resolve this dispute. Their work was greatly appreciated, not just because this dispute had great importance to Canada, but also because it had afforded an opportunity to examine the extent of a Member's obligations under Article XVII of GATT 1994 and the inter-play between this Article and the other WTO Agreements. As Canada had indicated previously, this dispute was but one in a long running series of grain-related discussions, studies and investigations launched by the United States over the past decade and a half. Canada welcomed the Appellate Body and the Panel's findings because they confirmed what it had maintained all along – that the Canadian Wheat Board conducted its business in accordance with WTO rules.

56. Two of the factual findings by the Panel made this point clear. First, the Panel found that, "[t]he Canadian Wheat Board is controlled by the producers whose grain it markets" (Panel Report, para. 6.122). Second, the Panel had found that "[t]he fact that the Government of Canada does not supervise the Canadian Wheat Board's sales operations makes it more, rather than less, likely that the Canadian Wheat Board will act in the commercial interests of the producers." (Panel Report,

para. 6.124). As such, the Panel had concluded that "because of its governance structure, the Canadian Wheat Board has an incentive to maximize returns to the producers whose product it markets" (Panel Report, para. 6.131). In other words, the Canadian Wheat Board's sales were made solely in accordance with commercial considerations.

57. Both the Appellate Body and the Panel had also recognized that state trading enterprises were subject not only to Article XVII disciplines, but also to many more in the GATT 1994, including the anti-dumping, subsidies and agriculture agreements. As the Appellate Body had put it, Article XVII was not a "comprehensive code of conduct for state trading enterprises". Indeed, "the negotiators of GATT created a number of complementary requirements to address the different ways in which state trading enterprises could be used by a contracting party to seek to circumvent its obligations under the GATT." (AB Report, para. 98). Taken together, the Panel's findings, and the Appellate Body's confirmation of them, validated Canada's long-standing position in the WTO agriculture negotiations that new disciplines called for by the United States and the EC on export state-trading enterprises were simply not required. Canada would continue to defend the ability of farmers to choose how to market their products. Canada asked that the DSB adopt these two Reports – WT/DS276/AB/R, dated 30 August 2004, and WT/DS276/R, dated 6 April 2004.

58. The representative of China said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their diligent work and the high quality of the Reports in this case. It was China's understanding that this was a very important and difficult case since it was the first major dispute concerning rights and obligations of Members in respect of state trading enterprises (STE) under Article XVII of GATT 1994. In their Reports, the Panel and the Appellate Body had reached a number of conclusions which had confirmed the correctness of the understanding and interpretation of Article XVII of GATT 1994 put forward by China in its third-party written submissions and oral statements in this dispute. First, Article XVII of GATT 1994 permitted Members to establish or maintain state trading enterprises or grant exclusive or special privileges to any enterprises, and mere utilization of the exclusive or special privileges by such enterprises could not be explained as the violation of Article XVII of GATT 1994. Second, Article XVII:1(b), 1(b), by defining and clarifying the requirement in Article XVII:1(a), was dependent upon rather than separate and independent from Article XVII:I (a). Third, Article XVII of GATT 1994 was not a provision imposing comprehensive competition-law-type obligations on STEs. China also welcomed the clarifications provided by the Panel and the Appellate Body on important terms in Article XVII:1, such as "commercial considerations" and "enterprises". In short, the Panel and the Appellate Body Reports had provided important guidance regarding the interpretation and application of Article XVII of GATT 1994. China welcomed the adoption of the Reports by the DSB at the present meeting.

59. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS276/AB/R and the Panel Report contained in WT/DS276/R, as upheld by the Appellate Body Report.

## 6. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/266)

60. The Chairperson drew attention to document WT/DSB/W/266 which contained additional names proposed for inclusion on the indicative list, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the names contained in document WT/DSB/W/266.

61. The DSB so agreed.