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on 21 March 2005

Chairman: Mr. Eirik Glenne (Norway)

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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.29)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.29)

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(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.4)

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.3)

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 five sub-items to which he had just referred be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.29)

2. The Chairman drew attention to document WT/DS176/11/Add.29, 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 her country had provided a status report in this dispute on 10 March 2005, in accordance with Article 21.6 of the DSU. As noted in the report, several legislative proposals relating to Section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, both in the US Senate and the US House of Representatives. The US administration was working with the US Congress with respect to appropriate statutory measures to resolve this matter.

4. The representative of the European Communities said that in February 2005 two bills had been introduced in the US Senate and the US House of Representatives that would, *inter alia*, repeal Section 211. Adoption of these bills would bring a satisfactory solution to this dispute by removing a legislation driven by specific interests. The EC hoped that the introduction of these bills would give an impetus to the implementation process. It would be most damaging if the United States were to miss the deadline of 30 June 2005. The United States could not be a strong advocate of efficient and non-discriminatory protection of intellectual property rights worldwide, while at the same time failing to bring itself into compliance with its TRIPS obligations more than three years after the condemnation of the US legislation. In that respect, the EC stressed that half of the additional implementation period had already elapsed.

5. The representative of Cuba expressed her country's deep regret that months and years had been passing by while the United States had continued to fail to comply with the DSB's rulings. For more than three years Members had been listening to repetitive reports informing them that the US administration was working with the US Congress towards an appropriate solution to this dispute. Cuba wondered how much time the US Congress would need to do something so straightforward as

taking the only proper decision, namely, to repeal Section 211. Cuba believed that this process must be very frustrating for the US administration, which had been entrusted with the task of persuading the US Government to meet its obligations as a WTO Member. The situation, as described, resembled a boxing ring while the strategy of the US boxer was attrition. Cuba's advice to him was to give this up since his opponents' resilience was well known. Cuba would not stop its calls for compliance with the DSB's recommendations and rulings in this dispute and would continue to repeat that the only possible solution was the abrogation of Section 211. In that respect, Cuba considered that the bill introduced on 9 February 2005 by 20 Democratic and Republican US senators would fully comply with this objective.

6. 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.29)

7. The Chairman drew attention to document WT/DS184/15/Add.29, 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.

8. The representative of the United States said that her country had provided a status report in this dispute on 10 March 2005, 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 antidumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in WT/DS184/15/Add.3. The US administration continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments.

9. The representative of Japan expressed his country's regret that, since 31 August 2004 when the reasonable period of time had been extended for the third time, no tangible step had been taken towards the full implementation of the DSB's recommendations beyond general statements repeated by the United States at every DSB meeting. Japan expressed concern about the fact that since 4 January 2005, when the 109th US Congress had convened, no bill had yet been introduced. As had been stated at previous DSB meetings, Japan's decision to agree to the third extension of the reasonable period of time had been premised on trust in the pledges made by the United States towards the full implementation of the DSB's recommendations within the reasonable period of time. Since the reasonable period of time would expire in the next four months, Japan reiterated its urgent call for the United States to meet its obligation under the WTO Agreement, by first promptly introducing a bill to the US Congress. Prompt compliance was important for maintaining the credibility of the dispute settlement mechanism. If the United States fell short of implementation by the end of July 2005, Japan would be entitled to the recourse provided for under the DSU in order to safeguard its rights and interest.

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

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.14 – WT/DS234/24/Add.14)

11. The Chairman drew attention to document WT/DS217/16/Add.14 – WT/DS234/24/Add.14, 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.

12. The representative of the United States said that her country had provided a status report on 10 March 2005, in accordance with Article 21.6 of the DSU. On 7 February 2005, the US administration had proposed repeal of the CDSOA in its budget proposal for fiscal year 2006. In addition, on 3 March 2005, legislation that would repeal the CDSOA had been introduced in the US House of Representatives. The US administration would work with the US Congress to enact legislation, and would continue to confer with the complaining parties in these disputes in order to reach mutually satisfactory resolutions of these matters.

13. The representative of the European Communities said that the EC welcomed the introduction of a bill that would repeal the CDSOA. This was certainly a positive sign. The EC would, however, recall that in the last US Congress two bills aimed at implementing the DSB's ruling and recommendation had also been pending, but there was not even an attempt to discuss them, even less to adopt them. And unfortunately, this had not been an isolated incident. The EC as well as other WTO Members had had the same experience in other disputes where bills had been introduced, but never discussed. The EC hoped that, this time, further steps would follow and called on the US administration to actively work with Congressional leaders in order to ensure rapid compliance with the US obligations under the WTO. In the absence of such immediate action the EC would have no other option than to exercise its retaliation rights.

14. The representative of Canada said that his country noted the status report of the United States. In particular, Canada welcomed the 3 March 2005 bill that would repeal the Byrd Amendment. As had been stated in the past, Canada considered that the repeal of the Byrd Amendment was the most effective way of ending the dispute under consideration. In that vein, Canada certainly hoped that the March 2005 initiative would have a more felicitous outcome than the efforts undertaken in June 2003, March 2004 as well as February 2005. He recalled that in 2004, Canada had conducted an extensive public consultation process with Canadians on its retaliatory options. At present, Canada was assessing comments received from Canadians on its retaliatory options. Canada was clear that retaliation was not its preferred option. Canada hoped that the United States would remove this option altogether by repealing the Byrd Amendment, and thereby bringing itself into compliance with its WTO obligations. Canada again called upon the United States to end this dispute and to repeal the Byrd Amendment.

15. The representative of Japan said that his country very much welcomed the fact that a bill repealing the CDSOA had been introduced to the US Congress in March. Japan had taken note of it as an important, positive step toward the resolution of this dispute. However, what was more important was the passage of this repealing legislation at the earliest possible opportunity. Japan noted that during the economic/trade discussions held by the United States and Japan, including the recent high-level discussion in March, the US side had always stated the importance of complying with its obligations under the WTO Agreements. In order to substantiate this commitment, Japan strongly urged the US administration to make further efforts towards securing the repeal of the CDSOA by taking all actions it had at its disposal.

16. The representative of Brazil said that his country welcomed the recent introduction in the US Congress of new legislation that would repeal the CDSOA. The illegality of the Byrd Amendment had been confirmed at all stages of the WTO dispute settlement process, at least since the adoption of the Appellate Body's decision in January 2003. The United States had been repeatedly requested to bring its measure into conformity with the multilaterally-agreed trade rules. While the United States continued to show lack of compliance, companies from many countries, including Brazil, continued to suffer from the illegal disbursements under the Act. Brazil urged the United States to enact this legislation as soon as possible. Brazil wished to remind that continuation of the illegal disbursements could prompt the co-complainants in this case to use the right to suspend concessions at any given moment.

17. The representative of Chile said that, like other Members, Chile welcomed the initiative of the United States to repeal the measure in question. However, this initiative was only intended to bring the long-standing question of conformity with the DSB's recommendations in the context of the fiscal year of 2006. Therefore, even if successful, this was still far from constituting prompt action to comply with the DSB's rulings. Like other Members, Chile urged the United States to take further and urgent efforts in this matter.

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

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.4)

19. The Chairman drew attention to document WT/DS160/24/Add.4, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

20. The representative of the United States said that her country had provided a status report in this dispute on 10 March 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration had been consulting on this matter with the US Congress. The US administration would continue to work with the US Congress and confer with the EC in order to reach a mutually satisfactory resolution of this matter.

21. The representative of the European Communities said that his delegation was bound to note, once again, that the status report submitted by the United States at the present meeting was a copy of the previous one, which had been submitted at the 17 February DSB meeting. This was further evidence of the apparent unwillingness of the United States to abide by the DSB's recommendations and rulings in the dispute under consideration and, more generally, by the copyright obligations under the TRIPS Agreement. The EC was extremely disappointed with the lack of any initiatives by the US administration or by the US Congress to bring the US Copyright Act into compliance with the TRIPS Agreement. Needless to say, the systemic implications of this situation had gone well beyond the case under consideration. At the 17 February DSB meeting, the United States had forcefully contended that it was second to nobody when it came to the protection of intellectual property rights. The EC had taken note of that statement, but deeds not words were required from the United States. Once again, in order to break the current impasse, the EC invited the United States to explain in concrete terms what was the substance of the consultations that the US administration stated to be conducting with the US Congress. Finally, the EC recalled that it had reserved its right to reactivate, at any point in time, arbitration proceedings pursuant to its retaliation request.

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

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.3)

23. The Chairman drew attention to document WT/DS204/9/Add.3, which contained the status report by Mexico on progress in the implementation of the DSB's recommendations in the case concerning Mexico's measures affecting telecommunications services.

24. The representative of Mexico said that on 10 March 2005, pursuant to Article 21.6 of the DSU, his country had submitted its most recent status report on implementation of the DSB's recommendations in the case: "Mexico – Measures Affecting Telecommunications Services". In that status report, Mexico had provided information with regard to the notification of an agreement on

implementation between Mexico and the United States. Pursuant to that agreement, Mexico had to implement the DSB's recommendations within a reasonable period of time of 13 months, which would expire in July 2005. Mexico had complied with the first phase of that agreement, which had been notified accordingly. Mexico was also drafting regulations for the establishment of commercial agencies. Once these were developed, Mexico would fully comply with the DSB's recommendations and rulings.

25. The representative of the United States said that her country thanked Mexico for its status report. The United States looked forward to reviewing and consulting with Mexico on its proposed regulations allowing the resale of international telecommunication services, which the United States understood were forthcoming.

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

2. European Communities – Selected customs matters

(a) Request for the establishment of a panel by the United States (WT/DS315/8)

27. The Chairman recalled that the DSB had considered this matter at its meeting on 25 January and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS315/8, and invited the representative of the United States to speak.

28. The representative of the United States said that, as her delegation had explained at the DSB meeting that had considered this issue, the United States was concerned with the non-uniform application of customs law in the EC and the failure of the EC to maintain a forum for the prompt review and correction of administrative action relating to customs matters. These aspects of the administration of customs law in the EC were inconsistent with Article X of the GATT 1994 and amounted to a trade barrier that was especially burdensome for small and medium-sized companies. Therefore, for all the reasons previously discussed, the United States again requested that the DSB establish a panel pursuant to Article 6 of the DSU, with standard terms of reference, to examine the matters set forth in the US panel request.

29. The representative of the European Communities said that the EC strongly regretted the US determination to proceed to litigation and its unwillingness to engage in any meaningful dialogue to address their alleged concerns with regard to the EC's customs administration. As the EC had noted on the first occasion when the United States had brought its request for the establishment of a panel: i.e. at the 25 January 2005 DSB meeting, and contrary to the US claims, the issues subject to this dispute had never been raised in the relevant bilateral or multilateral fora in the past. The United States had also failed – before, during and after the WTO consultations – to provide a single example of real and practical problems for US operators resulting from the application of EC customs measures. When the United States had published this case in the Federal Register, the US authorities had received only three submissions from US industry, none of which constituted any evidence in support of the US allegations of lack of uniformity in the application of EC's customs measures. The nature and motivation of the US claims remained unclear to the EC. The United States seemed to allege that the EC should establish a single centralised customs administration, as well as an immediate review of customs decisions at the EC level – as opposed to the current review by the EC member States' authorities and tribunals – in order to ensure uniformity in customs treatment across the EC. The EC reiterated that these were questions regarding the distribution of competences in the administration of customs rules within the internal legal order of a WTO Member which had gone well beyond what was required by the WTO rules. The EC had in place harmonized customs rules and institutional and administrative measures – enforced by the Commission and the European Court of Justice – to prevent divergent practices. These ensured effective co-ordination between the EC

member States and uniform customs treatment in all the EC member States. The EC remained confident that a WTO panel would confirm the compatibility of the EC customs regime with the WTO provisions. In order to avoid any further delay in this direction, and despite the absence of any factual and legal basis of the US claims, the EC would not object to the US request for the establishment of a panel at the present meeting.

30. 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.

31. The representatives of Australia, Brazil, China and Chinese Taipei reserved third-party rights to participate in the Panel's proceedings.

3. Japan – Import quotas on dried laver and seasoned laver

(a) Request for the establishment of a panel by Korea (WT/DS323/2)

32. The Chairman recalled that the DSB had considered this matter at its meeting on 17 February and agreed to revert to it. He drew attention to the communication from Korea contained in document WT/DS323/2, and invited the representative of Korea to speak.

33. The representative of Korea said that his country had requested the establishment of a panel with respect to Japan's import quotas on dried and seasoned laver, as contained in WT/DS323/2, which had been circulated on 7 February 2005 and discussed at the previous regular DSB meeting on 17 February 2005. Korea believed that, as stated at the 17 February DSB meeting, the highly restrictive import quotas on dried and seasoned laver imposed by Japan were inconsistent with Japan's obligations under the WTO, and in particular Article XI of GATT 1994. Since bilateral consultations had regrettably failed to reach a mutually satisfactory resolution to the dispute, Korea had no option, but to pursue a panel procedure to secure an effective and expeditious resolution of this dispute. Therefore, Korea requested, for a second time, that the DSB establish a panel pursuant to Article 6 of the DSU with standard terms of reference.

34. The representative of Japan said that his country regretted that Korea had decided to proceed with the second request for the establishment of a panel on this matter. It was Japan's understanding that, in accordance with Article 6.1 of the DSU, a panel would be established at the present meeting. Japan firmly believed that its import quota system on dried and seasoned laver was fully consistent with the relevant provisions of the WTO Agreements. Accordingly, Japan intended to make its case fully in support of its position before the Panel.

35. 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.

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

4. United States – Subsidies on upland cotton

(a) Report of the Appellate Body (WT/DS267/AB/R) and Report of the Panel (WT/DS267/R and Corr.1)

37. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS267/19 transmitting the Appellate Body Report on "United States – Subsidies on Upland Cotton", which had been circulated on 3 March 2005 in document WT/DS267/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that 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. He 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".

38. The representative of Brazil recalled that the Report of the Appellate Body in the case: "United States – Subsidies on Upland Cotton", which had been circulated to Members on 3 March 2005, had confirmed the Panel's findings and conclusions which had been made public on 8 September 2004. Both the Panel and the Appellate Body had found that various subsidies granted by the United States on the production, use and exports of cotton (and, as regards export credit guarantees, other commodities) were inconsistent with the US obligations under the Agreement on Agriculture and the SCM Agreement. Brazil welcomed the adoption of the Reports and thanked the Panel, the Appellate Body and the Secretariat for their hard work on this dispute. A 300-page Report of the Appellate Body and a 350-page Report of the Panel were more than telling about the dedication required from all the parties involved. The adoption of these Reports would take place almost two years after the establishment of the Panel. Two years that had been peppered with thousands of pages in often intricate submissions and exhibits, an unprecedented number of three hearings with the Panel, and many procedural disputes, including the drawn-out argument about the use of Annex V of the SCM Agreement. This protracted and sometimes painful process had finally come to an end. The Reports of the Panel and the Appellate Body dealing with the consistency of US subsidies with the multilateral disciplines on agricultural trade had now been finalized.

39. Before going over the most relevant points in the decisions arrived at by the Panel and the Appellate Body, he wished to make some remarks on the background of the Cotton case. First, he wished to recall what the case under consideration was about. This dispute concerned massive US subsidies for the production, use and export of US upland cotton – over US$4 billion in marketing year 2001 and US$12.9 billion from 1999 to 2002. The average subsidization rate for upland cotton, measured by the price received by US farmers, was 95 per cent in the same period. The average amount of upland cotton subsidies between marketing years 1999-2002 was almost 200 per cent above the average of the 1980-1998 period. These subsidies came in a variety of forms, including: marketing loans guaranteeing producer revenues of US$0.52 per pound; countercyclical payments triggered by prices below US$0.6573 per pound; multiple and special crop insurance subsidies for upland cotton; payments to US purchasers of US upland cotton; payments to US exporters of US upland cotton; direct payments to cotton farmers based on historical and updated acreage and yield data, and increased by market loss assistance payments as well as export credit guarantee programs (in this respect, not limited to upland cotton). These subsidies had enabled US upland cotton producers to increase production and US market share of world exports at a time when the gap had been growing between rising US costs of production and falling market prices, and when the value of the US dollar was increasing. Between marketing years 1998 and 2001, US production had increased 31.5 per cent. During the same period, US exports had surged more than 45 per cent. At the same time, the US share of the world export market had increased from 17.9 per cent in marketing year 1998 to 38.1 per cent in marketing year 2001. Had the United States abided by its WTO obligations or some basic laws of economics, the reality would have been markedly different. In the absence of the subsidies at issue, many US producers of upland cotton would have, at least, switched to alternative crops. The scenario that had just been described would be bad enough for US and world prices, if the United States did not export much of its upland cotton. But unfortunately for Brazil and other lower-cost producers in Africa and elsewhere, most of this subsidy-generated upland cotton was not consumed in the United States, by far the largest exporter of upland cotton in the world. These US exports – created and sustained by subsidy-enhanced overproduction and disposed of with the help of export subsidies – had a significant depressing and suppressing impact on world and Brazilian

prices for upland cotton. The average international upland cotton price measured by the A - Index for the period of 1999-2001 had fallen by more than 30 per cent in comparison to the average price for the period of 1980-1998. Not surprisingly, as US production and exports had increased, those of low-cost producers elsewhere in the world had decreased.

40. Brazilian cotton producers had lost an estimated U$450 million in revenue from suppressed world prices linked to US subsidies during the period of 1999 to 2002. The case filed by Brazil was 100 percent founded on the existing multilateral disciplines on trade in agriculture. Brazil was not advocating for a non-negotiated change of the negotiated rules in this dispute. Nor had Brazil requested the creation and imposition of new obligations on the United States. Brazil had simply asked that Members comply with the obligations to which they had committed themselves in Marrakesh on 15 April 1994. Brazil had already paid for the package that had been negotiated in the Uruguay Round. This case was about implementation of that package. Brazil should not be called upon to pay again for the very same rights and obligations it had bargained for a decade ago. Brazil would not, however, disagree that the Reports of the Panel and the Appellate Body in this dispute had an obvious and important impact on the negotiations in the context of the Doha Development Agenda. The Reports provided Members with a better understanding about the present content and reach of some of the issues at the heart of the Doha Round, namely decoupled payments, export subsidies, trade-and production-distorting subsidies as a cause of serious prejudice, the interplay between the Agreement on Agriculture and the SCM Agreement, to name a few. In order to clarify where one wanted to arrive at, Brazil considered that it would be more than useful to know where one were to depart from. The Reports also reinforced the legitimacy of the position of those who defended that the distortions in world agricultural trade had to cease.

41. With regard to the legal reasoning and conclusions of the Panel and the Appellate Body in the Cotton dispute, Brazil would briefly refer to the issues his delegation believed deserved special attention. These issues were: (i) the relationship between the Agreement on Agriculture and the SCM Agreement; (ii) the "green-box"; (iii) the analysis in the context of serious prejudice claims; and (iv) the disciplines on export credit guarantees for agricultural products. On the relationship between the Agreement on Agriculture and the SCM Agreement, the Reports in the Cotton case clearly and conclusively had put an end to any remaining doubt about the need to read both Agreements (and the WTO Agreement as a whole) in a harmonious, coherent way. Building upon the Report of the Appellate Body in "EC – Bananas III", the Reports in the Cotton case had put to rest the idea that the Agreement on Agriculture was an impregnable fortress or a unique animal that stood alone among the WTO Agreements. In the Appellate Body's words: ... "[T]he Agreement on Agriculture and the SCM Agreement are both multilateral Agreements on Trade in Goods contained in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), and, as such, are both 'integral parts' of the same treaty, the WTO Agreement, that are 'binding on all Members'. Furthermore, [...] a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously".

42. With reference to the so-called "green-box", the conclusions by the Panel and the Appellate Body were also unequivocal. A Member claiming "green-box" status for a measure must demonstrate that the measure was truly decoupled from the current type of production. Such a measure must not only appear to be decoupled, it must be so as a matter of fact. In other words, Annex 2 of the Agreement on Agriculture did not provide room for measures which channeled production decisions toward or away from certain crops, in particular where the crops in question formerly benefited from subsidies that were also not green-box subsidies. Green box measures must provide full planting flexibility and could not be used – even to allegedly "maintain fair competition" between domestic producers – to channel farmers' production decisions.

43. The Reports to be adopted at the present meeting had equally shed light on the approach panels were to take in examining serious prejudice claims. Contrary to what the United States had

argued throughout the proceedings, both the Panel and the Appellate Body had agreed that Article 6.3 of the SCM Agreement imposed no specific methodology to be followed in the determination of the existence of serious prejudice. Nothing in that provision required a panel to apply the very same methodologies that domestic investigating authorities had to comply with in countervailing duty proceedings. In that sense, the Panel had found, and the Appellate Body had confirmed that it had no obligation, for example, to precisely quantify the amount of benefits flowing from the subsidies in question nor to examine issues like "pass-through".

44. With regard to the issue of export credit guarantees, the Panel and the Appellate Body had confirmed that subsidized agricultural export credit guarantees did not enjoy a carve-out from the general disciplines on export subsidies. To conclude otherwise would lead not only to the perception of a significant gap in the Agreement on Agriculture, but also in practice it would open a huge avenue for circumvention of export subsidy commitments with billions and billions of dollars of export subsidies flowing without restraint or accountability. It would be hard to envisage a more disruptive way to depart from the object and purpose of the Agreement on Agriculture.

45. Finally, he concluded by expressing Brazil's hope and expectation that the United States would fully and timely comply with the DSB's rulings and recommendations in this matter.

46. The representative of the United States said that her country wished to note at the outset that it continued to believe that negotiation, not litigation, was the most effective way to address any distortions in agricultural trade. True, lasting reform was best achieved through multilateral negotiations in which all instruments that might distort global markets were addressed. The United States wished to reaffirm that it remained committed to success through the ongoing Doha Development Agenda negotiations. The United States was deeply disappointed in the Panel and the Appellate Body Reports in this dispute. The US measures at issue – domestic support for upland cotton, domestic support decoupled from production of any commodity and export credit guarantees for all agricultural commodities – had been designed to conform fully to its WTO commitments. The United States, therefore, regretted that the Panel and the Appellate Body had found several of these measures – though not all of them – to be WTO-inconsistent.

47. At the present meeting, the United States highlighted certain interpretations and approaches that should be of concern to Members no matter their view on the merits of Brazil's claims. But first, the United States noted that it was pleased that the Panel had rejected Brazil's claim that all types of US domestic support had caused significant suppression of cotton prices. In particular, the Panel had rejected Brazil's claim on direct payments and on crop insurance payments. The United States especially welcomed the Panel's findings that US direct payments under its 2002 farm legislation were consistent with WTO rules. These payments supported farmer income, but were not tied to current production or prices. In plain terms, a payment recipient needed not to produce cotton to get the payment – in fact, they were free to produce nothing at all. The United States had extensively reformed its farm programs in 1996, and its 2002 farm legislation continued those reforms. A key part of those reforms was to eliminate traditional "deficiency payments" with high levels of support tied to current production of cotton. In their place, payments not tied to current production of cotton had been introduced.

48. Contrary to Brazil's claims that direct payments caused significant price suppression, the economic literature demonstrated that such non-tied, or decoupled, support had at most minimal effects on production. The Panel Report had respected the economic literature and had supported the view that payments that were not tied to current production or prices did not cause WTO-inconsistent effects. Unfortunately, the analysis in the Reports was not as careful with respect to other elements of Brazil's claims. The Appellate Body had simply not required anything close to the analytical rigor from the Panel – either in its legal interpretations or its economic analysis – that was expected in the WTO dispute settlement system. The analysis by the Panel, particularly whether "the effect of the

subsidy" was to cause "significant price suppression," would not survive WTO scrutiny had it been undertaken by a domestic investigating authority. Nor had the Appellate Body itself exercised close to that level of rigor in its analysis or reasoning. The United States would not go into detail on all of the flaws at the present meeting.

49. The Appellate Body had recognized serious weaknesses in the Panel's reasoning. For example, the United States shared the Appellate Body's concerns that "in its reasoning, the Panel could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute". The United States further agreed that this Panel did not – to use the Appellate Body's own words – "demonstrate precisely how [the Panel] evaluated the different factors bearing on the relationship between the price-contingent subsidies and significant price suppression" (Appellate Body Report, para. 458). Given the potential ramifications of serious prejudice disputes on domestic support programs, the United States questioned whether Members were well served by a dispute settlement system that allowed panels to make rulings without "demonstrat[ing] precisely" how their conclusions had been reached.

50. With respect to export credit guarantees, the United States encouraged Members to read the dissenting views of one Appellate Body member found at paragraphs 631 – 641 of the Appellate Body Report. That member had succinctly explained that the text of Article 10.2 of the Agreement on Agriculture reflected a deferral of export subsidy disciplines on export credit guarantees until such time as "international disciplines" were agreed by WTO Members. Consider the following: had Members agreed that export credit guarantees were export subsidies and had included them within the list of measures subject to reduction under the Agreement on Agriculture, the United States would have scheduled its extensive export credit guarantee activity during the base period. The United States would then have been able to operate its current program within substantial volume reduction commitments. Instead, the United States had been precluded from scheduling such program activity because export credit guarantees were not included in the list of export subsidy measures. And now, under the Appellate Body's majority interpretation, the United States found that it was also immediately subject to a zero export subsidy commitment for most products using the program. The United States had failed to see how the WTO Agreements could fairly be read to prohibit US export credit guarantees for most products while Members' direct export subsidies were subject only to reduction.

51. The United States also respectfully disagreed with the Peace Clause finding that certain payments that were not tied to current production or prices were not "green box" decoupled income support under the Agreement on Agriculture. The sole reason that the Panel and the Appellate Body had deemed these payments not to be "green" was that the payments were contingent on recipients not producing fruits or vegetables on certain farmland. The Reports had concluded that these payments were, therefore, "related to" the fruit or vegetable production undertaken by the recipient. However, full payment was only "related to" the recipient not undertaking certain fruit or vegetable production. In fact, the recipient could choose to produce nothing at all and still be paid in full. Under the flawed reasoning in the Reports, it would appear that a Member could not provide decoupled income support unless all production had been permitted, even production of environmentally damaging crops or illegal narcotic crops. The United States questioned whether any Member could agree to provide support without imposing any conditions at all on what could and could not be produced by recipients. Further, the United States reminded Members that, even though these payments not tied to current production or prices had been found not to be "green," nonetheless, the Panel had rejected Brazil's claim that these payments had caused price suppression. Thus, the "green box" interpretation in the Reports could well have the perverse result of discouraging Members from shifting to admittedly less-distorting forms of support, impeding rather than advancing the reform of agricultural trade to which Members had committed themselves.

52. Finally, with respect to the findings that US domestic support measures had not been entitled to Peace Clause protection: the United States merely wished to register its surprise that, to uphold the Panel's Peace Clause conclusion, the Appellate Body had rejected the shared Peace Clause interpretation of the Panel and the parties. The Panel, Brazil, and the United States had agreed that, to determine if challenged "measures ... grant support to a specific commodity," the measures themselves must (in the Panel's words) "clearly or explicitly define a commodity as one to which they bestow or confer support" (Panel Report, para. 7.579). Under US payments that were not tied to current production, a recipient was free to produce no, one, or multiple commodities. Thus, these measures did not "clearly or explicitly define [any] commodity as one to which they bestow or confer support."

53. US farm legislation in 1996 and 2002 had been written with the Peace Clause in mind. The United States had specifically introduced payments not tied to current production that did not provide "support to a specific commodity." As a result, under the shared interpretation of the Panel and the parties, all US measures had been entitled to Peace Clause protection. Again, the United States wondered whether Members were well served by a Peace Clause interpretation that could not have been known to any Member designing its support programs or whether that interpretation instead might undermine confidence in the security and predictability of the multilateral trading system. The United Stated highlighted another – rather startling – aspect of the Appellate Body Report, which was that measures that had expired might nonetheless be subject to challenge in WTO dispute settlement. The reason given was that effects could last after the measure had expired. Troubling as that finding was, the United States further noted that the Appellate Body had made a recommendation that these expired US measures be brought into compliance, even though neither the Appellate Body nor the Panel had actually analyzed whether in this instance there were such continuing effects. The United States urged Members to carefully review both this finding and recommendation and consider their implications for the dispute settlement system.

54. The representative of the European Communities said that the EC had participated in these proceedings as a third party. Both before the Panel and the Appellate Body, the EC had taken position on several of the systemic legal questions that were at issue in the dispute under consideration. Whilst some of the findings of the Panel and the Appellate Body corresponded to the EC's position, the Panel and the Appellate Body sometimes had not followed the legal interpretations, which the EC had considered and continued to consider to be correct. Of particular concern to the EC was the fact that the Appellate Body had not taken into account the EC's arguments on the general relationship between the export subsidy and domestic support provisions of the Agreement on Agriculture and the corresponding provisions of the SCM Agreement, in light of Article 21.1 of the Agreement on Agriculture. The EC regretted that such an important systemic issue had not received more attention. Having said this, at the present meeting, the EC did not intend to reiterate all the positions that the EC had taken in this dispute. Instead, the EC wished to thank the Panel and the Appellate Body, as well as the WTO Secretariat and the Appellate Body Secretariat for the impressive dedication and professionalism with which they had mastered the enormous amount of legal and factual material that had to be dealt with in the course of these proceedings.

55. The representative of Argentina said that his country, which had participated as a third party in the dispute under consideration, wished to express its satisfaction with the findings contained in the Reports of the Appellate Body and the Panel to be adopted at the present meeting. In Argentina's view, the conclusions and findings in the Reports were extremely significant, both from the point of view of trade, since the subsidies at issue had greatly distorted the global agricultural market, and from the point of view of subsidy disciplines. First, he noted that it was of systemic importance to define the central aspects of the disciplines on actionable subsidies under of Article 6.3(c) of the SCM Agreement. Argentina wished to express its particular satisfaction with the findings that the effect of the price-contingent subsidies was significant price suppression within the meaning of Article 6.3(c). Of particular note was the finding that "significant price suppression" did not necessarily require a

precise quantification of the amount of the subsidy. Argentina also welcomed the findings that Step 2 payments to domestic users of cotton represent prohibited subsidies contingent upon the use of domestic over imported goods (paragraphs 1(b) and 2 of Article 3 of the SCM Agreement), while payments to exporters under the same programme constituted export subsidies in violation of Articles 3.3 and 8 of the Agreement on Agriculture, as well as Articles 3.1(a) and 3.2 of the SCM Agreement. At the same time, the confirmation provided by both the Panel and the Appellate Body that Article 10.2 of the Agreement on Agriculture could not be taken as an exception to the export subsidy disciplines in Article 10.1 and that as a result, export credit, export credit guarantees and insurance programmes were subject to the aforementioned disciplines, was of particular systemic importance. Argentina also wished to highlight the finding that showed export credit guarantees GSM 102, GSM 103 and SCGP were inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement, since they constituted prohibited export subsidies within the meaning of item (j) of the Illustrative List annexed to the SCM Agreement. Argentina hoped that the United States would implement without delay the recommendations contained in the Reports that would be adopted at the present meeting by the DSB by withdrawing the subsidies declared to be prohibited within the agreed time-period and swiftly bringing into conformity the other subsidies that violated its WTO obligations in light of their adverse effects which had been widely attested.

56. The representative of Canada said that his country was still studying the Report of the Appellate Body, but Canada appreciated the enormous effort that the Appellate Body, the panelists and the respective Secretariats had put into these Reports. The only comment that Canada wished to make was with respect to the comment made by the United States at the present meeting, reflecting its arguments before the Panel and Appellate Body, concerning Article 13 of the Agreement on Agriculture. The United States argued that according to the Appellate Body, "paragraph 6(b) would require a Member to continue to make decoupled income support payments, even if a producer's production is *illegal*", for example involving narcotics or "environmentally-damaging production". He recalled paragraph 340 of Appellate Body Report, where the Appellate Body stated: "Our interpretation of paragraph 6(b) would not prevent a WTO Member from making illegal the production of certain crops. Nor would it prevent a Member from providing decoupled income support while at the same time making the production of certain crops illegal". The findings of the Appellate Body in this respect were unambiguous and unequivocal, and did not bear the interpretation placed on them by the United States.

57. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS267/AB/R and the Panel Report contained in WT/DS267/R and Corr.1, as modified by the Appellate Body Report.