WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/198
26 October 2005

(05-4952)

Dispute Settlement Body
27 September 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 September 2005

Chairman: Mr Eirik Glenne (Norway)

Subjects discussed:

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.35)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.35)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.20 – WT/DS234/24/Add.20)

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.10)

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.35)

2. The Chairman drew attention to document WT/DS176/11/Add.35, 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 15 September 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 to implement the DSB's recommendations and rulings. In that connection, the United States had taken note of the statements made by the EC at the previous DSB meeting. The United States failed to understand how its commitment to implement the DSB's recommendations and rulings in this dispute and its efforts to comply could undermine the "authority" of the TRIPS Agreement. To the contrary, these affirmed Members' commitments to the TRIPS Agreement.

4. The representative of the European Communities noted that on the agenda of the present meeting there were two disputes with regard to which the United States had not only failed to respect its obligations under the TRIPS Agreement, but it had also failed to bring itself into compliance with the DSB's rulings and recommendations within the prescribed time-period for implementation. The United States was one of the main sponsors of the TRIPS Agreement. Thus its unwillingness to abide by the TRIPS obligations undermined the authority of the Agreement. There were four bills pending in the US Congress to repeal Section 211. Adoption of such bills would remove a discriminatory legislation that had been driven by specific interests and would bring a satisfactory solution to this dispute. This would conform to the US objective of ensuring effective and non-discriminatory protection of intellectual property rights worldwide.

5. The representative of Cuba said that Section 211 of the US Omnibus Appropriations Act of 1998 violated two main principles of the WTO; i.e. the principle of national treatment and that of most-favored-nation treatment. Cuba had consistently asked the DSB to request that the United States repeal Section 211 and that it fully meet its commitments as a WTO Member. The so-called understanding between the United States and the EC, which had been presented to the DSB at its

meeting on 20 July 2005, could only be considered as a "shameful surrender" on the part of the EC, which tacitly allowed the United States to continue to apply Section 211. There was a marked contrast between the EC's compliant and tolerant attitude towards the United States in this dispute and its firm and vocal position regarding the dispute over intellectual property, relating to Section 110(5) of the US Copyright Act. One could ask whether Cuba's legitimate rights would be used as a pawn by the powerful Members. Failure to comply with the DSB's rulings and recommendations was becoming a weakness of the multilateral trading system. How could anyone seriously argue that the dispute settlement mechanism provided security for all Members, when the failure of the most powerful Member to comply with its commitments and its flagrant violations were indulged. All WTO Members had decided freely to be part of the multilateral trading system, which was based on principles and rules. Multilateralism would thrive if there was trust and certainty that all Members would abide by such principles and rules, whereas systematic disregard for them would encourage arbitrariness and unilateralism. Cuba firmly reiterated that the only way to comply with the DSB's rulings and recommendations would be to abolish Section 211. Cuba urged other Members to condemn such understandings as well as the US continued failure to comply with its commitments, not only in this dispute, but also in other disputes, including those on the agenda of the present meeting.

6. The representative of China said that, due to systemic implications, his delegation was concerned about the progress in this dispute. At the 20 July DSB meeting, the parties to the dispute had notified the DSB that they had concluded an understanding. The EC had indicated in that understanding that it would not, at this stage, seek authorization from the DSB to suspend concessions or other obligations and had retained its right to do so in the future. However, the understanding did not refer to any new deadline for implementation. Although China recognized that the parties to the dispute had the right to settle procedural issues by mutual agreement, it was regrettable that the understanding contained no deadline. That might result in a further delay of the implementation of the DSB's decision, which had been delivered three years ago. China emphasized that the implementation in this dispute would not only be beneficial to the EC and Cuba, but also to the United States, who was an advocate of intellectual property rights in all forums. China applauded the US efforts to implement the DSB's decisions pertaining to the 1916 Anti-Dumping Act, and wished that the United States continue the momentum in bringing its relevant measures, which were found illegal by the DSB, into conformity with WTO rules. China joined the EC and Cuba in urging the United States to implement the DSB's decision in this dispute as soon as possible.

7. The representative of Canada recalled the provisions of Article 3.7 of the DSU, which provided that: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." Against that background, he said that to characterize an agreement or an understanding between two disputing parties as "shameful" represented a departure from the DSB practice and the way Members viewed such arrangements. He also considered that, to the extent Cuba was concerned about protecting its "legitimate economic interests", it had the right, under the WTO Agreement, to seek a settlement of its dispute with the United States.

8. The representative of Cuba said that he had not intended to intervene for the second time, but the statement made by Canada had prompted him to do so. His delegation did not wish to challenge the right of the parties to the dispute to come to an understanding, however "shameful" it might be, if such an understanding were to help to solve a dispute. His delegation was concerned that the US/EC understanding had been reached behind closed doors, without consulting with other Members and without taking into account Cuba's legitimate rights. Any WTO Member had the right to be informed of or to participate in discussions on such matters. That was in fact what his delegation wished to convey and not what the representative of Canada had alluded to. Cuba was aware of its WTO rights. It had not renounced its rights, and would never renounce them, in relation to the dispute under consideration.

9. 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.35)

10. The Chairman drew attention to document WT/DS184/15/Add.35, 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.

11. The representative of the United States said that his country had provided a status report in this dispute on 15 September 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. In that connection, on 19 May 2005, legislation had been introduced in the US House of Representatives (H.R. 2473) that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute. On 25 July 2005, the House Committee on Ways and Means had requested public comments by 2 September 2005, on whether to include H.R. 2473 in broader trade legislation regarding technical corrections and miscellaneous duty suspension. The Committee was now reviewing those comments. The US administration would continue to work with the US Congress to enact legislation to implement the DSB's recommendations and rulings.

12. The representative of Japan said that the credibility of the dispute settlement system relied on each Member's sincere commitment to meet its obligations under the WTO Agreements, which notably included an obligation to secure prompt and effective implementation of the DSB's recommendations and rulings. Japan had been waiting to see the passage of a bill introduced to the US Congress, which would amend the US anti-dumping statute questioned in this dispute. In that regard, Japan noted the status report by the United States, which touched upon the state of play of bill H.R. 2473 before the US Congress, and in particular the part regarding public comments. Although Japan had reached an understanding with the United States to reserve its right to resort to the measures set out under Article 22.2 of the DSU for a future date, it urged, once again, the United States to redouble its effort towards the full-fledged implementation of the DSB's recommendations and rulings in this dispute.

13. 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.20 – WT/DS234/24/Add.20)

14. The Chairman drew attention to document WT/DS217/16/Add.20 – WT/DS234/24/Add.20, 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.

15. The representative of the United States said that his country had provided a status report on 15 September 2005, in accordance with Article 21.6 of the DSU. As noted in that report, the US administration had proposed repeal of the CDSOA in its budget proposal for fiscal year 2006. In addition, legislation that would repeal the CDSOA had been introduced in the US House of Representatives. The Committee on Ways and Means was now reviewing public comments on whether to include that legislation in a broader bill regarding technical corrections and miscellaneous

duty suspension. On 9 September 2005, an amendment to appropriations legislation had been filed in the US Senate. The amendment would prohibit the distribution of CDSOA funds unless distribution of such funds would not be inconsistent with US WTO obligations. The US administration would continue to work with the US Congress to enact legislation, and to confer with the complaining parties in these disputes, in order to reach mutually satisfactory resolutions of these matters.

16. The representative of the European Communities said that, as had been mentioned at the previous DSB meeting, the Ways and Means Trade Sub-Committee of the House of Representatives had called on interested parties to comment on the inclusion of certain bills in a miscellaneous trade bill, including a bill introduced in March 2005 to repeal the Byrd Amendment. Since then, the Ways and Means Committee had posted on its website the submissions made. In that regard, he noted with interest that there were more submissions in favour of repeal than against it. In the previous week, there had also been some proposals in the US Senate to provide at least a temporary solution to this dispute. After a long period of apparent total disinterest in the US Congress, these were first positive signs. The EC called on the US administration and the US Congress to build on this momentum and to repeal the Byrd Amendment without further delay.

17. The representative of Canada said that his country noted the most recent status report of the United States on the Continued Dumping and Subsidy Offset Act of 2000. As previously stated, Canada was disappointed that US inaction had required Canada and other WTO Members to impose trade restrictive measures in order to induce US compliance with its WTO obligations. Canada regretted that these measures were necessary so close to the Hong Kong Ministerial Conference, at a time when the world was preparing to engage more deeply in negotiations to liberalize trade. Canada again reminded the United States of their common interest in the international trading system governed by the rule of law, which promoted trade rather than restricted it. Canada welcomed the inclusion of the Ramstad Bill H.R. 1121 to repeal the Byrd Amendment in the Miscellaneous Trade Legislation, currently being considered in the US Congress. Canada urged the passage of that Bill in order to bring the United States into compliance with its WTO obligations. Canada also noted, in the US most recent status report on the Byrd Amendment, an amendment to Appropriations Legislation H.R. 2862. Canada welcomed an explanation of this amendment.

18. The representative of Japan said that it was with a grave sense of regret that his country had to renew its call on the United States to secure the repeal of the CDSOA by passing the legislation without delay. This was all the more relevant as another round of illegal disbursement under the WTO-inconsistent CDSOA might soon be commenced. In its most recent status report, the United States had referred to the proposed amendment to the US appropriations legislation. The amendment, although incomplete, was a significant step in the right direction, provided that it would effectively annul disbursements under the CDSOA for good, needless to say, should its passage be secured. However, it was Japan's understanding that although that amendment had been filed, it had not been introduced in the US Senate. He recalled that Canada, the EC and Mexico had put in place their countermeasures *vis-à-vis* the United States, pursuant to Article 22 of the DSU. For its part, Japan had imposed 15 per cent additional duties on certain US products as from 1 September. It was regrettable that it had become necessary for four Members to impose such trade-distorting "last resort" countermeasures. Japan recalled that, as provided for in Article 22.8 of the DSU, the countermeasures shall be of a temporary nature until the implementation was secured. Therefore, Japan once again, strongly called on the United States to intensify its efforts to secure a prompt repeal of the CDSOA.

19. The representative of Brazil said that his country had noted the US status report in relation to the Byrd Amendment dispute. He recalled that Article 21.6 of the DSU established, *inter alia,* that "the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings." The reasonable period of time for the United States to implement the DSB's rulings and recommendations in the present dispute had ended on 27 December 2003, almost two years ago. However, twenty status reports later, no real progress had been signalled by the US delegation. While strongly urging the United States to repeal

immediately the Byrd Amendment, Brazil would appreciate elaboration by the United States on the next steps to be taken as regards the amendment of 9 September to Appropriations Legislation, referred to in document WT/DS217/Add.20 – WT/DS234/Add.20.

20. 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.10)

21. The Chairman drew attention to document WT/DS160/24/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

22. The representative of the United States said that his country had provided a status report in this dispute on 15 September 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration continued to work with the US Congress and to confer with the EC, in order to reach a mutually satisfactory resolution of this matter. The United States had taken note of the statement made by the EC at the 31 August DSB meeting. There could be no question about the US willingness to provide protection to intellectual property rights. The United States was second to none in providing strong protection for intellectual property rights. And given other items on the agenda of the present meeting, the United States considered that the EC was hardly in a position to lecture other Members about agreements being one-way.

23. The representative of the European Communities said that more than five years after the adoption of the DSB's rulings in this dispute, the dispute on the US Copyright Act was still on the DSB's agenda, to the dismay of European musicians and, he believed, of the WTO Membership as a whole. And, if one were to judge from the latest status report that the DSB had received, the United States was doing little if anything to address the issue of substandard intellectual property protection in the copyright field. The lack of interest of the United States to bring its legislation in line with the international standards on intellectual property was a very disturbing signal, as it appeared that the self-proclaimed champion of intellectual property rights seemed impotent to live up to its TRIPS obligations. He thus wondered what lesson should other WTO Members draw from that fact. The TRIPS Agreement was not a one-way agreement which created rights for the United States and obligations for others. The EC urged the United States to accord the highest priority to the resolution of this issue. Should that not be the case, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration on retaliation.

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

2. European Communities – Export subsidies on sugar: Implementation of DSB recommendations and rulings

(a) Communication from Australia, Brazil and Thailand (WT/DS265/32 – WT/DS266/32 – WT/DS283/13)

25. The Chairman drew attention to the communication from Australia, Brazil and Thailand contained in document WT/DS265/32 – WT/DS266/32 – WT/DS283/13 and invited the representatives of the respective countries to speak.

26. The representative of Australia said that he wished to commence his intervention with the observation that the DSB did not have injunctive powers. The functioning of the DSB was dependent on the good faith of WTO Members to observe and apply their WTO treaty commitments. Australia

had requested the inclusion of the present agenda item as a result of action by the EC, during the WTO dispute implementation period in the Sugar dispute, to increase exports of sugar by almost 2 million tonnes, through a declassification mechanism. That mechanism involved a declassification of quota sugar to C sugar. C sugar could not be sold on the internal EU market. As a consequence of declassification, quota sugar which would otherwise be disposed on the internal market would be forced on to the external market. Consistent with the recommendations and rulings of the DSB on 19 May 2005 – which had found that all sugar exports by the EC were subsidized and hence must be counted against its WTO export subsidy commitment limit of 1.273 million tonnes – the EC was required to take prompt steps to reduce its exports from an average of 5 million tonnes a year to its WTO scheduled commitment limit of 1.273 million tonnes. However, the declassification action meant that the EC would increase its subsidized exports of sugar to a level of some 6 million tonnes in excess of the EC's WTO export subsidy commitments for sugar. Clearly, action to increase exports would not be WTO compliant. Nor could it be categorized as an act of WTO dispute implementation. A WTO dispute implementation period did not serve to legitimize WTO-inconsistent actions.

27. He said that Australia had requested the inclusion of this agenda item for three reasons, all of which were legitimate to the surveillance authority of the DSB. First, because of an apparent interpretation by the EC that a WTO dispute implementation period afforded a licence to unilaterally waive WTO obligations during that period. In Australia's view, it was clear that there was nothing in the WTO to justify an interpretation that a WTO Member was entitled to suspend the application of its WTO obligations during a dispute implementation period. Second, because the EC's interpretation, if accepted, would damage the functioning and credibility of the WTO dispute settlement system. Suspension of obligations during a WTO dispute implementation period would not be conducive to the security and predictability afforded by the WTO dispute settlement system to the multilateral trading system, in accordance with Article 3.2 of the DSU. In the circumstances of this dispute, action to increase exports – during a period in which steps were required to reduce exports – detracted from the predictability and security afforded by the multilateral trading system. Such action would be no different from action to raise an applied tariff rate during a WTO dispute implementation period, following a WTO dispute ruling that the applied rate was in excess of the WTO-bound rate. Third, because action to increase subsidized exports in excess of the limits imposed under the WTO Agreement on Agriculture – which were prohibited by that Agreement – could serve to destabilize the world sugar market. Reports indicated that declassification could serve to increase EC sugar exports from an average of 5 million tonnes to record levels of around 7 million tonnes. Such action could serve to destabilize world sugar prices. In contrast, action to reduce EC sugar exports would be beneficial to world sugar price movements.

28. He noted that the WTO disputes implementation period in this dispute had commenced on 19 May 2005. The WTO dispute implementation period was of an entirely different character from the transitional period for implementation of commitments under Article 1(f) of the Agreement on Agriculture, which had expired in 2001. A WTO implementation period was accorded to enable "prompt compliance" with the recommendations and rulings of the DSB. It did not constitute some sort of open season for non-application of WTO obligations. Seemingly, the EC's justification for declassification was based on an interpretation that it did not need to apply its WTO obligations pending the end of an implementation period. If the EC were to suggest that declassification was necessary and justifiable as an exceptional circumstance related to EC sugar reform – which, to the best of Australia's knowledge, it had not – then the proper course of action for the EC would be to seek a waiver under Article IX:3 of the WTO Agreement.

29. In conclusion, he said that Australia wished to place on the DSB record that, in Australia's view, declassification was neither necessary nor conducive to implementation. To the contrary, it was clearly harmful to implementation. Such action also damaged the interests of many other WTO sugar producers, including many developing countries. The implementation period in respect of this dispute had been in operation for over four months. The EC's obligation to implement was extant from day one of that period. The WTO arbitrator would determine the date of expiry of the implementation

period. The DSU did not accord the EC any right to expect that an arbitrator appointed under Article 21.3 of the DSU could legitimize any WTO-inconsistent actions taken during the implementation period.

30. The representative of Brazil recalled that on 19 May 2005, the DSB had adopted the Reports of the Panel and the Appellate Body in the Sugar dispute, which had been brought to the WTO by Brazil, Australia and Thailand. In doing so, the DSB had recommended that the EC bring its measure found to be inconsistent with WTO rules into compliance with its obligations under the Agreement on Agriculture. He noted that it was worth stressing that, as a result of the adoption of the Reports by the DSB, the EC was under the obligation to reduce its subsidized exports of sugar from an average of approximately 5 million tonnes a year to its scheduled commitment level of a maximum of 1.273 million tonnes. The EC was equally required to reduce its budgetary outlays on export subsidies for sugar from an estimated €2 billion a year to its scheduled commitment level of a maximum of €499 million.

31. He recalled that at the DSB meeting on 13 June 2005, the EC had formally communicated to all Members that it had the intention to comply with the DSB's rulings and recommendations, but that it would need a reasonable period of time in order to do so. From that date until 9 August 2005, the complainants and the EC had discussed possible time-frames for implementation. Negotiations, however, had not led to a mutually acceptable date. The complainants, then, had requested that the reasonable period of time be established by an arbitrator, in accordance with Article 21.3(c) of the DSU. The arbitration proceedings on a reasonable period of time were currently in place and the Arbitrator was expected to hand down his award by 28 October 2005. The Arbitrator's award would determine the deadline by which the EC would have to conclude the implementation process in this dispute.

32. He recalled that on 22 September 2005, the EC had taken a formal decision to declassify quota sugar to C sugar in an amount of approximately 2 million tonnes. Given that C sugar could not be sold on the EC's market, that decision would result in the increase of the EC's illegally subsidized exports of more than 7 million tonnes, or around 6 million tonnes in excess of its commitments under the Agreement on Agriculture. In fact, the EC's increase in subsidized exports alone was higher than the EC's scheduled commitments.

33. In other words, instead of reducing its subsidized exports of sugar, as recommended by the DSB more than four months ago, the EC was further increasing the quantity of its illegal subsidized exports to the detriment of all other sugar producers and exporters in the world. The action by the EC had been taken in full knowledge of the content and extent of its multilateral obligations in respect of its sugar exports. There was no way that the EC could reconcile its deliberate decision on declassification with the fundamental principle of prompt compliance with the DSB's rulings and recommendations, enshrined in Articles 3.3 and 21.1 of the DSU. Nor could the EC demonstrate how that decision would be compatible with the duty of each WTO Member to ensure the conformity of its laws, regulations and administrative procedures with its multilateral obligations, pursuant to Article XVI:4 of the Marrakesh Agreement. The EC was in breach of the principle of good faith – a breach that the EC had attempted to impute to the complainants throughout these proceedings.

34. Brazil, together with Australia and Thailand, had brought this matter before the DSB in view of its authority to maintain surveillance of implementation of rulings and recommendations, in accordance with Articles 2 and 21.6 of the DSU. Neither of these two provisions imposed any threshold for a Member to take an implementation-related matter to the DSB. However, Brazil believed that the issue the co-complainants raised at the present meeting was of utmost relevance to the WTO Membership as a whole, and for the proper functioning of the WTO. In order to justify the action taken, the EC might claim that a declassification decision was merely an ordinary action that the EC took every year; that the action was only concerned with the balance of the EC's internal market; and that a WTO Member was allowed to continue applying its present WTO-inconsistent

measure up to the very last day of the reasonable period of time. In that respect, the EC might even ask the following question: "What is the raison d'être of a reasonable period of time, if a Member should adjust its illegal measure immediately upon adoption of a panel or Appellate Body report?" None of those excuses, by any minimally reasonable assessment, would be adequate to explain why the EC had decided to move away from – and not towards – compliance with the DSB's rulings and recommendations in the Sugar dispute. A declassification decision had not been an ordinary action to address supply and demand needs of EC's domestic market. Not after the adoption of the Panel and the Appellate Body Reports. Furthermore, the impact of such decision on international prices and, consequently, on the income of non-subsidized producers and exporters would be significant. Preliminary estimates indicated that the declassification at issue would reduce the international price by more than 6 per cent.

35. He then stressed the negative implications of a possible, but undesirable, reaction by the EC to what one could call the argument of "a reasonable period of time as a *carte blanche*". The implications of that argument certainly went well beyond the sugar-specific interests involved in the dispute in question. They should be a matter of great interest and concern for all WTO Members, in particular those who believed that the WTO dispute settlement mechanism was a central element of the multilateral trading system and a tool for securing the positive and expedited resolution of disputes. The assertion that, during a period intended to ensure compliance, a WTO Member would be entitled to exacerbate the pernicious effects of its illegal measure, whatever the reasons it advanced to do so, was at odds with the most basic and central principles governing the settlement of disputes in the WTO.

36. The EC's decision on declassification had altered – once again – the balance of rights and obligations to the detriment of Brazil and the co-complainants, as well as to other sugar producers and exporters outside the EC. The EC's action ran counter to the objective of positive solution of the disputes and had obvious consequences for the EC's credibility. The EC knew as well as anyone else the stakes in the realm of compliance with WTO rules. Better than anyone else, the EC knew its own stakes in the realm of compliance with WTO rules. The decision on declassification risked to seriously damage the credibility of the WTO dispute settlement as a central element in providing security and predictability to the multilateral trading system.

37. There was no doubt that, legally speaking, the implementation of the DSB's recommendations in the present dispute referred only to the current rules of the Agreement on Agriculture, a package of rights and obligations that had been in force for more than ten years. Yet, it was unavoidable to note the negative signal that the EC had sent to WTO negotiators less than three months before the Hong Kong Ministerial Conference by taking its decision on declassification. The elimination of all forms of export subsidies for agricultural goods by a credible date was a political commitment. At that point in time, Members should, at a minimum, apply a standstill as to the export subsidies commitments in place. Instead, by taking its decision on declassification on 22 September 2005, the EC had detracted from its commitments in this area. Hardly anyone could find a more deleterious way to express the gap between the words and the deeds.

38. Brazil urged the EC to reconsider its decision on declassification of quota sugar into C sugar and to adopt measures fully consistent with its obligations under the WTO Agreements, as clarified by the DSB's recommendations in the Sugar dispute.

39. The representative of Thailand said that his country wished to join Australia and Brazil in expressing deep disappointment with the EC's decision of 22 September 2005 to declassify approximately 2 million tonnes of quota sugar to C sugar. The reason for Thailand's disappointment was at least four-fold. First, since May 2005 the DSB had adopted the recommendations and rulings of the Panel and the Appellate Body in the Sugar dispute. The EC had been under the obligation to comply with those rulings and to reduce its levels of subsidized sugar exports. The EC had not done so. On the contrary, the EC had decided to increase its subsidized exports of sugar. Second, as the

EC's subsidized sugar exports had already exceeded the levels permitted by the WTO, its declassification measures had further increased the excessive amount to approximately 6 million tonnes. Third, such excessive sugar exports would adversely affect world sugar prices. The declassification measures in effect were harmful to the interests of developing-country Members, including Thailand. They were in contravention of Article 21.2 of the DSU. Finally, the EC's decision had been undertaken with the full knowledge that such measures constituted an infringement of its commitments. It ran counter to the EC's obligation to commence its implementation of the DSB's recommendations and rulings on this matter. Thailand had grave concerns about both the systemic and substantive implications of the EC's declassification measures. Thailand denounced the EC's decision to take such measures, which undermined both the EC's obligations and the effective functioning of the DSB. Therefore, Thailand strongly urged the EC to reconsider its decision and to bring the measures at issue into conformity with its commitments.

40. The representative of the European Communities said that the EC wished to assure other Members that it was conscious of its WTO obligations, including the obligation to implement the DSB's recommendations and rulings following the adoption of the Panel and the Appellate Body Reports in the Sugar dispute within a reasonable period of time still to be specified under the applicable WTO rules. The Commission had already presented on 22 June 2005 an ambitious proposal entailing a comprehensive reform of the EC sugar regime that would result in significant cuts in prices, production and exports and would bring about compliance with these rulings. That proposal was being discussed in the Council and the European Parliament.

41. In the meantime, the EC was bound to apply its existing rules for the current management of the Sugar market. These included the rule on declassification of quota sugar, which were exportable with export refunds, to C sugar, which must be exported without export refunds. Although the decision on the amount had not yet been adopted, the EC expected that an amount of sugar higher than in recent years would have to be declassified for 2005/2006 due to a number of incidental factors, including a fall in consumption and a rise in stocks as a result of the EC enlargement. Nonetheless, he wished to point out that this was a technical calculation done in an objective and transparent manner under the existing rules, and that the objective of the rule was precisely to ensure that export refunds on sugar stayed within the limits set out in the EC's Schedule as it had understood them until the Appellate Body's ruling in the recent WTO dispute.

42. In fact, while the EC had, at all times, scrupulously respected compliance with good faith interpretation of its obligations on export subsidies, the rulings in the Sugar dispute were placing new constraints on exports of EC sugar, which were in turn taken into account in the sugar reform proposal presented by the Commission. In order to ensure an effective transition to these new rules, the EC had sought agreement with the other parties to the dispute on a reasonable period of time for implementation, but had regrettably not been able to reach an agreement with the co-complainants on this.

43. He expressed the EC's commitment to abide by its existing WTO obligations. As it had already been declared in the DSB, the EC intended to fully implement its obligations arising from the DSB's recommendations and rulings. The EC had in fact already started to take the necessary steps to that end and would follow that path until implementation had been achieved. Yet, the EC must insist that, like any other WTO Member in similar circumstances, it was entitled to a reasonable period of time for its implementation because immediate compliance was impossible. The complainants – as much as they would wish the EC to comply with the rulings immediately – were obliged to accept that the EC required a reasonable period of time for implementation.

44. He noted that the complainants were right in stating that the EC was obliged to bring itself into compliance with the DSB's recommendations and rulings, and that the process of achieving that must start on day one of the reasonable period of time. As stated, the EC was doing this and had wasted no time. Where the complainants were wrong was their understanding of the process of

bringing about WTO compliance: it seemed that they understood this as a gradual reduction of exports that had been found to be subsidized inconsistently with WTO rules until those exports reached the amount of zero. Hence there must be no increase of these exports during the implementation period. This was not how the implementation period was defined in the DSU. Implementation during the reasonable period of time was understood as a legislative process through which the measure found inconsistent had to be modified so as to eliminate its legal flaws. Until that had been achieved, it was impossible to have new rules in place and consequently the old legal rules continued to apply. For these reasons, the EC was puzzled about the complainants' request to place this issue on the agenda of the present meeting, which seemed to be a novel way of applying the DSB's surveillance over implementation under Article 21.6 of the DSU.

45. The DSB took note of the statements.

3. United States – Countervailing measures concerning certain products from the European Communities: Recourse to Article 21.5 of the DSU by the European Communities

(a) Report of the Panel (WT/DS212/RW)

46. The Chairman recalled that at its meeting on 27 September 2004, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by the EC concerning the implementation by the United States of the DSB's recommendations in this dispute. The Report of the Panel contained in document WT/DS212/RW had been circulated on 17 August 2005 as an unrestricted document, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Report was now before the DSB for adoption of the request of the European Communities. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

47. The representative of the European Communities said that, first, the EC wished to thank the Panel and the WTO Secretariat for their speedy work on an admittedly highly technical and complicated subject. The EC was grateful in particular for the Panel's findings regarding the UK and Spanish cases in which the United States, acting contrary to clear and unequivocal WTO jurisprudence, had been found in blatant violation of its obligations under the SCM Agreement. The privatization dispute was already a long and protracted one, and it was time for the United States to correctly implement the jurisprudence as emphatically repeated by the recent Panel under Article 21.5 of the DSU. At the present meeting, the EC did not wish to enter into details. However, the EC felt the need to recall briefly the main obligations, as stated in the Panel's findings and conclusions. As reiterated in the original Panel and the Appellate Body in this case, in a sunset review process involving privatization information, the investigating authority was obliged under the SCM Agreement to examine whether the privatization was at arm's length and fair market value in order to determine whether the benefit from the non-recurring subsidies bestowed upon a pre-privatized company continued to exist for the privatized producer. This duty was clear and required an active and fully substantiated examination. Mere assumptions did not suffice. Second, the investigating authority was under the obligation in sunset reviews and revised sunset review proceedings to take into account all the evidence placed on its record in making its determination of likelihood of continuation or recurrence of subsidization. Refusal to consider new evidence was clearly inconsistent with Article 21.3 of the SCM Agreement. The United States had done none of the above. It was time to rectify its errors and finally put an end to this protracted dispute.

48. Having said that, the EC wished to briefly express its reservations over a number of points and findings made by the Panel. First, the EC did not agree with the finding of the Panel concerning the term "measures taken to comply" in this case. Finding that the "measures taken to comply" in the proceedings under consideration had simply been the affirmative likelihood-of-subsidization analysis, as set out in the Section 129 determinations, had not effectively promoted the positive resolution of

the dispute and had not addressed the main problems, which were the maintenance of, or the failure to revoke, the countervailing duties in violation of the US commitments under the SCM Agreement. The Section 129 determinations were simply the statement of reasons for the maintenance of the duties, not the measure that the United States ought to have taken in order to comply with the DSB's rulings and recommendations. The focal point was the maintenance of the countervailing duties in violation of the SCM Agreement and the Panel should have reasoned accordingly.

49. Second, the EC wished to express again the view that the spirit and also the sheer logic of recent WTO jurisprudence required analyzing privatization issues based on the companies as a whole. Although the SCM Agreement did not prescribe a particular methodology for analyzing whether a privatization was conducted at arm's length and at fair market value, both the spirit of past rulings as well as practical necessities, militated against "segmentation" techniques that simply aimed at prolonging countervailing duties against clear economic and market realities. What should count was whether the company as a whole was privatized under conditions of arm's length and fair market value. In this case and as a reminder, the privatization of Usinor had occurred at arm's length and for fair market value because the average price paid for Usinor's shares had exceeded the average price per share recognized by the Privatization Commission, as necessary to recoup the value of the company, and fell within the market-clearing price range that the USDOC had identified. Following segmentation techniques, such as those employed by the United States risked opening Pandora's box and could perpetuate disputes and market distortions, which did not correspond to market realities. Despite the above reservations, the EC nevertheless did not wish to prolong this dispute and thus requested the adoption of the 21.5 Panel Report.

50. The representative of the United States said that at the outset, he wanted to express his delegation's gratitude to the Panel and the Secretariat for producing a report of very high calibre. By way of background, it is worth recalling that the United States had implemented the original DSB recommendations and rulings by applying a new methodology for determining the continued countervailability of subsidies after full privatization of the subsidy recipient. In doing so, the United States had taken into account whether the privatization was at arm's length and for fair market value. Of the 12 administrative determinations originally challenged by the EC, the EC had challenged implementation with respect to only three. All involved sunset reviews concluding that subsidization was likely to continue or recur in the event of revocation of the countervailing duty order. The reviews involved French, UK and Spanish products. It was very significant that the Article 21.5 Panel had found no breach with regard to the French case, in which the US Department of Commerce had found that certain shares in a French company had not been privatized at arm's length or for fair market value. The Panel's finding recognized that the United States had applied a privatization methodology in response to the recommendations and rulings of the DSB that was consistent with the SCM Agreement. Although the United States did not necessarily agree with all of the reasoning in paragraph 7.283 of the Panel Report, it was obviously very pleased with this result.

51. The United States was also very pleased with the Panel's finding that investigating authorities did not need to reconsider the likelihood of continuation or recurrence of injury merely because the recommendations and rulings of the DSB required reconsideration of the likelihood of continuation or recurrence of subsidization.

52. With regard to the UK and Spanish reviews, the United States noted that it intended to modify its measures in response to the Article 21.5 Panel findings that the United States should have applied its privatization analysis in these reviews. At the same time, however, the United States was surprised at these findings, since the United States had implemented by assuming that the privatizations at issue were at arm's length and for fair market value, the most favourable outcome possible for respondents had the analysis actually been performed. The United States had instead made its sunset determination of likely continuation or recurrence of subsidization based on the existence of other subsidies which had not been challenged before the original Panel, and which, therefore, should not have been considered in the Article 21.5 proceeding.

53. Similarly, concerning the UK case, the United States intended to modify its measure in response to the Panel's finding that the US authorities should have considered certain evidence that had been presented to them for the first time during implementation of the DSB's recommendations and rulings – even though that evidence could have been presented during the underlying sunset review. Here again, the United States considered that the Panel should have found otherwise. Interested parties should not be able to use domestic implementation proceedings to raise factual claims they chose not to raise in the original administrative proceedings and which were not the subject of the original WTO dispute. In sum, while the United States disagreed with certain aspects of the Article 21.5 Panel Report, the United States considered the Report overall to be very positive and well-reasoned.

54. The DSB took note of the statements and adopted the Panel Report contained in WT/DS212/RW.

4. European Communities – Customs classification of frozen boneless chicken cuts

(a) Report of the Appellate Body (WT/DS269/AB/R – WT/DS286/AB/R) and Reports of the Panel (WT/DS269/R and WT/DS286/R)

55. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS269/9 – WT/DS286/11 transmitting the Appellate Body Report pertaining to the disputes: "European Communities – Customs Classification of Frozen Boneless Chicken Cuts", which had been circulated on 12 September 2005 in document WT/DS269/AB/R – WT/DS286/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 Reports pertaining to these disputes had been circulated as unrestricted documents. He noted 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".

56. The representative of Brazil recalled that on 12 September 2005, in its Report on: "European Communities – Customs Classification of Frozen Boneless Chicken Cuts", the Appellate Body had confirmed most parts of the findings and conclusions of the Panel Report, which had been circulated on 30 May 2005. Both the Panel and the Appellate Body had concluded that the EC's current legislation on the classification of frozen boneless salted chicken was inconsistent with its multilateral obligations under the GATT 1994. Brazil welcomed the adoption of these Reports and thanked the Panel, the Appellate Body and the Secretariat for their hard work in this dispute. The present outcome also reflected positively on Brazil's close co-operation with Thailand, the other co-complainant with whom it had had the opportunity to work in the context of the Sugar dispute. The Reports left no room for further interpretation: the EC Regulation 1223/2002 and the EC Decision 2003/97/EC had resulted in the imposition of customs duties in excess of the duties provided for in the EC's Schedule LXXX. In reclassifying frozen boneless salted chicken cuts, the EC had acted in breach of Article II:1(a) and Article II:1(b) of the GATT 1994. Before going through the most relevant points raised by the Panel and the Appellate Body Reports, he wished to reiterate the immediate consequences of the changes introduced by the EC in its customs classification.

57. First, with the enactment of Regulation No. 1223/2002 and Decision 2003/97/EC, exports of the product in question from Brazil to the EC market had fallen by nearly 80 per cent. During the three-year period in which that legislation had been in force, the EC's measures had caused an estimated loss of nearly US$2 billion for Brazilian exporters. That loss was a direct consequence of the measures that had redefined the product exported by the co-complainants, which had been, until then, covered under heading 02.10 of the EC Combined Nomenclature as salted chicken (frozen or

not) and subject then to an *ad valorem* tariff of 15.4 per cent. With the new measures, imports of frozen salted chicken cuts had been reclassified under heading 02.07 and subject to a specific tariff of €102.4/100 kg. amounting to an AVE four to five times higher than the tariff bound in Schedule LXXX. Under heading 02.07, the product exported by the co-complainants, frozen salted chicken, had been reclassified as *in natura* meat, fresh, chilled or frozen, without any kind of salting. The EC's objective was clear. In changing the definition and scope of heading 02.07, it was, in practice, prohibiting the imports of frozen salted chicken cuts under heading 02.10.

58. When Brazil had brought this case to the WTO in 2003, it had not sought to obtain a lower tariff level for salted chicken cuts than that provided for in the EC's Schedule nor had it tried to reinterpret the Harmonized System Convention. The dispute under consideration was not about legitimate expectations of an exporting Member. It was about the interpretation of the meaning and scope of a tariff concession in a Member's Schedule. It was about the predictability and security of commitments undertaken by Members in their Schedules, one of the foremost objectives and purposes of the WTO Agreement and the GATT 1994.

59. With respect to the legal reasoning and conclusions reached by the Panel and the Appellate Body, he wished to touch upon what Brazil considered to be the most important issues in this dispute, namely, the terms of reference, the interpretation of the term "salted" according to the rules of treaty interpretation codified in the Vienna Convention, and the final findings of the Panel and the Appellate Body. With regard to the terms of reference, he said that shortly after Brazil had requested the establishment of a panel in September 2003, the EC had enacted Regulations 1871/2003 and 2344/2003, in order to "clarify" the "correct interpretation of heading 02.10".[1] Although the Appellate Body had considered these pieces of legislation as outside the Panel's terms of reference, the Appellate Body had also clearly and unequivocally found that heading 02.10 of the Harmonized System was not exclusively characterized by the concept of long-term preservation.[2] It followed that the concept found in Regulations No. 1871/2003 and No. 2344/2003 could not stand. In the Appellate Body's own words: "... meat to which salt has been added, so that its character has been altered, will be 'salted' within the meaning of heading 02.10, even if such salting does not place meat in a state of 'preservation'."[3] Moreover, as the Appellate Body stated: "... the non-inclusion of the two subsequent measures in the Panel's terms of reference would not hinder a positive resolution of this dispute".[4]

60. With regard to the interpretation of "salted" of heading 02.10, he said that the dispute in question would constitute an important reference for future analyses of the Vienna Convention. The in-depth interpretation and application by the Panel and the Appellate Body of one of the major instruments for the interpretation of international treaties would certainly shed new light over future cases. In particular, Brazil welcomed the Appellate Body's finding that frozen salted chicken under heading 02.10 of the Harmonized System did not contain a requirement that salting must, by itself, ensure long-term preservation.[5] Although the Appellate Body had also recognized that the concept was not excluded from heading 02.10 of the Harmonized System, it had explicitly set forth that if the criterion of long-term preservation were to form part of the tariff commitment regarding frozen salted chicken in heading 02.10 of the EC Schedule, there must be clear evidence that such criterion had been agreed upon by all WTO Members for the EC Schedule.[6] The Appellate Body had found no such evidence.[7]

[1]The EC's Responses to the Panel's Questions, para. 41.
[2] AB Report, para. 229.
[3] AB Report, para. 229.
[4] AB Report, para. 161.
[5] AB Report, para. 229.
[6] AB Report, para. 344.
[7] *Idem.*

61. In fact, the Appellate Body had concluded that the long term preservation criterion was not explicitly stated or clearly enshrined within the EC's customs legislation or case law. Rather, the six-year classification practice by European customs authorities of the frozen salted chicken under heading 02.10 shown that the criterion was not as obvious and long-standing as purported by the EC.

62. With regard to the final findings and conclusions, he said that three main conclusions had been drawn by the Panel and endorsed by the Appellate Body: (i) frozen boneless chicken cuts that had been impregnated with salt, with a salt content of 1.2 to 3 per cent, were covered by the tariff commitment under heading 02.10 of the EC Schedule; (ii) EC Regulation 1223/2002 and EC Decision 2003/97/EC had resulted in the imposition of customs duties on the products at issue that were in excess of the duties provided for in respect of the tariff commitment under heading 02.10 of the EC Schedule; and (iii) the EC had acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 and had, thus, nullified or impaired benefits accruing to Brazil and Thailand. Considering that the above-mentioned measures were isolated European Commission regulations and decision, the removal of the inconsistencies identified by the Panel and the Appellate Body should be a rather simple, straightforward and fast procedure. The best way to bring these measures into conformity would be to withdraw them immediately and to ensure that subsequent legislation did not impede the classification of the product under heading 02.10. It was Brazil's expectation that the EC would fully and promptly comply with the DSB's recommendations on this matter. Brazil would follow with interest all the implementation actions to be taken by the EC, and stood ready to consult with the EC, at the earliest opportunity, on a reasonable period of time for implementation.

63. The representative of Thailand said that his country wished to thank the Panel, the Appellate Body and the Secretariat for the time and attention they had devoted to this factually and legally complex case. The thoroughness and care with which both the Panel and the Appellate Body had examined each of the parties' claims were exemplary. Thailand was pleased to note that the positions that it had taken since the outset of this dispute had prevailed before both the Panel and at the Appellate Body. The Reports that would be adopted at the present meeting were of great commercial importance to Thailand. However, they also had systemic implications that were of interest to all WTO Members. Although time would not permit to review the Appellate Body's decision in detail, at the present meeting he wished to highlight certain aspects of the Appellate Body Report that were of particular consequence for all Members.

64. First, he noted that the Appellate Body had affirmed the key principle that tariff bindings could not be circumvented through the reclassification of products. Prior to the conclusion of the Uruguay Round, the EC had established the scope and coverage of its tariff concession for "salted" meat. Following the conclusion of the Round, Thailand had exported large quantities of salted and frozen chicken cuts to the EC under this tariff concession. However, when Thailand's exports to the EC had increased, the EC had changed the rules of the game by declaring that Thailand's exports now had to be treated as frozen chicken. As a result, the product was subjected to a substantially higher tariff. The reclassification was intended to, and it had, severely restricted Thai chicken exports to Europe. From the time of the reclassification, Thailand maintained that the actions taken by the EC violated its tariff concession on salted meat. Thailand was pleased that both the Panel and the Appellate Body had so agreed.

65. In an organization that often considered a broad range of issues related to goods, services, and intellectual property, the Appellate Body Report provided a salutary reminder of the central importance of tariff concessions in the multilateral trading system. When WTO Members – particularly developing-country Members – negotiated tariff commitments, they expected them to be honoured faithfully by the Member granting them. Indeed, the conditions of competition that tariff concessions guarantee were a crucial factor in the decision of each WTO Member whether or not to accept the results of a Round. The Appellate Body's decision thus provided strong reinforcement to the principles of security and predictability that underpinned the entire framework for negotiations in

the current Round. As a final observation on this first issue, he noted that one should be clear about what this decision did – and did not – say. It did not say that Members could never reclassify products. It did say that Members could not reclassify products in such a way so as to breach their commitments under Article II of GATT 1994.

66. A second matter that Thailand wished to draw to the attention of Members was the Appellate Body's analysis of treaty provisions at issue using the principles of treaty interpretation, as set out in the Vienna Convention on the Law of Treaties. This was the first case in which the Appellate Body had provided such a through and detailed analysis of each component of the principles of treaty interpretation such as "ordinary meaning", "context", "object and purpose", "subsequent practice" and "supplementary means of interpretation", as set out in Article 31 and Article 32 of the Vienna Convention, incorporating many of the arguments made by Thailand. It had clarified how the Harmonized System related to these principles. The clarifications made by the Appellate Body on these key interpretative principles would, doubtless, be important in future disputes. Thailand was pleased that the complaint it had brought and the arguments it had presented had not only resolved the dispute at hand, but it had also led to the development of jurisprudence that should help avoid similar disputes in the future.

67. Thailand was, therefore, pleased to seek adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report. These two Reports demonstrated that the rules-based multilateral trading system worked – and worked well – for developing countries. Indeed, this year alone, Thailand had been a complainant in two cases before the Appellate Body, and had sought adoption of the reports in both cases. This was a testimony to the fact that developing countries could negotiate commitments in the WTO with the confidence that they could resort to the WTO dispute settlement mechanism should their trading partners not respect their part of the bargain.

68. Finally, Thailand recalled that Article 21.1 of the DSU provided that prompt compliance with the DSB's recommendations or rulings was "essential in order to ensure effective resolution of disputes to the benefit of all Members." Accordingly, the EC should implement the DSB's rulings as promptly and expeditiously as possible. Thailand stood ready to discuss with the EC a "reasonable period of time" for implementation that reflected the shortest period possible within the legal system of the EC. Thailand recognized that the EC had moved expeditiously in the past to adopt amendments to its Combined Nomenclature and hoped that the EC could take prompt and effective action to adopt the required changes to implement the DSB's rulings in this case. Thailand looked forward to discussing with the EC the modalities for prompt implementation in these circumstances.

69. The representative of the European Communities said that the EC had taken note of the Appellate Body Report. It thanked the Appellate Body members and the Secretariat for their work, but was unable to support the adoption of the Report. The EC noted that the Appellate Body had accepted a number of the EC's criticisms of the Panel's reasoning and had reversed the Panel's finding on a number of points concerning the interpretation of the term 'salted' under tariff heading 0210, but had still come to the same ultimate conclusion as the Panel. However, in so doing, the Appellate Body had ignored a number of arguments made by the EC which, in the EC's view, should have been considered as convincing. It was regrettable that these arguments had not been given a full airing, and had not been subject to detailed reasoning. There were a number of elements which the EC considered should have led the Appellate Body to different conclusions. First, the Appellate Body had failed to provide a persuasive explanation of the structure of Chapter 2 of the Harmonized System, which according to the EC was based on two categories of state of meat, namely, fresh, chilled and frozen meat and meat preserved by one of the processes listed under heading 02.10, namely smoked, dried, in brine and salted. Sheer logic and the historical evolution indicated that this was a valid categorization of Chapter 2 and past practice seemed not to have created any problems. It was not after all a coincidence that the WCO had never faced any problems with this categorization and had never witnessed any inter-State disputes regarding the classification of products preserved according to the processes of tariff heading 02.10.

70. Second, the EC also failed to understand the Appellate Body's finding on the object and purpose under Article 31(1) of the Vienna Convention on the Law of the Treaties. Although the Appellate Body had disagreed with the Panel and had recognized that the object and purpose of a particular treaty provision might allow better to ascertain the common intentions of the parties, it had failed to correct the Panel's erroneous rejection of the EC's arguments. It was well known to all trade negotiators that tariff commitments were structured and based on specific trade objectives of the parties concerned. It was, thus, rather reasonable to ascertain the common intentions of the parties through a reasoned analysis of the particular objectives of the parties while negotiating tariff commitments, rather than having recourse to the very general and rather vague overall treaty purposes and objectives.

71. Third, during the original Panel's proceedings, the EC had referred quite extensively to the classification practice of the complainants regarding the products at issue. The EC had repeated its reservations during the Appellate Body proceedings. It was regrettable to see that the Appellate Body had preferred to rather ignore this issue and had, thus, failed to draw the appropriate conclusions. On several occasions, the Appellate Body had acknowledged that, in accordance with past WTO jurisprudence, the classification practice of several Members was relevant including that of exporting Members. Having said that and despite the fact that it had admitted that Members' Schedules and tariff commitments formed an integral part of the GATT 1994 and that the Members' Schedules were practically identical to the Harmonized System, it had nevertheless failed to draw the appropriate inferences. In connection with the above, the Appellate Body seemed to agree with the Panel's statement that the latter examined the classification practice of exports from Brazil and Thailand and had found this evidence of limited probative value. The EC failed to understand how the Appellate Body had found the evidence submitted by the EC as being of limited probative value. The EC still was not in a position to understand how a WTO Member could classify the same products under tariff heading 02.07 and demand importing countries to classify them under a different tariff heading, namely that of 02.10.

72. At the same time, the EC wished to express its satisfaction over the interpretation given by the Appellate Body to the term "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties and its finding that no international practice existed with respect to all products covered by the tariff heading at issue. This was clearly a systemic issue and the Panel's interpretation was not only legally erroneous, but also dangerous for the interpretation and application of a multilateral treaty such as the WTO. Were the Panel's interpretation to be accepted, it would risk undermining the security and predictability of the WTO Agreement and the GATT 1994 simply by reason of unilateral acts of Members.

73. Unfortunately, the Appellate Body had immediately undermined its own approach on subsequent practice through an application of supplementary means of interpretation under Article 32 of the Vienna Convention that made it impossible for negotiators to be sure of their scope of the commitments they were taking, and in this case certainly to a nonsensical result: a last minute Act of the European Commission published after the verification period in the Uruguay Round had been found to have influenced the minds of Uruguay Round negotiators, while long-standing practice and jurisprudence throughout the Uruguay Round, both in the EC and the United States, had not. Moreover, the EC could not, but repeat again that such finding bore little connection with reality. Had the negotiators indeed considered that salted meat covered any poultry with any amount of added salt, why had Brazil engaged in the EC – Poultry dispute and why had it only started exporting this product in 1998, two years after Thailand, and four years after the conclusion of the Uruguay Round. The EC wished to voice its strong disagreement with the Appellate Body's finding on deemed knowledge as developed in the context of the analysis under Article 32 of the Vienna Convention on the Law of the Treaties. For a demanding and detailed multilateral Agreement, such as the WTO and the GATT 1994, it was at least risky to infer the common intention of the parties simply based on the notion of "constructive knowledge". That might lead to the distortion or misrepresentation of the common intention of the parties through the arbitrary and possibly manipulated use of unilateral acts.

For treaties such as the WTO and the GATT 1994, the threshold must be set higher. The "circumstance of conclusion" must be of an objective character clearly evident to all negotiators at the time of the conclusion of the treaty. Deemed knowledge and especially asserted *ex post* was not sufficient and could not substitute the need to demonstrate a direct link between a circumstance and the common intentions of the parties.

74. Finally, even setting aside all these objections, the EC did not understand how the Appellate Body had confirmed the Panel's ultimate conclusion. It did not appear that the Appellate Body's ultimate conclusion of inconsistency followed from the reasoning. Even if it were correct that the term "salted" in heading 02.10 did not refer "exclusively to products that have a level of salt content sufficient to ensure 'preservation' by salting", it did not necessarily follow that frozen boneless chicken cuts with a certain salt quantity was not also *prima facie* classifiable under heading 02.07 – which covered frozen chicken. The Harmonized System had certain rules for deciding under which heading a product, which was *prima facie* classifiable under two headings, should be classified. While the EC considered that this rule was not applicable because the product was only classifiable under 02.07, the Appellate Body's finding that 02.10 could cover products which were prepared by salting necessarily raised the question whether the particular products at issue also came under heading 02.07, and, if so, under which heading were they best classified. For all these reasons, the EC regretted that it could not support the adoption of that Report.

75. The representative of Japan said that his country had not been a participant to these proceedings, but had examined the Appellate Body Report with great interest. At the present meeting, his delegation wished to briefly comment on what was stated by the Appellate Body in paragraph 199 of its Report, because Japan considered that this matter was important from a systemic point of view. In paragraph 199, in its deliberation on whether the Harmonized System could be the "context" for the purpose of interpreting the EC's Schedule for tariff concessions, the Appellate Body had engaged in the interpretation of Article 31(2)(a) of the Vienna Convention. However, it seemed to have been unnecessary for the Appellate Body to plunge into the interpretation of that Article of the Vienna Convention, regarding its statement that the Harmonized System was "relevant" in interpreting the EC Schedule.

76. The representative of the United States said that his country had participated in this proceeding because of the systemic importance of many of the issues relating to the proper interpretive approach to be applied in WTO dispute settlement. While the United States did not take a position on the substantive outcome of the dispute, it considered several aspects of the Panel and the Appellate Body Reports to be well-reasoned. For example, the United States considered that the Panel and the Appellate Body were correct in concluding that two measures that post-dated the panel requests were not within the Panel's terms of reference. The Appellate Body had emphasized that previous disputes in which later amendments to a measure were included involved narrowly circumscribed "limited circumstances."

77. To give other examples, the United States appreciated the thoughtful approach of the Appellate Body on the questions of whether the EC's classification practice in this dispute could by itself constitute "subsequent practice" for the purposes of an analysis of context, as set forth in Article 31(3)(b) of the Vienna Convention, and whether classification practice and other acts of Members might be relevant for a panel's analysis in other ways, as supplementary means of interpretation under Article 32 of the Vienna Convention. Likewise, the United States appreciated the Appellate Body's thoughtful recognition, in the context of discussing the relevance of domestic court judgments, of differences among Members' domestic legal systems, and how these differences could affect conclusions drawn on the meaning and significance of such judgments. It was important that such Member-specific factors be taken into account in order to ensure accurate findings.

78. While considering much of the analysis in this Report helpful, the United States was troubled by some of the discussion concerning "object and purpose." The Panel had considered it appropriate

to examine the object and purpose of individual agreement provisions, and had considered "security and predictability" as an object and purpose underlying the GATT and the WTO. On the first of those two points, although the Appellate Body had observed that the customary rules of interpretation reflected in Article 31 of the Vienna Convention contemplated an examination of the object and purpose of the agreement as a whole, and not that of individual provisions, the Appellate Body had gone on to suggest that a panel could examine the "object and purpose" of an individual provision if that inquiry were directed at assisting the panel "in determining the treaty's object and purpose on the whole." The United States had serious misgivings about any attempt to identify, a priori, the "object and purpose" of an isolated provision. The United States noted first that the task of ascertaining the "object and purpose" of a treaty as a whole was not always an easy one. A treaty interpreter was not free to assign an "object and purpose" to a treaty unless there was some objective basis for it. It was even more difficult to talk about the "object and purpose" of an individual provision.

79. The "purpose" of any treaty provision could be determined only by ascertaining what the provision means. In turn, ascertaining the meaning of a provision required interpreting that provision; and, under customary international law (and therefore under Article 3.2 of the DSU), that process of interpretation proceeded in accordance with the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention. However, it would appear to the United States that, under the approach suggested by the Appellate Body, a treaty interpreter could first identify some supposed "purpose" of a particular provision; then use that "purpose" to determine the object and purpose of the treaty as a whole; and then, as a final step, interpret the provision on the basis of that "object and purpose." It was not clear how this approach could avoid simply being circular.

80. That approach would also seem to leave open the possibility of adding to or diminishing rights and obligations under the covered agreement at issue. It should not be left to parties to a dispute (or to panels) to divine "purposes" of a provision, since a party was often simply using this as an invitation to re-write the provision. It was perhaps for that reason that the Appellate Body had gone on to express a note of warning against using that approach. And so, while the United States questioned the approach for the reasons just expressed, it could certainly agree with the Appellate Body when it "caution[s] against interpreting WTO law in the light of the purported 'object and purpose' of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole."[8]

81. The United States was also troubled by the Panel and the Appellate Body conclusion that "security and predictability" was an object and purpose underlying the WTO and the GATT 1994 that should be considered in interpreting a Member's Schedule. Neither the Panel nor the Appellate Body cited language in the text of the WTO or the GATT 1994 referring to this as an object and purpose of those agreements. Instead, the only authority cited in the Reports were past Appellate Body reports. But the Appellate Body could not create or assign an object or purpose that was not there.

82. The only place where these words appeared in the WTO Agreement was Article 3.2 of the DSU. There, it was explained that the dispute settlement system provided security and predictability to the multilateral trading system, not that "security and predictability" was an object and purpose. Further, Article 3.2 explained that "security and predictability" were provided through a proper interpretation of the covered agreements that did not add to or diminish Members' rights and obligations. In other words, security and predictability were the result of faithfully clarifying the covered agreements, they were not the object and purpose of the covered agreements. Considering amorphous objects and purposes not found in the text of a covered agreement was a recipe for adding to or diminishing the rights and obligations actually found in that text; in other words, this was an approach that undermined security and predictability.

[8] AB Report, para. 239.

83. Finally, he concluded by noting once again that the US concerns with this aspect of the Reports did not mean that it considered either the outcome incorrect, or that other aspects of the analysis were not proper and well-reasoned.

84. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS269/AB/R – WT/DS286/AB/R and the Panel Reports contained WT/DS269/R and WT/DS286/R, as modified by the Appellate Body Report.

5. Appointment of Appellate Body members

(a) Decision by the DSB on the reappointment of Appellate Body members

85. The Chairman recalled that Article 17.2 of the DSU provided that Appellate Body members shall each serve a four-year term and may be reappointed once. He said that Messrs. Luiz Olavo Baptista, John Lockhart, and Giorgio Sacerdoti had been appointed to serve as Appellate Body Members in December 2001. As a result, the terms of office for these three Appellate Body Members would expire in December 2005. Following the process outlined at the DSB meeting held on 20 June 2005, he said that he had consulted informally with delegations regarding the positions held by those individuals. He had reported on the results of those consultations to the DSB at its meeting on 20 July 2005 and had proposed that a decision on the reappointment of Messrs. Baptista, Lockhart, and Sacerdoti be taken by the DSB at the present meeting. No delegation had objected to his proposal. Therefore, at the present meeting, he wished to propose that the DSB agree to appoint Messrs. Baptista, Lockhart, and Sacerdoti as Appellate Body Members for a second four-year term, to begin on 12 December 2005. He then invited delegations wishing to make statements to take the floor.

86. The representative of Brazil expressed his country's gratitude to the Chairman of the DSB for having conducted the process of reappointment of Appellate Body members in an efficient, practical and consistent manner. A decision by the DSB to be taken on this matter, almost three months before the expiration of the terms of office of Messrs. Baptista, Lockhart and Sacerdoti, constituted a valuable contribution to the proper functioning of the WTO dispute settlement mechanism. Brazil was also pleased to note the general support of WTO Members for the reappointment of those three Appellate Body members. That demonstrated that WTO Members continued to have confidence in their independence, impartiality and knowledge.

87. The Chairman proposed that the DSB take note of the statements and agree to appoint Messrs. Luiz Olavo Baptista, John Lockhart, and Giorgio Sacerdoti as Appellate Body Members for a second four-year term, to begin on 12 December 2005.

88. The DSB took note of the statements and so agreed.