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Dispute Settlement Body
20 April 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 April 2005

Chairman: Mr. Eirik Glenne (Norway)

Subjects discussed: Page

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.30)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.30)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.15 – WT/DS234/24/Add.15)

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

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.4)

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16)

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 six 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.30)

2. The Chairman drew attention to document WT/DS176/11/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 US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 7 April 2005, in accordance with Article 21.6 of the DSU. As noted in that 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 repealing bills were pending respectively in the US Senate and the US House of Representatives. The adoption of those bills would bring a satisfactory solution to this dispute by removing a legislation driven by specific interests. The deadline for implementation of the DSB's rulings and recommendations in this dispute was fast approaching, but the EC was still waiting for earnest signs from the United States that it would take action by 30 June 2005. Despite the exceptionally long period of time for implementation – more than 3 years – which had been granted to the United States, all that the United States had been able to report was that "several legislative proposals ... have been introduced". The US inaction stood in sharp contrast with its determination to promote efficient and non-discriminatory protection of intellectual property rights worldwide. It would obviously be most damaging if the United States failed to bring itself into compliance with its TRIPS obligations.

5. The representative of Cuba said that her country was astonished by the failure of the United States to move any closer to compliance with its obligations in the dispute at issue. One could even

question the meaning of a reasonable period of time provided for compliance in the DSU since one Member was able, at its convenience, to allow three or four years to pass and still failed to comply with a decision adopted by the DSB. She, therefore, wondered what Members should expect from the WTO if one important Member maintained such an attitude. Cuba invited the United States to reflect on the damaging effect of its actions on the WTO, and to start observing the WTO rules. Cuba had repeatedly called for Section 211 to be repealed. She noted that the US Congress had before it a bill which would achieve that objective. Cuba urged the United States to honour its obligations without further delay by repealing Section 211. Cuba would also remind the United States that the six-month period of time granted to it for implementation would expire in June 2005.

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.30)

7. The Chairman drew attention to document WT/DS184/15/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 US anti-dumping measures on certain hot-rolled steel products from Japan.

8. The representative of the United States said that his country had provided a status report in this dispute on 7 April 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 anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration continued to support specific legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass these amendments.

9. The representative of Japan said that it was truly regrettable that her country was still awaiting to see any tangible signs towards a fully-fledged implementation by the United States of the DSB's recommendations and rulings in this dispute. Japan was very much concerned that the US Congress still had to see a bill presented to it in order to fully implement the WTO ruling. The WTO rules-based multilateral trading system owed its credibility to the premise that its Members adhered to those rules, including the DSU rules. Absent such adherence to the rules, the credibility would be eroded. As Members were well aware, Japan's decision to agree to the third extension of the reasonable period of time in this dispute had been based on the assumption that the United States would fully implement the DSB's recommendations and rulings within the revised reasonable period of time. She noted that that revised reasonable period of time would expire in about three months. Japan reiterated its urgent call for the United States to meet its obligation under the WTO Agreements, by first promptly introducing a bill to the US Congress. If the United States fell short of implementation by 31 July 2005, Japan would be entitled to the recourse provided for under the DSU.

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.15 – WT/DS234/24/Add.15)

11. The Chairman drew attention to document WT/DS217/16/Add.15 – WT/DS234/24/Add.15, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

12. The representative of the United States said that his country had provided a status report on 7 April 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 Continued Dumping and Subsidy Offset Act 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, on 31 March 2005, the EC Commission had adopted a proposal to impose, starting from 1 May 2005, a 15 per cent additional import duty on certain US products. This was the first step in the EC legislative process. That proposal had now been transmitted to the EC Council for discussion and adoption. The decision in this regard had not been taken lightly. The introduction of a repealing Act in March 2005 was a positive move and the EC still hoped that it would give the necessary impetus. But, in light of previous experiences in this and other disputes, the EC could not, unfortunately, trust that the United States was just about to come into compliance with its WTO obligations. In this respect, the EC could only note that the United States had not been able to report on any progress. The EC could not accept that the United States continued to ignore indefinitely its international obligations and to inflict increasing damages to EC exporters. More than US$ 1 billion had already been collected on imported products and redistributed to the competing US products and US$ 1,6 billion could be distributed in October 2005. A new distribution of collected duties under the CDSOA was not acceptable to the EC. Finally, the EC particularly welcomed Canada's decision to also apply a 15 per cent additional import duty on certain US products and expected that other co-complainants would soon join it in applying retaliation.

14. The representative of Canada said that his country had noted the status report of the United States with regard to the Continued Dumping and Subsidy Offset Act of 2000. Given the United States' failure to repeal the WTO-inconsistent Byrd Amendment, Canada had announced on 31 March 2005 that it was proceeding with imposing retaliatory measures against the United States. Canada continued to express its disappointment with the United States' failure to repeal the WTO-inconsistent Byrd Amendment. Canada again called upon the United States to end this dispute and repeal the Byrd Amendment.

15. The representative of Japan said that, as her country had stated at the 21 March 2005 DSB meeting, Japan very much welcomed the fact that a bill H.R. 1121 had been introduced in the US Congress in March 2005. Japan also noted the fact that this repealing legislation of the CDSOA had now been referred to the Committee on Ways and Means. These were important, positive signs for the resolution of this dispute. However, it was more important that the repealing legislation be passed at the earliest possible opportunity. Japan was aware that the EC and Canada had decided to exercise their retaliatory rights against the United States as from 1 May 2005. At the moment, Japan was carefully observing how the US Congress might proceed with the consideration of the repealing bill. Japan noted that in a bilateral context of a series of the US/Japan economic-trade discussions, including the one held in March 2005 between high-level officials, the US side had always stated the importance of complying with its obligations under the WTO Agreements. To substantiate that commitment, Japan strongly called on the United States to take a concerted action towards a prompt repeal of the CDSOA. If the current situation continued to prevail, Japan intended to take appropriate actions to address such a situation, including the exercise of its rights under the WTO Agreements in order to secure the implementation by the United States of the DSB's recommendations and rulings in this dispute.

16. The representative of the United States said that with respect to the comments made by the EC and Canada, he wished to state that the United States regretted that the EC and Canada had decided to suspend their obligations in connection with these disputes. The US administration's recent budget proposal to repeal the CDSOA – and the introduction of repeal legislation in

March 2005 – demonstrated that the United States was making progress in appealing the CDSAO and it would continue to work with US Congress to achieve compliance with the DSB's recommendations and rulings in these disputes. The United States would be reviewing carefully the measures taken by the EC and by Canada in order to be sure that the measures were consistent with the DSB's authorization. In this regard, he recalled that the DSB only authorized the suspension of concessions or other obligations as provided in the decision of the Arbitrator.

17. 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.5)

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

19. The representative of the United States said that his country had provided a status report in this dispute on 7 April 2005, in accordance with Article 21.6 of the DSU. As noted in that 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 would confer with the EC in order to reach a mutually satisfactory resolution of this matter.

20. The representative of the European Communities said that his delegation would not spend any time discussing the most recent US status report, which was anything but informative as usual. The EC regretted the US lack of commitment to Article 21.6 of the DSU concerning surveillance of implementation of the DSB's rulings and recommendations. Such a lack of commitment was also apparent with regard to the copyright obligations laid down in the TRIPS Agreement. The EC feared that the United States had decided to ignore such obligations since it was hard to understand the lack of any initiatives by the US administration or the US Congress to bring the US Copyright Act into compliance with the TRIPS Agreement. The international struggle to improve the protection of intellectual property rights was badly affected by the apparent unwillingness of the United States to live up to its TRIPS obligations. The EC and, his delegation believed, the WTO Membership as a whole were fully committed to the protection standards negotiated during the Uruguay Round. It was, therefore, unfortunate that one WTO Member undermined that global effort by refraining from complying with a DSB ruling. 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, which the US administration stated that it was conducting with the US Congress. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, arbitration proceedings on its retaliation request in relation to this dispute.

21. The representative of Australia said that it was now over four years since the DSB had adopted the recommendations and rulings in this dispute. Australia had previously registered its concerns about the lack of prompt implementation by the United States in this dispute, and about the temporary monetary compensation arrangement reached between the parties to the dispute. Australia would be interested in receiving further information from the United States about the stage reached in the US administration's consultations with the US Congress on the action needed on the relevant provisions of the Copyright Act to achieve compliance in this dispute.

22. The representative of the United States said that his delegation had noted the statements made by the EC and Australia. The United States regretted that under both the present agenda sub-item as well as the previous ones, the EC had again suggested that the US compliance record was poor and that the EC had again made unfounded comments on the US record in respect of intellectual property rights. As his delegation had stated in previous DSB meetings, the United States had fully complied

in the vast majority of disputes and was working towards compliance in the rest. Also, as it had already stated, the United States was second to none in providing strong protection for intellectual property rights. The United States also wished to draw attention to two particular points with regard to the EC's comments. First, the United States was surprised that the EC was raising this issue, given the agenda item to which Members would be turning to shortly relating to intellectual property protection in the EC. Second, the United States recalled that in the Bananas dispute, the EC was still not in compliance, seven years after the DSB had adopted its recommendations and ruling, and the EC had had to work out an interim arrangement via a WTO waiver so that it could remain out of compliance.

23. The representative of the European Communities said that the EC would have the opportunity to explain its position on the Panel Report concerning geographical indications, which had just been referred to by the United States. He stressed that the EC was firmly committed to its TRIPS obligations, and there should be no doubt that the EC would comply with such obligations promptly. Furthermore, the EC ensured that the implementation would be completed within a shorter period of time than four years from the adoption of the Panel Report on copyright. The least one could say was that the United States was not setting an example for its celerity. Now, since the United States had brought up the issue of geographical indications, the EC wished to stress that it only asked the United States to show a similar level of commitment to multilateral rules like the EC for the benefit of the WTO and intellectual property protection worldwide.

24. The representative of Australia noted that the United States had reacted to the request for further information by simply drawing attention to another Members' record in another case. Australia would still like to have some further information on where the US administration stood with the US Congress on this matter and what was being discussed. Australia expected that, after more than four years, the United States could do better than simply state that it was consulting with the US Congress.

25. The representative of the United States said that his delegation thanked the delegation of Australia for its question. At the present meeting, he could only say that he would transmit that question to his authorities for their consideration.

26. 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.4)

27. The Chairman drew attention to document WT/DS204/9/Add.4, 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.

28. The representative of Mexico said that on 7 April 2005, based on Article 21.6 of the DSU, Mexico had submitted its latest status report regarding implementation in the case "Mexico – Measures Affecting Telecommunications Services" (WT/DS204). In that status report, his country had provided information regarding a notification of an agreement on implementation between Mexico and the United States. In accordance with that agreement, Mexico had a reasonable period of time of 13 months, which would expire in July 2005. Mexico had already complied with the first phase of that agreement, which had been notified accordingly. Similarly, Mexico was drafting regulations for the establishment of commercial agencies. Once these had been developed, Mexico would have fully complied with the DSB's recommendations and rulings.

29. The representative of the United States said that his country looked forward to having the opportunity to consult with Mexico as Mexico was drafting its new re-sale regulations.

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

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16)

31. The Chairman drew attention to document WT/DS246/16, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's conditions for the granting of tariff preferences to developing countries.

32. The representative of the European Communities recalled that following the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 20 April 2004, the EC had confirmed its intention to fully implement the DSB's recommendations and rulings in this dispute. The EC also recalled that under the Arbitrator's award of 20 September 2004, the reasonable period of time for implementation would expire on 1 July 2005. On 20 October 2004, the European Commission had proposed to the EC Council, a new GSP regulation which would, *inter alia*, repeal the "Drug Arrangements" under the Council Regulation (EC) No. 2501/2001. As stated in the relevant status report, which had already been submitted to the DSB, that proposal was currently under discussion in the EC Council. The EC was confident that it shall honor its commitments and shall fully respect the deadline for implementation in this case.

33. The representative of India said that his country thanked the EC for the first status report regarding the implementation of the DSB's recommendations and rulings in the dispute: "EC – Conditions for the Granting of Tariff Preferences to Developing Countries" (WT/DS246). The European Communities had, until 1 July 2005, to comply with the DSB's decision in this dispute. India noted that the EC was in the process of discussing a new GSP regulation which would, *inter alia*, repeal the "Drug Arrangements" under the current GSP regulation. India looked forward to the EC fully complying with the DSB's recommendations and rulings within the reasonable period of time.

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

2. United States - Subsidies on upland cotton

(a) Implementation of the recommendations of the DSB

35. The Chairman 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. He recalled that at its meeting on 21 March 2005, the DSB had adopted the Appellate Body Report in the case: "United States – Subsidies on Upland Cotton" and the Panel Report on the same mater, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

36. The representative of the United States said that his country intended to implement the DSB's recommendations and rulings in this dispute in a manner that respected the United States' 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. His delegation stood ready to consult with Brazil in this regard.

37. The representative of Brazil said that his delegation took note of the content of the statement made by the United States at the present meeting. In light of the substantive obligation set forth in Article 21.3 of the DSU and its relevance for the achievement of the objectives of the WTO, Brazil expected a much more detailed statement on the US intentions concerning the implementation in the dispute under consideration. It was hard to explain such scarcity of words and ideas by any time constraints or lack of experience with the operation of the WTO dispute settlement system. At least since 3 March 2005, the date of issuance of the Appellate Report in the Cotton case, the United States had been fully and definitively knowledgeable of its WTO obligations in this matter and, accordingly, should have been in a position to disclose at the present meeting a much more elaborated expression of the work the US administration was presumably devoting towards a meaningful WTO-consistent implementation. This was particularly true given the expedited time-frames, which applied to the implementation of the DSB's rulings and recommendations under the SCM Agreement.

38. With regard to the operation of the dispute settlement system, the United States had extensive experience, both as a complainant and defendant. As a complainant, the United States was well aware of the legitimate domestic expectations surrounding the implementation phase of a dispute, especially when parties had been litigating in protracted and painful cases. On the other hand, as a defendant, the United States was also familiar with the need to provide concrete and substantial responses to what the dispute settlement system required, in terms of both procedural and substantive matters. With reference to the time-period for implementation of the DSB's rulings and recommendations in this case, Brazil recalled that the Panel, pursuant to Articles 4.7 and 7.8 of the SCM Agreement, had made recommendations concerning the period of time applicable to implementation in the cotton dispute. Nothing in the Appellate Body Report had modified those recommendations. Brazil did not share the view that any further discussion between the parties or guidance from elsewhere was necessary. Brazil would be following the US implementation actions with great interest and a thorough evaluation of each action would be undertaken by its authorities. As Brazil had stated upon the adoption of the Reports at issue, this dispute had gone on for too long. Brazil expected that the short statement made by the United States did not reflect the extent of US commitment to abide by its obligations. Brazil still hoped that the United States would fully and timely comply with the DSB's rulings and recommendations in this matter.

39. The representative of the European Communities said that the US request for a reasonable period of time raised a number of complex issues. The EC wished to note that the Appellate Body had not reversed or modified the Panel's recommendations. These must, therefore, be considered to remain valid and adopted. These were violations of the SCM Agreement and the Agreement on Agriculture. The EC considered that, in this particular case, should the United States request so, it was entitled to a reasonable period of time in order to come into conformity with the Agreement on Agriculture. How long that period should be was, in the event of disagreement, a question to be determined by an arbitrator, who must also take into account the period of time for withdrawal of the measure as recommended by the Panel.

40. The representative of the United States said that his delegation wished to refer to one point made by Brazil at the present meeting. Brazil was certainly correct that the Panel Report had specified an implementation period with respect to certain issues. However, with respect to other issues, no such period had been specified. The representative of Brazil had just stated that Brazil did not share the view that any further discussion would be necessary. The United States hoped that Brazil might be able to reconsider that view.

41. The representative of Brazil said that his delegation was encouraged by the statement just made by the United States since it understood that the United States had confirmed that it would implement the DSB's recommendations regarding the dispute under the SCM Agreement. In other words, that the United States would comply with the time-period provided for in that Agreement. This of course would take care of a large part of the dispute. With regard to the issues that fell under the Agreement on Agriculture, Brazil would like to receive some indications of the US intentions in

this regard. He underlined that, in any case, such implementation would have to be within the shortest time possible.

42. The representative of the United States thanked the delegation of Brazil for its statement. However, rather than discussing that question at length at the present meeting, he suggested that Brazil and the United States take up that issue bilaterally.

43. 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.

3. European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs

(a) Reports of the Panel: Complaint by the United States (WT/DS174/R and Add.1, 2 & 3) and Complaint by Australia (WT/DS290/R and Add. 1, 2 & 3)

44. The Chairman recalled that at its meeting on 2 October 2003, the DSB had established a single panel to examine the complaints by the United States and Australia pertaining to these matters. He recalled that the Reports of the Panel, contained in document WT/DS174/R and Add.1, 2 and 3 and in document WT/DS290/R and Add.1, 2 and 3 had been circulated on 15 March 2005 as unrestricted documents, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Panel Reports were now before the DSB for adoption at the request of the United States and Australia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Reports.

45. The representative of the United States said that his country was pleased to propose the adoption of the Panel Report at issue. The United States believed that the Report provided useful guidance to Members with respect to geographical indications (GIs) and trademarks, and it would like to thank the Panel and the Secretariat for their thorough work. The United States would like to highlight certain aspects of the Report that Members might find particularly instructive. First, the Panel had confirmed what the United States had long alleged, namely, that the EC's GI Regulation discriminated against non-EC persons and products. Specifically, the Panel had confirmed that the EC could not continue to deny GI protection to a foreign national simply because his or her government did not have an "equivalent" GI protection system to that of the EC. Nor could the EC continue to make GI protection contingent on the availability of "reciprocal" GI protection in the other country. Rather, WTO Members must offer GI protection to the nationals of all WTO Members, regardless of how those Members had chosen to implement their TRIPS Agreement obligations. This finding emphasized the freedom that Members had under the TRIPS Agreement to implement GI obligations within their own system.

46. Second, the Panel had confirmed that a Member such as the EC that permitted its own nationals to register and oppose GIs directly must provide that same direct access to nationals of other WTO Members, and did not require intervention by their governments. This was important, because whether or not a name qualified for GI protection in the territory of a Member depended on criteria under the domestic law of that Member. If a national of any WTO Member satisfied those criteria, that national should receive the protection, regardless of whether its government intervened. The same was true of the ability to oppose the registration of GIs. Intellectual property rights were private rights that should be granted to right-holders who qualified for them; Members should not shift the burden to other governments to negotiate those rights on behalf of their nationals.

47. Third, the Panel had confirmed that the EC could not continue to make GI protection for foreign nationals contingent on the availability of specific government inspection systems in their home country. This finding, too, emphasized the discretion that WTO Members had in implementing GI protection in their own territory. It also emphasized again that intellectual property rights were

private rights that could not be denied to foreign nationals based on how their government had chosen to protect GIs in their territory.

48. Finally, the Panel had made several important findings with respect to the relationship between trademarks and GIs. The Panel had found that the EC GI Regulation was inconsistent with Article 16.1 of the TRIPS Agreement, because it failed to allow the owners of validly registered, pre-existing trademarks the right to prevent confusing uses of geographical indications registered under the EC Regulation. Significantly, the Panel had also rejected the EC's claim that Articles 24.3 and 24.5 of the TRIPS Agreement provided for a regime of "co-existence" between registered geographical indications and pre-existing trademarks under which owners of registered trademarks were denied Article 16.1 rights. The Panel had found that the Regulation's inconsistency with Article 16.1 was justified only insofar as it fitted within the narrow permissible exceptions to trademark rights under Article 17 of the TRIPS Agreement. This finding under Article 17 had important implications for how the EC GI Regulation must be applied.

49. First, the Panel had relied on the fact that the EC GI Regulation prevented registration of a GI if it would cause a "relatively high" likelihood of confusion with a pre-existing trademark. Because the Panel had found that the GI Regulation fit within the Article 17 exception only because it "can" ensure the rejection of GIs that caused a relatively high likelihood of confusion, it was incumbent on the EC to make sure that it did so in practice. Therefore, the United States expected that, in determining whether a GI should be registered and protected, the EC would reject registrations where such a likelihood of confusion existed. To do otherwise would be contrary to the Panel's findings in this dispute. In this regard, a relatively high likelihood of confusion in the relevant market for a trademark – even if just in a single EC member State – was sufficient to compel rejection of the GI registration. Further, where a GI registration was sought for a sign that was identical to a pre-existing registered trademark and was for use on identical goods, such a likelihood of confusion would be presumed, pursuant to Article 16.1 of the TRIPS Agreement.

50. Second, the Panel had found that GIs registered under the Regulation were permitted to curtail a trademark owner's rights to only a very limited extent. Specifically, since the GI Regulation conferred a right to use the GI only if used strictly in accordance with its registration, the Panel had found that the trademark owner's rights were not curtailed with respect to any signs that were not registered, including, significantly, "linguistic versions" of the GI that were not entered in the register. These findings were critical to the Panel's ultimate conclusion that the Regulation's breach of Article 16.1 was justified under the narrow TRIPS exception to trademark rights. Indeed, as the Panel had expressly stated: "[I]f the GI registration prevented the trademark owner from exercising its rights against these signs, combinations of signs or linguistic versions, which do not appear expressly in the GI registration, it would seriously expand the exception and undermine the limitations on its scope."[1] Thus, under the Panel's findings, registered trademark owners continued to enjoy their full TRIPS rights to prevent the confusing use of anything other than the specific sign entered in the GI register. This included the right to prevent the confusing use of the registered GI translated into another language. In conclusion, the United States looked forward to the EC's prompt implementation of the DSB's recommendations and rulings in this dispute, and would be carefully monitoring the EC's future application of its GI Regulation in light of the Panel's findings.

51. The representative of Australia said that his country welcomed the adoption of the Panel Report, which had confirmed that the EC's GIs regime was inconsistent with the EC's existing obligations under the TRIPS Agreement and the GATT 1994. Australia thanked the members of the Panel for their work in relation to this dispute. It was ironic that, just at a time when the EC was pursuing its ambitious agenda in the WTO on geographical indications, this Panel Report highlighted that there were significant problems with the EC's own domestic GIs regime. This demonstrated some of the difficulties in this complex area when the EC, as the key demandeur on increased GI

[1] Panel Report, paragraph 7.657.

protection, had been shown not to be implementing its own GIs regime in a WTO consistent manner. Australia's challenge focused particularly on the EC's national treatment obligations and the rights required to be made available to trademark owners. The Panel had found that several aspects of the EC regime denied national treatment to both the goods and nationals of other WTO Members. Among the Panel's findings concerning the EC's national treatment obligations, two should be of particular interest to other Members.

52. First, the EC could not require other Members to agree to provide an equivalent level of protection to GIs from the EC before GIs from other Members could be protected under the Regulation. In other words, there was no requirement to adopt the EC's system for protecting GIs in order to be protected by that system. The Panel's finding underlined that Members were still free to choose how they implemented their GI obligations under the TRIPS Agreement. Second, the EC could not require another WTO Member government to act on behalf of its national right-holders who was seeking to protect intellectual property rights within the EC. The obligation to accord national treatment in respect of an EC measure fell on the EC itself. Consequently, the EC itself had to provide the means by which the nationals of other WTO Members could apply for, or object to, the registration of a term as a GI or designation of origin within the EC. This was consistent with the status of intellectual property rights as private rights.

53. The Panel Report had also included detailed legal reasoning and conclusions concerning the relationship between trademarks and GIs under the TRIPS Agreement. The Panel had found that the EC GIs Regulation was inconsistent with Article 16.1 of the TRIPS Agreement because it limited the availability of trademark owners' rights under that TRIPS provision. Only through reliance on a "limited exception" under Article 17 of the TRIPS Agreement had the Panel been able to find that the EC Regulation was justified. This finding was clearly based on certain understandings on the part of the Panel of the meaning of specific provisions of the Regulation, understandings developed in reliance on explanations of its Regulation provided by the EC. It was incumbent upon the EC to make good on its word.

54. First, the Panel's finding clearly relied on the understanding that registration of a term as a GI or designation of origin under the Regulation entitled use of the term only in accordance with its registration (paragraph 7.657). Second, the Panel's finding clearly relied on the understanding that the rights of the owner of an earlier trademark were not limited in respect to any use of a term in "linguistic versions", or translations, which were not registered under the Regulation (paragraph 7.657). Third, the Panel's finding clearly relied on the understanding that the EC could ensure that in cases where the likelihood of confusion was relatively high the limited exception would not apply (paragraph 7.658). Any application of the measure in a manner at odds with the Panel's understandings – whether the trademark rights concerned arose at the Community or at an EC member State level would negate the basis of the Panel's finding.

55. Turning to other findings in the Panel Report, Australia welcomed the Panel's findings that Articles 24.5 and 24.3 of the TRIPS Agreement were not applicable. Significantly, the Panel had specifically rejected the EC's view that Article 24.5 required the co-existence of GIs with earlier trademarks. Further, the Panel's findings established that recognition of a term as a GI in relation to the territory of one WTO Member was not of itself sufficient to prevail over a trademark owner's rights in relation to the territory of another WTO Member. Any exceptions to the rights required to be made available to the owner of a trademark relating to the confusingly similar or identical use of a sign for similar or identical goods must be determined by each WTO Member in relation to that Member's territory. Australia welcomed as well the finding that a provision of the Regulation was a technical regulation within the meaning of the TBT Agreement. The finding reinforced that a WTO Member's measures to protect intellectual property rights were also subject to the disciplines of the other covered agreements. In the case of the TBT Agreement, this meant that such measures must not create unnecessary obstacles to international trade. Finally, Australia looked forward to the EC's full and prompt implementation of the DSB's rulings and recommendations in this dispute.

56. The representative of the European Communities said that the EC thanked the Panel for its Report. The dispute under consideration raised complex issues relating to a large number of legal claims in an area of WTO law, which had not previously been the subject of dispute settlement. The EC was grateful for the considerable amount of work the Panel had done to produce a thorough legal and factual analysis of all these issues. The EC was bound to note its disappointment that the Panel had not agreed that EC Regulation 2081/92 allowed the registration of geographical indications relating to the territories of other WTO Members on the same conditions as applied to registration of GIs relating to areas within the EC. The EC had strongly argued before the Panel that the EC's regime did not discriminate in this regard, and the EC remained of that view.

57. The EC was, however, very pleased that the Panel had found the key aspects of the EC regime on geographical indications to be compatible with WTO rules, and had accordingly rejected the vast majority of the legal claims made by the complainants. In this regard, the EC attached great importance to the fact that the Panel had found the provisions of Regulation 2081/92 governing the relationship between geographical indications and (earlier-in-time) trademarks to be fully justified under the TRIPS Agreement. The EC welcomed this clear recognition of the principle of "co-existence" between geographical indications and trademarks. The Panel had also confirmed that the requirement, laid down in Regulation 2081/92, of inspection structures in third countries to guarantee the quality of exported products did not constitute a violation of WTO obligations. The EC welcomed this recognition that the EC might impose reasonable conditions on the registration of geographical indications aimed at ensuring the genuine quality of products benefiting from the high level of protection under Regulation 2081/92.

58. With regard to the MFN claims brought by the United States, the EC also welcomed the clarification by the Panel that measures with which the EC harmonized the law inside the EC did not constitute a violation of MFN principles. On certain other issues, including on the question whether applications for registration of geographical indications relating to areas within other WTO Members must be granted the opportunity to apply directly to the authorities of the EC, the Panel had not fully accepted the EC's arguments. The EC wished to record its disagreement with the reasoning of the Panel of these issues.

59. Finally, on a procedural point, the EC wished to note its disagreement on the Panel's findings regarding the compatibility of the panel requests with Article 6.2 of the DSU. The EC considered that the Panel's approach could not be regarded as a precedent for future cases. However, given the overall quality of the Panel Report, and the Panel's vindication of key aspects of the EC regime for protection of geographical indications, the EC did not object to the adoption of the Reports in cases WT/DS174 and WT/DS290.

60. The representative of Canada said that the issue of geographical indications was an important one, currently being discussed and negotiated in the Doha Development Round. Canada was pleased that the Panel had agreed with its position that the existing EC Regulation violated the principle of national treatment, a principle that was at the heart of the international trading system. Canada thanked the Panel for its diligence in these matters.

61. The representative of Australia asked whether the EC in its statement had indicated that, notwithstanding its objections to the Panel's conclusions, it would bring its measures into conformity with the Panel's recommendations and rulings.

62. The representative of the European Communities said that the EC wished to remind Australia that, in accordance with the DSU provisions, it would make a statement regarding the implementation of the DSB's recommendations in the case under consideration and that it would do this in due time.

63. The representative of India said that his country had participated as a third party in this dispute. India wished to thank the members of the Panel and the Secretariat for their hard work in

producing the Report, which would be adopted at the present meeting. India recognized that this was a particularly difficult task in that this was the first time that a WTO Panel has ruled on the intellectual property rights in the area of geographical indications. The Panel had found, by examining both the national treatment provisions of the GATT 1994 as well as the TRIPS Agreement, that national treatment obligations could not be conditioned on reciprocity, thus confirming the trade related nature of obligations on intellectual property rights in the WTO. India also noted that exceptions to intellectual property rights built into the TRIPS Agreement were available to Members and permitted some diminution of rights of intellectual property right holders. His delegation had listened carefully not only to Australia's statement, but also to both the EC and the US statements under the present agenda item. With respect to the reference to the possible learning from this dispute for the ongoing Doha Work Programme, he wished to note that, given the trade-related nature of its intellectual property rights obligations, exceptions and procedures built into the TRIPS Agreement should also further trade objectives.

64. The representative of Australia noted that there were some very significant trade policy considerations arising from this legal case. The implications of the Panel's findings included that, before Members began to tamper with any changes to the TRIPS Agreement, they should reflect on how they had implemented their existing TRIPS obligations. In this dispute it had been shown that one Member, a demandeur, was unable to live up to its TRIPS obligations. He said that there was a lot of missing data on how current obligations were being implemented.

65. The DSB took note of the statements and adopted the Panel Report contained in WT/DS174/R and Add.1, 2 and 3 pertaining to the complaint by the United States, and the Panel Report contained in WT/DS290/R and Add.1, 2 and 3 pertaining to the complaint by Australia.

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

(a) Report of the Appellate Body (WT/DS285/AB/R) and Report of the Panel (WT/DS285/R)

66. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS285/9 transmitting the Appellate Body Report on: "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", which was circulated on 7 April 2005 in document WT/DS285/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. As Members were aware, 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 was without prejudice to the right of Members to express their views on an Appellate Body report".

67. The representative of Antigua and Barbuda said that his country wished to thank the Panel and the Appellate Body, as well as the WTO Secretariat for their work on this very important and difficult issue. Antigua and Barbuda recognized that this particular dispute was unique in many ways and presented the WTO with particularly difficult issues. While his country had some concerns about some of the statements and conclusions reached by the Appellate Body in its Report, it was generally satisfied with the result. Antigua and Barbuda looked forward to prompt adherence by the United States with the recommendations and would be monitoring the progress very closely.

68. The representative of the United States said that his delegation 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. As discussed in the US submissions to the Appellate Body in this dispute, the

Panel Report in this dispute was very flawed. The United States was, therefore, pleased that the Appellate Body had seen fit to reverse or modify key findings of the Panel, and to identify and correct numerous flaws in the Panel's legal reasoning. The United States was pleased with the Appellate Body's finding that the US federal statutes at issue in this dispute were "measures ... necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a) of the GATS. This finding rested on several important subsidiary findings. Significant among them was the Appellate Body's reversal of the Panel's erroneous finding that the United States was required to enter into consultations with Antigua and Barbuda before it could justify these measures as being "necessary".

69. Further, in applying the Article XIV chapeau, the Appellate Body had correctly clarified that it was an error for the Panel to rely on a very small number of unrepresentative cases to make a general finding concerning whether enforcement of US laws was non-discriminatory. The United States noted that the Appellate Body had raised the possibility of discrimination under one US statute that related to horse racing. However, the Appellate Body explicitly had not found that this statute was in fact discriminatory. His authorities were exploring possible avenues for addressing this narrow issue. The Appellate Body had also provided other important clarifications relating to GATS Article XIV. For example, it had clarified that under GATS Article XIV, which was similar to Article XX(d) of the GATT 1994, Members were not required to "identify the universe of less trade-restrictive alternative measures." Rather, the issue was whether the complaining party had identified a reasonably available WTO-consistent alternative. The United States welcomed that clarification.

70. The United States further welcomed the Appellate Body's finding that the Panel had erred in examining whether certain US state laws were consistent with US GATS obligations. This finding was important because it reconfirmed the burden that a complaining party must meet in order to present a prima facie case. The Appellate Body emphasized that "[a] prima facie case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim." The United States appreciated the Appellate Body's rigor in analyzing whether Antigua and Barbuda as the complaining party presented sufficient evidence and legal arguments concerning US state laws to sustain its burden of establishing a prima facie case.

71. The United States regretted the Appellate Body's affirmation, on different grounds, of the Panel's findings with respect to sector 10.D of the US Schedule of specific commitments. However, the United States noted that, in contrast to the Panel, the Appellate Body had had recourse to the W/120 document and the UN CPC only as preparatory work, and not as context, in interpreting the US Schedule. The Appellate Body had also corrected some of the more egregious errors in the Panel's analysis of the US Schedule, such as the Panel's reliance on the purported meaning of terms in non-authentic languages. The United States was disappointed by the Appellate Body's analysis of Article XVI, and in particular its failure to give effect to the explicit terms "in the form of", which was repeated in each of the first four sub-paragraphs of Article XVI:2. The Appellate Body's reasoning appeared to rely upon the preparatory work while de-emphasizing the precise terms actually used in the text agreed to by all Members. In the US view, this was not a model of proper textual analysis. Indeed, the Report itself acknowledged some of the many questions left open or even created by the Appellate Body's interpretation. These included the proper legal analysis of "limitations on market access in respect of part of a committed sector" or "limitations on one or more means of cross-border delivery," and the proper meaning of what the Appellate Body called "quantitative measures" – a phrase that appeared in some of the negotiating history, but was ultimately omitted from the text of the GATS.

72. In sum, the United States welcomed the central conclusion of the Appellate Body that the relevant US measures were necessary to protect public morals or maintain public order in relation to gambling. While the United States was disappointed with some aspects of the Report, it appreciated the reversal of various disturbing aspects of the Panel's analysis. The United States thanked the members of the Appellate Body again for their hard work.

73. The representative of the European Communities said that the EC welcomed the Report of the Appellate Body. The ruling had confirmed the right of WTO Members to regulate, in a non-discriminatory manner, the supply of services (including gambling and betting services) in order to protect public interests, and it provided valuable guidance on the correct legal interpretation of the GATS. Moreover, the ruling had confirmed a number of legal arguments presented by the EC in the course of the dispute settlement procedure. The Appellate Body had confirmed that the US schedule of GATS commitments must be interpreted, in accordance with the same principle that applied to the interpretation of schedules of all other WTO Members, and that the US schedule must, therefore, be interpreted as including a commitment on cross-border supply of gambling and betting services. The Appellate Body had also vindicated the EC's view that measures of a WTO Member which prohibited all cross-border supply of services were to be regarded as market access restrictions within the meaning of Article XVI:2(a) and (c) of the GATS. Finally, the Appellate Body had correctly stressed that measures which restricted, or prohibited, the supply of services for which specific commitments had been scheduled by a WTO Member, must be applied in a non-discriminatory manner, as required by Article XIV of the GATS. The Appellate Body, moreover, had introduced a number of important clarifications on the interpretation of the term "necessary" under Article XIV of the GATS.

74. The representative of Japan said that her country had participated in the proceedings of this dispute as a third party. This dispute involved various issues of systemic importance with regard to trade in services, notably the interpretation of the GATS schedule and the application of the GATS provisions of general exception. At the present meeting, her delegation wished to make a few comments. First, Japan welcomed the approach taken by the Appellate Body in finding that the United States had indeed made a commitment in respect of gambling and betting services. Namely, the Appellate Body had used W/120 document and the 1993 Scheduling Guidelines as supplementary means for interpretation, in accordance with Article 32 of the Vienna Convention on the Law of Treaties. Second, Japan welcomed the fact that the Appellate Body had reversed the Panel's finding which would place upon a Member an excessive requirement to engage in bilateral or even multilateral consultations with other Members, in order to justify its domestic regulation under the GATS general exception clause. Finally, Japan considered that the Appellate Body had taken an appropriate approach in reviewing the Panel's finding on whether the word "sporting" would include gambling in the US Schedule. Japan concurred with the view of the Appellate Body that the Panel had failed to explain the basis for reviewing the translation of the word "sporting" in French and Spanish, notwithstanding the fact that the United States schedule explicitly indicated on the cover that its schedule was authentic in English only. It was thus appropriate and just that the Appellate Body had not followed the approach taken by the Panel in this regard.

75. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS285/AB/R and the Panel Report contained in WT/DS285/R, as modified by the Appellate Body Report.