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Dispute Settlement Body
19 May 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 May 2005

Chairman: Mr. Eirik Glenne (Norway)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.31)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.31)

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

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.6)

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.5)

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16/Add.1)

(g) Canada – Measures relating to exports of wheat and treatment of imported grain: Status report by Canada (WT/DS276/20)

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 seven 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.31)

2. The Chairman drew attention to document WT/DS176/11/Add.31, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that her country had provided a status report in this dispute on 4 May 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.

4. The representative of the European Communities said that it was now more than one month before the expiry of the extended deadline for implementation. Two bills were pending respectively

in the Senate and in the House of Representatives that would, *inter alia*, repeal Section 211. Adoption of these bills would bring a satisfactory solution to this dispute by removing a legislation driven by specific interests.

5. The representative of Cuba said that it was disrespectful towards the DSB that one month prior to the expiration of the extended deadline for implementation, the United States had submitted a status report that was exactly the same as the one that had been submitted at the previous meeting, showing no sign of progress in the settlement of this dispute. It was of even greater concern to Cuba that this attitude had become a habit of the United States, despite repeated criticisms raised against it by other delegations, not only with regard to this dispute, but also with regard to three other disputes that were before the DSB at the present meeting. This attitude clearly demonstrated the importance that the United States attached to the WTO. Cuba wished to remind the United States that only 42 days were left within which the United States had to implement the DSB's recommendations and rulings in this dispute. Cuba requested that the United States propose to the US Congress the only correct way of implementing those recommendations, which was to repeal Section 211.

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.31)

7. The Chairman drew attention to document WT/DS184/15/Add.31, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

8. The representative of the United States said that her country had provided a status report in this dispute on 4 May 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. Indeed, the United States was pleased to note that legislation was being introduced in the US House of Representatives that would do just that. The US administration would work with the Congress to encourage its timely passage.

9. The representative of Japan said that his country welcomed the statement made by the United States that a bill to amend the US anti-dumping duty statute was being introduced to the US Congress. Japan had waited for this over three years. The introduction of a bill, as foreshadowed by the United States, would indeed be an important step toward the full-fledged implementation of the DSB's recommendations and rulings in this dispute. At the same time, Japan wished to recall that the reasonable period of time for implementation by the United States would expire on 31 July 2005. Japan strongly hoped that further steps would follow promptly and that the necessary legislative amendments would finally be secured. Japan urged the United States to do its utmost for the passage of the new bill at the earliest opportunity. Japan would closely monitor the course of action and hoped to be further notified by the United States of any progress with regard to the implementation of the DSB's recommendations and rulings in this dispute.

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.16 – WT/DS234/24/Add.16)

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

12. The representative of the United States said that her country had provided a status report on 4 May 2005, in accordance with Article 21.6 of the DSU. On 7 February 2005, the US administration had proposed repeal of the Continued Dumping and Subsidy Offset Act (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 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 in April 2005, the EC had informed the DSB that it had taken the first step in its legislative process to impose retaliatory measures against the United States with the adoption of a Commission's proposal. On 25 April, the EC Council had adopted this Commission's proposal. Consequently, since 1 May 2005, the EC had been applying a 15 per cent additional duty on imports of certain products originating in the United States. The EC had selected the targeted products from the indicative list communicated in November 2004 and the precise list had been notified to the DSB on 29 April 2005 in writing. The EC regretted that it had to take that step. But, since the condemnation of the CDSOA, the United States had not given any convincing signs that implementation was forthcoming. While the EC welcomed again the introduction of a repealing bill in the House, it could not help, but note that this bill had received thus far the support of only one co-sponsor. The EC hoped that its decision would help focus minds on the need to repeal the CDSOA. This legislation generated a US rest-of-the-world problem. Canada had also started to apply retaliation on certain US products on 1 May 2005. He recalled that Brazil, Chile, India, Japan, Korea and Mexico had also been authorized by the DSB to suspend the application of tariff concessions or other obligations to the United States at any time. Canada, the EC and the six other Members were the major trading partners of the United States. All together, they represented 71 per cent of total US exports and 64 per cent of total US imports.

14. The representative of Canada said that his country noted the status report of the United States in relation to the Continued Dumping and Subsidy Offset Act of 2000. On 29 April 2005, Canada had submitted its retaliation notification to the DSB and had requested that that notification be circulated to all Members. On 1 May 2005, Canada had implemented retaliatory measures against the United States on imports of live swine, cigarettes, oysters, and certain specialty fish originating in 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 to repeal the Byrd Amendment.

15. The representative of Korea said that his country also noted the statement made by the United States and its status report on the implementation of the DSB's rulings and recommendations in the case: "United States – Continued Dumping and Subsidy Offset Act of 2000". As Members were aware, more than two years had already passed since the DSB's finding that the CDSOA was inconsistent with the WTO rules, and it was well over one year since the implementation period had ended in December 2003. Nevertheless, the United States had yet to comply with the DSB's rulings and recommendations. The United States had failed to repeal the said Act and even continued to make disbursements under the existing Act that had been found to be WTO-inconsistent. Such non-compliance by the leading WTO Member not only denied the rights and benefits of other Members, but also seriously undermined the effective functioning of the WTO dispute settlement system. No delegation would deny that the dispute settlement mechanism served as a cornerstone of the WTO

system enhancing the integrity and predictability of the system and, no doubt, the effectiveness of the dispute settlement mechanism hinged on Members' swift and sincere compliance with the DSB's rulings and recommendations. As notified to the DSB on 29 April 2005, the EC and Canada had taken retaliatory measures against the United States on 1 May 2005 by imposing additional duties on certain products originating from the United States. Korea hoped that these measures would prompt the United States to faithfully implement the DSB's decision and would thereby resolve this tediously prolonged dispute. Once again, Korea strongly urged the United States to repeal the CDSOA without further delay. Otherwise, Korea would be obliged to seriously consider following the lead of the EC and Canada.

16. The representative of India said that, like other Members, India noted with concern that the US status report showed virtually no progress in its efforts to repeal the Byrd Amendment except the referral of bill H.R. 1211 to the Committee on Ways and Means of the US House of Representatives. India had obtained its rights under Article 22 of the DSU, and was looking at all possibilities, although immediate full compliance by the United States of its WTO obligations was India's preferred option. India urged, once again, the United States to take the necessary steps required to fully comply with the recommendations immediately.

17. The representative of Japan said that his country noted the status report of the United States and welcomed the fact that bill H.R.1121 to repeal the CDSOA, which had been introduced to the US House of Representatives in March 2005, had been referred to the Committee on Ways and Means. This was a positive step by the United States towards the resolution of this dispute, and Japan was eagerly awaiting the passage of the bill to repeal the CDSOA at the earliest possible opportunity. Japan had taken up every opportunity to urge for the early repeal of the CDSOA. Japan noted that the importance of complying with the obligations under the WTO Agreements was well-recognized by the United States and had been expressly stated in recent Japan/US bilateral economic-trade talks. Japan strongly called on the United States to take a concerted action towards a prompt repeal of the CDSOA. As from 1 May, the EC and Canada had been imposing additional duties on US products in view of the non-compliance by the United States with the DSB's recommendations and rulings. Japan was also aware that voices had significantly been raised in the United States to repeal the CDSOA. At the moment, Japan was observing carefully how the US Congress might proceed with the consideration of bill H.R.1121. 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.

18. The representative of Brazil said that his delegation wished to briefly echo the other co-complainants to this dispute to signal that it had taken note of the status report by the United States and, like other Members, wished to urge the United States to promptly comply with the DSB's rulings and the recommendations. Brazil was closely following the implementation stage of this case and was considering what options to follow. Brazil wished to register, for the record, that retaliation was not Brazil's preferred option, but that option was still on the table given the US lack of implementation.

19. The representative of Chile said that his country had also been authorized to take retaliatory measures against the United States. Chile noted the status report submitted by the United States. His country wished to support the previous statements made by other co-complainants in this dispute and called on the United States to comply with the DSB's recommendations.

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.6)

21. The Chairman drew attention to document WT/DS160/24/Add.6, 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 her country had provided a status report in this dispute on 4 May 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration had been meeting with the US Congress on this matter. The US administration would continue to consult with the Congress and confer with the EC in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Communities said that almost five years after the adoption of the Panel Report by the DSB, the United States had still not brought its Copyright Act into conformity with the TRIPS Agreement. This was a cause of great concern for the EC, as stated on numerous occasions before the DSB. The EC considered that action by the United States to remedy this unfortunate situation would be important not only from the point of view of the EC right holders, but also from a more general perspective, as it would dispel any doubts about the US commitment to appropriate copyright protection. Therefore, the EC trusted that the United States would accord high priority to the resolution of this issue of systemic importance. 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 proceeding on its retaliation request.

24. The representative of Australia said that at the previous DSB meeting, his delegation had asked whether the US delegation could provide a more substantive report on the status of the US administration's consultations to implement the DSB's recommendations and rulings in this dispute. Once again, Members had received another status report informing them that consultations were continuing. Australia asked the United States when it hoped to have some results from the consultations.

25. The representative of the United States said that, as had been indicated at the previous DSB meeting, her delegation had conveyed Australia's interest in this matter to the US authorities. The US administration was continuing its consultations with the US Congress, as she had indicated earlier in the report, but that legislative process was in the hands of its Congress. The US administration was working closely with them to resolve the dispute.

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.5)

27. The Chairman drew attention to document WT/DS204/9/Add.5, 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 2 June 2004, Mexico and the United States had reached an agreement on implementation in this case. He recalled that the agreement consisted of the following: (i) the United States would recognize the right of Mexico to continue to prohibit international simple resale (ISR); i.e. the use of private lines to carry public traffic; (ii) for its part, Mexico would eliminate, from its current International Long-Distance Rules establishing the "uniform settlement rate" system, the "proportionate return" system and the requirement that the carrier with the largest share of outgoing traffic to a particular country should be the one to negotiate the settlement

rate on behalf of all Mexican carriers dealing with that country; (iii) Mexico had also undertaken to put into effect, within thirteen months following the adoption of the Report the regulations needed to authorize, under Mexican law, the issuing of permits for resale of switched international long-distance telecommunications services. As Members were aware, since 2004 Mexico had complied with the first of its commitments by eliminating the aspects of its International Long-Distance Rules that the Report considered to be WTO-inconsistent. He was, therefore, pleased to inform the DSB that in April 2005, Mexico had issued a draft regulation for the marketing of telecommunications services. Under the provisions of this instrument, companies from any country established in Mexico might market international long-distance services in Mexico without owning public telecommunications networks. This new legislation, along with the amendments that, since 2004, had allowed settlement rates to be freely negotiated between Mexican carriers and those from any other Member, confirmed the competitiveness of the Mexican telecommunications market. Once his government received all comments on the draft, and the necessary domestic procedures for the final publication of the regulation were completed, Mexico hoped that, together with the United States, it would be able to notify the DSB that a mutually agreed solution to this dispute had been reached.

29. The representative of the United States said that her country wished to thank Mexico for its status report. The United States was pleased that Mexico had published its proposed re-sale rules for public comment, which the United States of course viewed as a very positive development. The United States was continuing its review of the proposed regulations, as it was continuing its review of Mexico's international long distance rules. The United States looked forward to consulting with Mexico as it continued its efforts to implement the DSB's recommendations and rulings.

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/Add.1)

31. The Chairman drew attention to document WT/DS246/16/Add.1, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's conditions for the granting of tariff preferences to developing countries.

32. The representative of the European Communities said that on 20 April 2004, the EC had confirmed its intention to fully implement the DSB's recommendations and rulings in this dispute. The reasonable period of time would expire on 1 July 2005. Already on 20 October 2004, the European Commission proposed to the EC Council a new GSP regulation which would, *inter alia*, repeal the "drug arrangement" under Council Regulation (EC) No. 2501/2001. As stated in the status report submitted to the DSB, the proposal was currently under discussion within the EC Council. The EC was confident that it shall honour its commitments and shall fully respect the deadline for implementation.

33. The representative of India said that his country wished to thank the EC for the second status report regarding implementation of the DSB's recommendations and rulings in this dispute. India noted that the status report showed no progress since the first status report had been received by the DSB in April 2005. However, the EC had until 1 July 2005 to comply with the DSB's decision. India assumed the EC was taking the necessary steps to meet this deadline, and 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.

(g) Canada – Measures relating to exports of wheat and treatment of imported grain: Status report by Canada (WT/DS276/20)

35. The Chairman drew attention to document WT/DS276/20, which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the case concerning Canada's measures relating to exports of wheat and treatment of imported grain.

36. The representative of Canada said that his country welcomed this opportunity to provide a status report on its implementation of the DSB's rulings and recommendations in this matter. Canada's written report had been submitted to the DSB on 4 May 2005. Canada had put forward legislation on 11 March 2005 to implement the DSB's recommendations and rulings. This legislation had now been passed by the House of Commons and was under consideration by the Senate. Canada expected to be in full compliance with its WTO obligations by the agreed upon implementation deadline of 1 August 2005.

37. The representative of the United States said that her country thanked Canada for its status report and looked forward to consultations with Canada as it took steps in its implementation of the DSB's recommendations. At the present meeting, the United States wished to ask Canada some questions about the status report. First, she asked if Canada could explain how the legislation mentioned in Canada's status report would bring it into conformity with its WTO obligations, given that the legislation did not appear to address one of the challenged measures in this dispute, Canada Grain Regulation Section 56(1). In addition, the United States also understood that the proposed legislation contemplated repealing certain of the measures at issue in this dispute. The United States asked if Canada could clarify whether it intended to replace the measures being repealed with other measures that would address entry of foreign grain into Canadian grain elevators, mixing foreign grain with Canadian grain, or extending the rail revenue cap to cover foreign grain shipments.

38. The representative of Canada said that the second question raised by the United States was rather technical and, therefore, he would convey that question to his authorities for further response. He hoped to have such a response either at the next DSB meeting or in discussions with the US delegation directly. With respect to the first question, he said that this matter had been discussed with the United States in the context of the discussions on a reasonable period of time for implementation. The legislation in question dealt with legislative measures. The regulations were administrative decrees and they could only be addressed once the legislative framework was in place. As soon as the Act was cleared in the Canadian Parliament, his country would be in a position to promulgate the regulations at the administrative level and deal with the issues at hand. He hoped that his response at the present meeting answered the first question raised by the United States.

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

2. Implementation of the recommendations of the DSB

(a) European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs

(b) United States – Measures affecting the cross-border supply of gambling and betting services

40. 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 proposed that the two sub-items to which he had just referred be considered separately.

(a) European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs

41. The Chairman recalled that at its meeting on 20 April 2005, the DSB had adopted the Panel Reports pertaining to the complaints by the United States and Australia in relation to the case on: "European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs". He invited the EC to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

42. The representative of the European Communities said that on 20 April 2005, the DSB had adopted the recommendations and rulings in the case: "European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs". The EC intended to fully implement the DSB's recommendations and rulings in this case in a manner consistent with its WTO obligations and it had already begun to evaluate options for doing so. The EC intended, in particular, to modify certain provisions of its GI regime relating to agricultural products and foodstuffs (Regulation 2081/1992) to make it fully compatible with the DSB's rulings and recommendations. Due to the relative complexity of the issues involved and the need for a satisfactory implementation, the EC would need a reasonable period of time in which to do so. The EC stood ready and willing to discuss on an appropriate reasonable period of time for implementation with Australia and the United States, in accordance with Article 21.3 (b) of the DSU.

43. The representative of the United States thanked the EC for its statement that it intended to implement the DSB's recommendations and rulings in this dispute. The United States was prepared to discuss with the EC a reasonable period of time for such implementation, pursuant to Article 21.3(b) of the DSU.

44. The representative of Australia said that his country welcomed the EC's confirmation of its intention to implement the DSB's recommendations and rulings in this dispute. The EC had indicated that it would require a reasonable period of time in which to implement those recommendations and rulings. Australia looked forward to discussions with the EC in the near future in order to reach an agreement on such a period of time.

45. The DSB took note of the statements, and of the information provided by the European Communities regarding its intentions in respect of implementation of the DSB's recommendations.

(b) United States – Measures affecting the cross-border supply of gambling and betting services

46. The Chairman recalled that at its meeting on 20 April 2005, the DSB had adopted the Appellate Body Report in the case on: "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

47. The representative of the United States said that her 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 do this. Her delegation stood ready to discuss this matter with the Government of Antigua and Barbuda, in accordance with Article 21.3(b) of the DSU.

48. The representative of Antigua and Barbuda, the Minister of Finance and the Economy of Antigua and Barbuda, Dr Errol Cort, said that among the responsibilities of his Ministry was the financial services industry, including the directorate of offshore gaming. He said that he was honoured to be at the present meeting to represent his country in this important matter. First, he wished to express his delegation's disappointment in the statement just made by the United States. Prior to the present meeting, his country had had no contact or communication from the United States regarding its intentions in this matter. Under Article 21.3 of the DSU, Antigua and Barbuda believed that it was entitled to hear at this meeting specifically what the United States proposed to do to comply with the decision and what time-frame it suggested in which to accomplish that. The statement of the United States at the present meeting gave no substantive guidance as to the US intentions, and his country would respectfully ask the United States to be more specific in front of the DSB. Failing that, at the very least, he wished to extend an invitation to the US delegation to meet with his delegation following the present meeting in order that it might promptly get the clarity to which his country was entitled. Antigua expected full and complete compliance by the United States with the recommendations adopted by the DSB in this case. As noted at the previous meeting, Antigua and Barbuda would monitor the situation very closely to ensure timely and sufficient implementation by the United States. He wished to note again how important this industry was to his country's delicate economy and to the betterment of its citizens, and time was of the essence in this matter.

49. At the present meeting, Antigua and Barbuda wished to take this opportunity to make a few observations. First, his country was disturbed that the United States, in its public pronouncements regarding this case, had stated that it needed only to "clarify internet gambling restrictions in certain ways" or "tweak" the US Interstate Horseracing Act. A close and thorough reading of the Appellate Body Report demonstrated that the United States had asserted in this dispute that it prohibited "the remote supply of gambling and betting services by any supplier, whether domestic or foreign. In other words, the United States sought to justify [its measures] on the basis that there is no discrimination in the manner in which the [measures] are applied to *the* remote supply of gambling and betting services."[1]

50. To comply with the ruling, the United States must give Antigua market access for the provision of gambling and betting services. This should not be a difficult or time consuming task. For a start, the US federal government could immediately cease sending letters and issuing statements that Antiguan operators could not lawfully do business in the United States. The United States also had experience governing its own domestic remote gambling industry. If Members were not already aware of it, the United States had sanctioned domestic Internet and telephone account wagering services that accepted hundreds of millions of dollars in wagers each year. There was extensive remote gambling on horse races and other events and contests in the United States. Under the rules of WTO law, pursuant to the Appellate Body Report, it was discriminatory for the United States to allow its domestic remote gambling industry to flourish while seeking to ban the provision of remote gambling services from Antigua and Barbuda.

51. In this context, Antigua and Barbuda believed that the ruling provided the United States with an alternative – and that was to prohibit all domestic remote gambling. It should also be noted that one was referring to "remote" gambling, not "internet" gambling, not "horse racing" gambling. The distinction that the United States impressed upon and which had been explicitly accepted by the Panel and the Appellate Body was the "remote" and "non-remote" distinction. If "remote" gambling was bad enough, in the eyes of the United States, to deserve prohibition, then it should be prohibited in the United States across the board, whether it crossed international borders or state lines or not, whether it involved the internet, the telephone, the post or any other method of "remote" supply. That much was clear. In its ruling, the Appellate Body had determined that the United States had met the first part of the Article XIV exception under the GATS, but had not proven that its measures were non-discriminatory under the

[1] Appellate Body Report, para. 350.

chapeau of Article XIV. However, it should be observed that the finding in favour of the United States under the first part of the test hung by a very slender thread indeed. In its ruling, the Appellate Body established for the first time a clear rule for the assessment of an Article XIV claim and the respective burdens of the parties under it. The Appellate Body had stated that first the United States had to establish a prima facie case of necessity under Article XIV. At that time, the burden shifted to Antigua to demonstrate that one or more "reasonably available alternatives" to an outright prohibition existed, at which time the burden would then be shifted back to the United States to prove that these alternatives would not in fact work..

52. He noted that the Appellate Body had concluded that: "because the United States made its prima facie case of necessity, and Antigua faded to identify a reasonably available alternative measure ... the United States demonstrated that its statutes are 'necessary' and therefore justified, under paragraph (a) of Article XIV."[23] In the same paragraph of its Report, the Appellate Body also stated that "Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the [measures]." However, a complete reading of the proceedings had revealed that this statement by the Appellate Body was, with the deepest of respect, simply not correct. Over the course of the proceedings, Antigua and Barbuda had raised a number of alternatives, including of course its own regulatory scheme, but also the fact that sophisticated and experienced jurisdictions such as Ireland and the United Kingdom had seen fit to permit the internet gambling efforts of their licensed "bricks and mortar" operations and the fact that the United States itself had adopted a legislative approach to regulate conduct on the internet that might pose a danger to children. His country had also suggested that Antiguan operators could engage agents in the United States who could be used to assess the identity and particulars of proposed customers in person prior to the creation of their accounts with Antiguan operators. Notwithstanding the aforesaid and contrary to what had been stated by the Appellate Body, the Panel Report in fact had taken note of some of this evidence, indeed even in the Article XIV context.

53. Given the considerable economic and other resources that his tiny country had invested in this case, it was most disappointing that the Appellate Body had apparently chosen to overlook this evidence, clearly in the record and referred to by Antigua and Barbuda in its Appellate submissions. Be that as it might, "reasonably available alternatives" to prohibition did exist. Finally, he wished to make clear to WTO Members one fact that might only be known to students of the case under consideration against the United States. That was from the beginning of this dispute Antigua and Barbuda had made it clear that it recognized that gambling and betting services should be subject to regulation. Antigua and Barbuda itself regulated them and did not deny the right of the United States to reasonably regulate these services to ensure the protection of citizens. But prohibition was not regulation. In this respect, due notice must be taken of the decision of the US Supreme Court, announced on 16 May 2005, in a dispute among its states regarding cross-border wine sales. That case was remarkably analogous to the dispute under consideration and, his country suspected that it might very well soon have an impact on the resolution of the dispute. Antigua and Barbuda had offered the United States the opportunity to cooperate on the regulation and oversight of gambling and betting services. His country hoped that the United States would accept his country's offer and work towards a resolution of this dispute that would give Antiguan operators fair, reasonable and responsible access to the enormous gambling market in the United States.

54. 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.

[2] Appellate Body Report, para. 326

3. European Communities – Export subsidies on sugar

(a) Report of the Appellate Body (WT/DS265/AB/R – WT/DS266/AB/R – WT/DS283/AB/R) and Reports of the Panel (WT/DS265/R; WT/DS266/R; WT/DS283/R)

55. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS265/28 – WT/DS266/28 – WT/DS283/9 transmitting the Appellate Body Report on: "European Communities – Export Subsidies on Sugar", which was circulated on 28 April 2005 in document WT/DS265/AB/R – WT/DS266/AB/R – WT/DS283/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 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".

56. The representative of Australia said that his country welcomed the findings of the Appellate Body and the Panel in this dispute and the adoption of these Reports by the DSB at the present meeting. Australia thanked the Appellate Body and the Panel for their work in relation to this dispute. His country also thanked the co-complainants – Brazil and Thailand – for their cooperation throughout this dispute. Australia looked forward to the EC's full and prompt implementation of the DSB's rulings and recommendations in this dispute. Australia stood ready to consult with the EC at the earliest opportunity on a reasonable period of time for implementation. The Appellate Body and the Panel had confirmed that all sugar exported from the EC received export subsidies and that the EC must limit its subsidised exports of sugar to the levels set out in its Schedule. This meant that instead of exporting at its current level of over 5 million tonnes a year, the EC would have to limit its annual subsidised sugar exports to 1.2735 million tonnes, and that it would have to reduce its expenditure from €1.3 billion to €499.1 million a year.

57. At the present meeting, he wished to put on the record some important Panel and Appellate Body findings in this dispute. First, Australia welcomed the Appellate Body's finding that the Panel had erred in exercising judicial economy on the complainants' claims under Article 3 of the SCM Agreement. Second, the Reports did not require the EC to make any changes to the preferential arrangements currently enjoyed by certain ACP countries into its internal sugar market. There was nothing to stop the EC from observing its commitments to the ACP countries as well as its export subsidy reduction commitments to Australia. The Panel had called upon the EC to "bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries". Australia called upon the EC to implement the rulings in a way that did not damage access to EC markets for the ACP countries. Third, the findings in this dispute did not create a de-facto ban on low priced exports. As explained by the Appellate Body, Article 9.1(c) of the Agreement on Agriculture did not apply merely because export sales were made at low prices – rather, it required that payments be made, that such payments be made on the export of an agricultural product, and that such payments be financed by virtue of governmental action. It was only when all three requirements were met that an Article 9.1(c) export subsidy existed. Fourth, the Reports did not blur the distinction between the WTO disciplines on domestic support and the WTO disciplines on export subsidies. By contrast, and as stated by the Appellate Body, the findings respected the boundary between the two disciplines – they were designed to ensure that WTO Members provide both domestic support and export subsidies in conformity with the Agreement on Agriculture. As the Appellate Body had stated, the use of domestic support, without limit, to provide support for exports undermined the benefits that were intended to accrue from a WTO Member's export subsidy commitments. The Appellate Body had found that the production of C sugar was a direct consequence of the EC sugar regime. C sugar

exports equalled between 11 and 21 per cent of EC quota production and commanded a price sufficient to cover only 30 per cent of its cost of production. Plainly, the export of C sugar was not some incidental effect of the EC sugar regime. Fifth, a WTO Member could not escape its export subsidy obligations under the Agreement on Agriculture by inserting a footnote to its Schedule that was inconsistent with its treaty obligations. These Reports should serve as a caution to any WTO Member who, as part of the Doha Round negotiations, sought to escape its obligations under the Agreement on Agriculture by the insertion of creative footnotes in its Schedule. Finally, for the record, at no time had Australia negotiated or agreed to the footnote as a departure from the EC's obligations under the Agreement on Agriculture. The facts were on the Panel and the Appellate Body record.

58. The representative of Brazil said that on 28 April 2005, in its Report on "European Communities – Export Subsidies on Sugar", the Appellate Body had confirmed the findings and conclusions of the Panel Report of 15 October 2004. Both the Panel and the Appellate Body had concluded that the EC's sugar regime was in breach of EC's obligations under the Agreement on Agriculture. Brazil welcomed the adoption of these Reports. Brazil thanked the Panel, the Appellate Body and the Secretariat for their work in this dispute. He emphasized the importance that Brazil had attached to the close and constructive cooperation maintained with the other two complainants – Australia and Thailand – throughout these proceedings.

59. The Reports made absolutely clear that the EC could only grant export subsidies to sugar up to the annual limits of 1,273,500 tonnes and €499.1 million. Full adherence by the EC to these export subsidy commitments would enlarge the sugar international market by as much as five million tons per year, to the benefit of the competitive producers and exporters, developing countries most of them. Such a result should not be feared nor regretted by WTO Members. Not even by those with a legitimate interest in the maintenance of the preferential access granted by the EC to sugar of ACP countries and of India's origin.

60. There was absolutely nothing in the Reports that the DSB was adopting at the present meeting (as well as in the cases brought by the three complainants) that would compel the EC to change the conditions upon which that preferential access was accorded to those countries. The decision to change those conditions was entirely in the EC's hands. The Reports could not be construed as an obstacle for the EC to comply with its WTO obligations and preferential arrangements regarding sugar, or by any other commitment to support or aid those countries. Brazil had always been aware of the significance of the sugar sector to the ACP sugar producing countries. That was why Brazil supported the approval of the waiver that allowed for that preferential treatment, which had virtually excluded Brazil from the European sugar market to the benefit of the ACP suppliers. Brazil was also developing and strengthening technical cooperation programs with the ACP countries in the field of sugar and ethanol production with a view to increase their competitiveness and to add value to the industry output.

61. At the present meeting, Brazil wished to briefly highlight some of the most relevant findings of the Panel and the Appellate Body Reports. With regard to footnote 1 to the EC's Schedule, he said that: (i) the Agreement on Agriculture established that both the budgetary outlays and the quantity commitment levels be specified in a Member's Schedule in respect of any export subsidy listed in Article 9.1. There was no room for an "interpretation that a Member is only obliged to fulfill 'whatever commitments' it chooses to specify in its Schedule"; (ii)"it is clear that the commitments specified in a Member's Schedule must be in conformity with the provisions of the Agreement [on Agriculture]". No provision under this Agreement authorized Members to depart, in their Schedules, from their obligations under the Agreement (paras. 216 and 220); (iii) "we see no basis in the Panel Reports for the contention of the European Communities and the ACP Countries that the Complaining Parties or the WTO Members negotiated or agreed to Footnote 1 [to EC's Schedule] as a departure from the European Communities' obligations under the Agreement on Agriculture." (para. 223).

62. With respect to C Sugar, he noted that: (i) "C sugar is being sold on the world market by European Communities' sugar producers/exporters at a price that does not even remotely cover its average total cost of production." (para. 264); (ii) "sales below total cost of production cannot be sustained in the long term, unless they are financed from some other sources." (para. 266); (iii) "the subsidized production and export of C sugar is not the incidental effect of the domestic support system, but is a direct consequence of the EC sugar regime." (para. 280).

63. With respect to the distinction between export subsidy and domestic support, he noted that: (i) "if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue through a WTO Member's export subsidy commitments." (para. 280).

64. With respect to the principle of estoppel and good faith, he noted that: (i) "the European Communities has no basis on which to [...] assert that it could have legitimately relied upon [an] alleged shared understanding' in deciding not to include exports of C sugar in the base quantity levels in its Schedule." (para. 316); (ii) There was "nothing in the Panel record to suggest that the Complaining Parties acted inconsistently with Article 3.10 of the DSU or the principle of good faith." (para. 319).

65. With respect to judicial economy, he said that; (i) "in declining to rule on the Complaining Parties' claims under Article 3 of the SCM Agreement, the panel precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the SCM Agreement [...]. This constitutes false judicial economy and legal error."; (ii) Unfortunately, the Appellate Body had found that there were not sufficient elements for it to complete the legal analysis required in the case. Brazil respectfully disagreed and noted that had the Appellate Body found otherwise, it would have concluded that the subsidies at issue were also incompatible with the Agreement on Subsidies.

66. Finally he expressed Brazil's expectation that the EC would fully and promptly comply with the DSB's rulings and recommendations in this matter. Brazil stood ready to consult with the EC at the earliest opportunity on a reasonable period of time for implementation. In this respect, Brazil recalled that, in its opening statement before the Appellate Body, it had referred to Article 42(2) of EC's Regulation 1260/2001, under which the European Commission routinely adopted implementing rules in the sugar sector in a matter of days.

67. The representative of Thailand said that her country wished to begin by thanking the members of the Appellate Body, the Panel and the Secretariat for their hard work throughout the dispute settlement proceedings in this important case. Thailand was pleased to propose the adoption of the Reports of the Panel and the Appellate Body. Thailand believed that this Report would provide useful guidance to WTO Members with respect to their obligations under export subsidy provisions of the Agreement on Agriculture. On this occasion, Thailand wished to highlight certain aspects of the Report that it believed to be of particular significance. First, this dispute concerned the export subsidies granted in respect of sugar by the EC under its Council Regulation No. 1260/2001. These subsidies had long been of concern to Thailand, and to other WTO Members. Indeed, even within the EC, there had been much clamoring for change of a regime considered to be punitive to developing countries such as Thailand. The findings of the Panel and the Appellate Body in this case should provide further impetus for the EC to reform its sugar regime. The Appellate Body had upheld the Panel's finding that footnote 1 to Section II, Part IV of the EC's Schedule did not enlarge or otherwise modify the EC's commitment levels specified in that Schedule. The Appellate Body had also upheld the Panel's findings that payments in the form of low-priced sales of C beet to sugar producers were "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the Agreement on Agriculture, and that the production of C sugar received a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the Agreement on Agriculture, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the EC's sugar regime. Accordingly, the Appellate Body had upheld the Panel's finding that the EC, through its sugar regime, acted inconsistently with its obligations under Articles 3.3 and 8 of the

Agreement on Agriculture, and nullified or impaired the benefits accruing to the complaining parties under the Agreement on Agriculture. Thailand welcomed these rulings. The Panel and the Appellate Body had unequivocally confirmed that the export subsidies granted by the EC, which had been challenged by the complainants, were inconsistent with the EC's reduction commitments under the Agreement on Agriculture. These rulings were important for the future and integrity of the multilateral trading system. Members could not, with impunity, insert footnotes in their Schedules that purported to modify or shrink their obligations. Further, Members could not attempt to evade their obligations not to provide export subsidies by effectively cross-subsidizing export production. The Appellate Body had also found that the Panel had erred in exercising judicial economy, and had thereby failed to discharge its obligation under Article 11 of the DSU with respect to the complaining parties' claims under Article 3 of the SCM Agreement. The Appellate Body had, however, decided not to complete the analysis on the grounds that it did not have sufficient facts to do so. While Thailand was disappointed by the Appellate Body's reluctance to rule on Thailand's SCM claims and thus determine the implementation period, Thailand welcomed the recognition by the Appellate Body that the remedial regime under the SCM Agreement essentially differed from that under the Agreement on Agriculture. Thailand looked forward to working with the EC to achieve prompt and effective implementation.

68. Before closing the statement, she reiterated that as a developing country, Thailand was fully aware of the need of developing countries for foreign earnings as an engine for economic development. Thus, Thailand did not object to the preferential treatment accorded by the EC to selected ACP countries. Nevertheless, as Thailand had mentioned in its submissions to the Panel and the Appellate Body, the EC could not continue to use the trade preferences it granted to selected developing countries as an excuse for not abiding by its WTO obligations, to the detriment of other developing countries. There was nothing to prevent the EC from honouring its commitments to ACP without damaging other sugar exporting countries. In this connection, Thailand wished to reassure the ACP countries that the Reports pertaining to this dispute were not intended to affect their preferential import arrangements with the EC. It was possible for the EC to respect its obligations under both the Sugar Protocol and the WTO Agreements. Thailand did not believe that there was a conflict between the two sets of obligations. Thailand noted that the Panel had suggested that the EC should consider measures to bring its domestic production of sugar more in line with domestic consumption while respecting its international commitments under the Sugar Protocol. Her country believed that this approach would protect the rights of the ACP countries, and would also guarantee the rights of Members under the WTO Agreement. Thailand wished to emphasize that all WTO Members had an interest in an EC's regime that was consistent with the EC's obligation under the WTO Agreement. Indeed, Thailand believed that the ACP countries in particular had an interest in a WTO-consistent sugar regime that provided legal security and that was not vulnerable to challenge. Thailand reiterated that it looked forward to the EC's full and prompt implementation of the DSB's ruling and recommendation in this dispute.

69. The representative of the European Communities said that the EC had already made public its intention to comply with the WTO ruling. However, the EC considered that the Panel and the Appellate Body Reports raised serious systemic concerns, which deserved careful consideration by WTO Members. In the EC's view, the Panel Report was flawed on a number of grounds. The EC had hoped that the Appellate Body would subject the Panel's poor legal reasoning to a more rigorous review and correct the errors in the Panel's reasoning. It was with regret that the EC noted that the Appellate Body had not reversed any of the findings of the Panel. This was all the more regrettable because the Appellate Body's reasoning was often far from persuasive and raised a number of important systemic concerns. In respect of footnote 1 to the EC's export subsidy commitments, the Appellate Body had dismissed many of the EC's arguments with little examination. The lack of examination was difficult to understand when comparisons were made with other recent reports of the Appellate Body where the same or very similar issues arose He then referred to some examples. As part of its argumentation, the EC had relied upon cover notes to draft Schedules and letters from 1994 from Australia, which showed that in 1994 Australia had shared the EC's understanding of this

footnote, and had not understood the footnote as it now pretended to. The Appellate Body had dismissed these arguments by simply stating, without any further explanation, that "the Complaining parties have rebutted the[se] interpretations", (para. 180). How they had been rebutted, or why the Appellate Body found those rebuttals convincing had never been explained. By contrast, in the "US – Gambling" dispute, the Appellate Body had examined in detail cover-notes from the United States (para. 206). Another example was with respect to the Appellate Body's treatment of the "Modalities Paper", the basis for the scheduling of agricultural commitments. The Appellate Body had essentially dismissed the relevance of the "Modalities Paper" in two sentences (para. 199). However, in the "US – Gambling" case, the Appellate Body had analyzed in some detail the 1993 Scheduling Guidelines for the GATS negotiations, which could be considered the equivalent document to the "Modalities Paper" (paras. 202 and 203). Further, the EC had relied before both the Panel and the Appellate Body on the Schedules of other Members who had scheduled only one form of export subsidy commitment (either a budgetary outlay or quantity commitment). However, this was nowhere analyzed in the Appellate Body Report. Again, the contrast with the "US – Gambling" report was striking. There the Appellate Body had consecrated two full pages of analysis to the Schedules of other parties (paras. 182-186). These differences in treatment should be of concern to all because the Appellate Body's hard-won reputation depended, *inter alia*, on Members' confidence that it would apply detailed legal reasoning equally to all Members on a consistent basis. That report was not, in the EC's view, sufficient in this respect. These were not the only concerns with the Appellate Body's reasoning. For instance, the EC could see no reason, why, alone among the covered agreements, the Agreement on Agriculture contained a self-standing dynamic obligation to reduce export subsidy commitments rather than to respect the obligations set out in the schedules, which had been subject to a formula agreed in a "Modalities Paper".

70. Another concern was the Appellate Body's use of Article 9.2(b)(iv). Much of the Appellate Body's reasoning was based on this provision, which the Appellate Body had considered that the EC had not disputed that the Appellate Body had used this provision. However, the EC had in fact expressly stated in its Appellant's submission (footnote 91) that it had not agreed with the Panel's finding that it had used this provision. Turning to C sugar, the EC had hoped that the Appellate Body would use this opportunity in order to correct, or at least limit, the unintended consequences of its earlier and, in the EC's view, insufficiently considered interpretations of Article 9.1(c) of the Agreement on Agriculture in the "Canada – Dairy" cases. Unfortunately, the Appellate Body had chosen not to use this opportunity to address these deficiencies. This Report had gone even further than "Canada – Dairy" and should be a cause of great concern for all Members. The Appellate Body has redrawn the boundary between domestic support and export subsidies in a manner which could not have been anticipated by any Member at the time of the conclusion of the WTO Agreement. Furthermore, it had done so according to one criterion (cost of production) which would be extremely difficult to enforce in practice, both for the authorities of the Member concerned and for panels, and which made Members responsible for the actions of private parties over which they had no control.

71. The Appellate Body's reading of the term "payment" as encompassing a purely internal allocation of resources within the same economic entity, where no money or goods changed hands, could not be reconciled with the ordinary meaning of that term. The Appellate Body's reading was based on little else than its perception of what it described as the EC's "formalistic" position could lead to "circumvention". The Report, however, had not substantiated this perception. This way of reasoning assumed what it purported to demonstrate; i.e. that exports of C sugar benefitted from export subsidies. Moreover, Article 10.1 of the Agreement on Agriculture already addressed specifically the possibility that Members might seek to circumvent their commitments. The complainants, however, never argued that the alleged "cross-subsidization" was an "export subsidy" within the meaning of that provision. The EC found even more troubling the Appellate Body's holding that the existence of a subsidy did not require a benefit. The existence of a benefit was inherent in the notion of subsidy. Indeed, it was a matter of common sense – as well as of definition of a subsidy in the SCM Agreement that there could be no subsidy without a benefit. The only reason given by the Appellate Body was that the term "benefit" was not expressly mentioned in

Article 9.1(c). The EC noted that, by the same token, terms such as "cross-subsidization" or "cost of production" did not appear anywhere in the Agreement on Agriculture. The EC regretted that the Appellate Body had not given greater consideration to this important issue, in particular by examining the detailed contextual arguments submitted by the EC and some third parties. Likewise, the EC regretted that the Appellate Body had not addressed in a meaningful manner the extensive arguments and undisputed evidence submitted by the EC to the effect that by bringing this dispute with respect to the exports of C sugar the complainants had acted inconsistently with the principle of good faith and Article 3.10 of the DSU and, subsidiarily, that the complainants could not claim any nullification or impairment because, at the time of the conclusion of the WTO Agreement they had no expectations that the EC would cease its exports of C sugar. The participants in the Uruguay Round had agreed to reduce export subsidies by 21 per cent. Yet, as a result of the Appellate Body's ruling, the EC would have to reduce its exports of sugar by 72 per cent. The complainants knew only too well that the EC had never agreed to such reduction. Interpretations of the Appellate Body, which had effectively modified the value of concessions to such an extent after a long time, might deter the negotiation of further concessions.

72. The representative of Mauritius, speaking on behalf of the 14 ACP countries, which had participated in the proceedings of the Panel and the Appellate Body, said that the Members in question were deeply disappointed and concerned with the decision of the Appellate Body to uphold certain findings of the Panel in the case on the EC sugar regime. This would have a serious socio-economic impact on the weak and vulnerable ACP countries and would be against the letter and spirit of the WTO and the Marrakesh Agreements. Already one ACP country, St Kitts and Nevis was being forced out of sugar; nobody wished to have the WTO Organization where small Members had only the exit route. This would seriously undermine the confidence of the small and vulnerable economies in the multilateral trading system. The ACP countries concerned participated actively as third parties throughout the Panel and appeal proceedings. They had strongly presented their case against the upholding of the claims of the complainants, which would adversely affect the trade and economic benefits derived from the export of sugar to the EC under the Sugar Protocol. It was to be noted that the quantity of sugar the ACP countries exported to the EC since 1975 had not increased and they were not in any way responsible for the imbalance in the world market. In fact, the decreased level of world market price arose because of the world market was a residual market, used by large producers to dump their increasing surpluses. In making their case, the ACP countries had emphasized the socio-economic importance and the multifunctional role that the sugar industry continued to play in their respective countries. The benefits they derived from this important long-standing trading relationship with the EC was critical for the survival of their fragile sugar industries and the livelihood of hundreds of thousands of poor farmers without alternative sources of income. But, the pleas of the ACP countries concerned had not been heard by the Panel and the Appellate Body. This insensitivity was regretted. The ACP countries, however, drew some comfort from the assurances that the European Commission would continue to defend the valid interest of sugar producers and consumers in both the EC and ACP countries and the statement of Commissioner Boel to the effect that "the ACP countries' strong intervention in the case shows their concern at the effect this ruling could have on their preferential access to the EU market. The Commission shares this concern".

73. The ACP countries equally noted that the complainants had, on several occasions, indicated that they would do nothing against the interests of the ACP. They expected them to uphold their commitments when the findings of the Panel would be implemented and moreover, accept that the ACP be involved in any negotiations on implementation. They strongly believed that the Appellate Body's rulings would have systemic implications for the three pillars which underpinned the Agreement on Agriculture. The Appellate Body Report had created an element of uncertainty which now needed to be addressed in the ongoing Doha Round negotiations. The ACP countries had always held the view that the complainants' grievances could have been best addressed in the ongoing Doha Round, thus ensuring a balance between the rights and obligations of all Members. The Appellate Body's decision not to make a ruling on the complainants' claim under the SCM Agreement had given them some degree of satisfaction. They had also noted the statement by the European Commission

that it would comply with the findings and recommendation of the Appellate Body and that it would honour its international commitments. In this respect, the ACP countries wished to recall the suggestion made by the Panel on the concerns and interests expressed by the ACP third-parties regarding the continued preferential access to the EC's market for their sugar exports. In this regard, the Panel had noted the statement made by the EC on 14 July 2004 that the EC "fully stands by its commitments to ACP countries and India" and that, with the reform of its sugar regime, the ACP countries and India would "get a clear perspective, keep their import preferences and retain an attractive export market". The Appellate Body had not modified this suggestion and it therefore stayed.

74. It is noteworthy that the Appellate Body had recognized that the footnote regarding ACP sugar indeed had an effect and it had not agreed with the Panel that the footnote was of no legal effect. This would have to be taken into account in the reform of the EC sugar regime and the ACP countries had legitimate expectations in getting fully involved with the EC in the shaping up of the reform. It had been often stated that the ACP was averse to change and was overly dependent on preferences. The complainants and indeed the WTO membership as a whole, had recognized the ACP specific situation and constraints, which were inherent and permanent features of their vulnerable small economies. The ACP countries appreciated this recognition and understanding. The ACP countries had always underscored that they were not against the reform of the EC's sugar regime. However, they wished a reform which was fair and equitable to all stakeholders and which would fully comply with the legal, moral and political commitments of the EC *vis-à-vis* the ACP sugar supplying countries, in particular its commitments under the ACP-EC Sugar Protocol and Article 36(4) of the Cotonou Agreement, which called for safeguarding of the benefits to the ACP countries while taking into account the special legal status of the Protocol. The ACP countries had no doubt that the EC would take this fully into account, along with the Appellate Body's findings and recommendations as well as the important suggestion made by the Panel in paragraph 8.8 of its Report, while considering proposals for the reform of the EC sugar regime.

75. The representative of Canada said that his delegation wished to join other Members in thanking the Panel, the Appellate Body and the respective Secretariats for their work in this dispute. At the present meeting, he wished to make two substantive comments in respect of the Appellate Body Report. He recalled that during the Appellate Body proceedings, Canada had expressed its concern that upholding the Panel's finding that "payments" "on the export" of a product needed not be "contingent on" the export but, rather, must be "in connection" with exports, would blur the distinction between the disciplines on domestic support and on export subsidies, which was an essential feature of the Agreement on Agriculture, and would expose *bona fide* domestic support to challenges. Canada was pleased to note that, in keeping with the export subsidy disciplines set out in the Agreement on Agriculture, the Appellate Body had emphasized that its findings of violation had been based in part on the formal EC requirement that C sugar be exported. Nevertheless, Canada had also a number of serious reservations about the reasoning used by the Appellate Body in this case. Canada was disappointed with the Appellate Body's decision to, in essence, simply update "Canada – Dairy" without further consideration of its flaws. Here again, Members should be concerned with the Appellate Body's approach. The Appellate Body had broadened the scope of a "cross-subsidization" standard that could be found nowhere in the Agreement on Agriculture. Canada did not see how this standard – where no benefit was required – and its application in Article 9.1(c) could be reconciled with the existing subsidy disciplines in the WTO Agreement. The Agreement on Agriculture recognized that some spill-over between domestic support and export production could occur. Yet the "cross-subsidization" standard used provided very little guidance to Members on how to manage lawful domestic support, a fact made all the more challenging given that a single private party's internal reallocation of resources could be considered a subsidy. In Canada's view, the Appellate Body had clearly turned Article 9.1(c) into an anti-dumping provision, with none of the guidance offered by the Anti-Dumping Agreement. At the present meeting, he also wished to make one comment on the statement made by Thailand and Brazil with respect to judicial economy. These countries had noted that the Appellate Body had made its finding on judicial economy and had

refused to complete the analysis on the basis that there were no facts on the record. In this context, there was another basis mentioned by the Appellate Body, which was of systemic importance. The Appellate Body noted that the relationship between the SCM Agreement and the Agreement on Agriculture was a particularly sensitive one that Members and the disputing parties had not had the chance to fully argue this issue before the Appellate Body. In this sense, the Appellate Body had recognized the sensitivity that had been expressed in the DSB with respect to arguments that did not have full airing before the Appellate Body. Thus, Members needed to be mindful of the sensitivity of the Appellate Body to that concern. Finally, Canada would urge the EC to take every action necessary to minimize the adverse impact that the implementation of this Report could have on the ACP countries and India.

76. The representative of St. Kitts and Nevis said that his country, as a third party to this dispute, fully supported the statement made by Mauritius on behalf of the ACP countries. Indeed St. Kitts and Nevis, as a small and vulnerable Member of the WTO, with a population of approximately 45,000, had now the difficult task of minimizing and hopefully averting economic and social dislocation by planning transiting mechanisms out of sugar and of finding new opportunities in sugar where available. The task ahead was difficult and even more so to explain to dislocated farmers. His country was reminded of the negative affects that loss of market for bananas caused on the economy of its sister island Dominica. St. Kitts and Nevis looked forward to their attempts at adjustment being taking fully into account.

77. The representative of India said that his country had participated as a third party in this dispute. India thanked the members of the Panel and the Secretariat for their hard work in producing the Report which had come up for adoption at the present meeting. India noted with satisfaction the disagreement of the Appellate Body with the Panel's finding that the footnote in EC's Schedule had no legal effect; Schedules of Members were treaty terms and had to be given their legitimate meaning in harmony with the rest of the treaty. India also expressed satisfaction that the Appellate Body had upheld the objective of security and predictability of the dispute settlement system by maintaining the same average cost of production benchmarks under Article 9.1 of the Agreement on Agriculture in this case as it had developed in the "Canada – Dairy" cases. India wished to point out another issue, more recently arising more frequently, that had a systemic implication on the working of the dispute settlement mechanism. This related to the need for a remand provision in the DSU. In this dispute, the Appellate Body had had to declare the Panel's use of the judicial economy with respects to the complainants' claims under Article 3 of the SCM Agreement as a "false judicial economy" and thus an error on the part of the Panel. However, while attempting to complete the legal analysis thereafter, the Appellate Body had expressed its inability to complete the legal analysis because they had not had on the record the requisite factual findings by the Panel among other reasons. This clearly called for a remand provision in the DSU. A contribution by some countries in the Special Session of the DSB, including India, had raised this as a systemic issue needing resolution. India invited Members to work on progress on this issue in the Special Session. Finally, India noted with satisfaction that the Panel, in its suggestions under Article 19.1 of the DSU, had suggested to the EC that in bringing its exports of sugar into conformity with its obligations, the EC considered measures to bring its production of sugar into line with domestic consumption whilst fully respecting its international commitments with respects to imports from developing countries. That would include the commitments towards the ACP countries and India. India noted with satisfaction the EC's statement made in July 2004, which had also been quoted at the present meeting by Mauritius.

78. The representative of Brazil said that his delegation wished to refer to the point raised by Canada with regard to judicial economy. He then reiterated what he had already stated in his earlier statement, namely that: "Unfortunately the Appellate Body found that there were not sufficient elements for it to complete the legal analysis required in the case". He said that in his statement he had not mentioned facts, but elements. He hoped that the clarification that he had just provided would respond to Canada's concern.

79. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS265/AB/R – WT/DS266/AB/R – WT/DS283/AB/R and the Panel Reports contained in WT/DS265/R; WT/DS266/R; WT/DS283/R, as modified by the Appellate Body Report.

4. Dominican Republic – Measures affecting the importation and internal sale of cigarettes

(a) Report of the Appellate Body (WT/DS302/AB/R) and Report of the Panel (WT/DS302/R)

80. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS302/11 transmitting the Appellate Body Report on: "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes", which had been circulated on 25 April 2005 in document WT/DS302/AB/R, in accordance with Article 17.5 of the DSU. He also wished to remind delegations that, in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

81. The representative of Honduras said that his country wished to take this opportunity to thank the Panel and the Appellate Body for the time and effort they had devoted to this dispute settlement proceeding. Honduras was not a frequent complainant in WTO dispute settlement proceedings. However, given the lack of compliance by the Dominican Republic of its WTO obligations, Honduras had been forced to seek the establishment of a panel. Honduras noted that its position had been vindicated in a large manner, not only by the Panel but also by the Appellate Body. Honduras was pleased that it had prevailed in the vast majority of its claims, which constituted the main motivation to pursue this dispute. Honduras had challenged the requirement that both imported and domestic cigarette packages had to have a stamp tax affixed in the territory of the Dominican Republic, with resulting additional procedures and costs for imported cigarettes. The Panel had held that a formally identical requirement on imported and domestic goods, such as the tax stamp requirement imposed by the Dominican Republic, might nevertheless result in less-favourable treatment to imported products; and had found that there was a *de facto* violation of Article III:4 of GATT 1994. The Dominican Republic had conceded the inconsistency of its measure by not appealing the Panel's findings under Article III:4, but had only appealed the Panel's interpretation and application of the "necessity" test made by the Panel under Article XX(d) of GATT 1994.

82. The Appellate Body had upheld the Panel's finding that the stamp tax requirement was not "necessary" within the meaning of Article XX(d), thus confirming that the measure of the Dominican Republic violated the GATT 1994. The Panel had also found that the Dominican Republic's two per cent transitional surcharge for economic stabilization was an "other duty or charge" that was inconsistent with Article II:1(b) of GATT 1994. It had also found that the Dominican Republic's 10 per cent foreign exchange fee was an "other duty or charge" which was inconsistent with Article II:1(b) of GATT 1994. Furthermore, the Panel had found that the foreign exchange fee could not be justified under Article XV:9(a) of GATT 1994 because it did not constitute an exchange restriction within the meaning of Article XV:9(a). The Panel had also made findings of inconsistency with Article III:2 and Article X:3 with respect to certain rules and administrative practices used by the Dominican Republic to determine its tax base for imported cigarettes. These findings had not been appealed by the Dominican Republic.

83. Despite the fact that in general Honduras was very pleased with the rulings made by the Panel and the Appellate Body, it wished to express a particular concern related to the manner in which the bond requirement had been examined. The Panel had concluded that Honduras had not established

that the bond requirement accorded treatment less-favourable to imported cigarettes than that accorded to like domestic cigarettes in violation of Article III:4. The Appellate Body had upheld the findings of the Panel, but on the basis of a lightly different reasoning that in Honduras' opinion was problematic and created a systemic concern.

84. According to the Appellate Body, if the existence of "*a detrimental effect* [on foreign products] is explained by factors or circumstances unrelated to the foreign origin of the product", there was no violation of Article III:4 of GATT 1994. This reasoning applied to that matter at hand had led the Appellate Body to conclude that " ... the difference between the per-unit costs of the bond requirement does not depend on the foreign origin of the imported product". Such an approach represented a departure from previous GATT and WTO jurisprudence on national treatment obligation under Article III:4. In previous cases *de facto* claims had been established against measures that made no distinction based on the origin of the product, the measures nevertheless resulted in less-favourable treatment for the imported products. In effect, in the same proceedings, Honduras had prevailed in relation to the tax stamp requirement in spite of the fact that the text of the legislation established it without making distinction to the origin of the product, it constituted however a *de facto* violation of Article III:4.

85. In the same way, in the "Chile – Alcohol" case, the Appellate Body had found that different level of taxes imposed in accordance with the alcohol content of the liquor was in violation of Article III:2 because it discriminated against imported liquor which had a higher alcohol content. Similarly, in the "Canada – Autos" case, the Panel had found that although the criteria for Canada granting an import duty exemption was not specifically based on nationality or on the foreign origin of the product, it had nevertheless resulted in less-favourable treatment being granted to other Members. WTO jurisprudence had consistently looked to the application of the measure, its operation and its effects on conditions of competition in the relevant market in order to determine whether less-favourable treatment was provided to imported products. Given the Appellate Body's statement in the above-mentioned Cigarettes case, it would be more difficult to bring a successful *de facto* national treatment claim in future. This issue was of systemic concern to all Members. Despite this specific concern, Honduras was pleased that its claims had been upheld. Honduras was pleased to seek adoption at the present meeting of the Panel and the Appellate Body Reports. Honduras called upon the Dominican Republic to implement the DSB's rulings and recommendations in a prompt manner. Honduras was ready to discuss with the Dominican Republic the implementation period that it would require to bring their measures into conformity, in the shortest period possible under the Dominican Republic's legislation.

86. The representative of the Dominican Republic said that her country wished to thank the members of the Appellate Body, the Panel and the WTO Secretariat for the time and effort taken in settling the dispute between the Dominican Republic and Honduras. In that regard, her country welcomed the Reports of the Panel and the Appellate Body, but maintained certain reservations on some aspects of the reports. With regard to the substance of the Reports, the Dominican Republic wished to point out that, of the six measures in the claims by Honduras, the Panel and the Appellate Body had found that three were consistent with the WTO rules. The Dominican Republic was satisfied, and attached great importance to the findings of the Panel and the Appellate Body that the bond requirement for importers and domestic producers of cigarettes was not inconsistent with Article XI:1 or, alternatively, with Article III:4 of the GATT 1994, which confirmed that the Dominican Republic had imposed that requirement in a manner consistent with the WTO rules and without discrimination. The Dominican Republic also noted with satisfaction that the Panel abstained from making any recommendation to the DSB on the measure concerning determination of the tax base for the Selective Consumption Tax in the Dominican Republic, since the measures complained of by Honduras were not in force at the time the Panel had been established. The Panel's decision meant that the Dominican Republic had not contravened any GATT or WTO provision in respect of the application of this measure. With regard to the inconsistency of the tax stamp requirement with the WTO rules, the Dominican Republic regretted the finding of the Panel and the Appellate Body

that the tax stamp requirement was not justified under Article XX(d) of the GATT 1994. In her country's view, this requirement was a necessary measure to ensure the enforcement of the Dominican Republic's tax laws and regulations, and to prevent the smuggling of cigarettes. In conclusion, as a Member with great faith in the multilateral trading system and respect for GATT and WTO rules, the Dominican Republic called on the DSB to adopt the Reports contained in documents WT/DS302/R, dated 26 November 2004, and WT/DS302/AB/R, dated 25 April 2005.

87. The representative of the European Communities said that the EC wished to thank the Panel and the Appellate Body as well as the Secretariat for their work on this dispute, in which the EC had participated as a third party because of the high systemic importance of several of the issues raised. In respect of the GATT Article XX defence invoked by the Dominican Republic to justify its tax stamp requirement, the EC was overall satisfied with the analysis by the Panel. However, the EC was concerned about the superficial way the Appellate Body had dealt with some of the arguments brought forward on appeal. The EC failed to see that the Appellate Body had adequately addressed the new arguments. In the EC's view, the Appellate Body should treat the parties' arguments very carefully. In relation to the way in which Article III:4 of GATT 1994 had been applied in this case, first, the EC had some comments on the Appellate Body's reasoning in paragraph 96 of its Report. There, the Appellate Body had considered it to be insufficient for a finding of less-favourable treatment if a detrimental effect on a given imported product was due to factors unrelated to the foreign origin, such as the market share of the given importer in this case. Thus, a per-unit cost that was higher for a given importer than for some domestic cigarettes during a particular period was insufficient, as this effect did not depend on the foreign origin. The EC was somewhat concerned about the Appellate Body's reference to what was and what was not "related to" or "dependent on" a product's "foreign origin". It must be clear that a de facto less-favourable treatment of imports contravened Article III:4 of GATT 1994, as the Appellate Body had also acknowledged repeatedly in its jurisprudence. Thus, it would seem that one should read the Appellate Body's reasoning in the light of its statements that detrimental effects existed for the given importer in this case, as compared to two domestic producers. The EC agreed, if this was to be understood along the lines of previous Appellate Body jurisprudence that less-favourable treatment must exist for "the group of like imported products" as compared to "the group of like domestic products". The EC was not certain whether anything more should be read into the Appellate Body's reference to what was and what was not "related to" or "dependent on" a product's "foreign origin". In the present case, there was no reason to believe that foreign manufacturers, as a group, had smaller market shares than the group of domestic manufacturers. Accordingly, there was no basis to find de facto less-favourable treatment in this case, as opposed to the situation that prevailed in the alcoholic beverages cases.

88. Second, the EC wondered why the Appellate Body had not examined, in its Article III:4 analysis, the fact that the identical bond requirement for imports and domestic products secures taxes to a different extent for those two groups, given that domestic producers faced the Selective Consumption Tax only some time after the sale, whereas imports faced this tax upon importation. Beyond all issues of tax reassessment and readjustment, as well as the purpose of securing other taxes as well, it seemed to the EC that this difference between imported cigarettes and domestic cigarettes was an uncontested fact in this dispute. Therefore, it would have seemed justified to consider this fact in the "less-favourable treatment" analysis, irrespective of what it would have meant for the overall result on this point. Finally, the EC would also like to make one remark on the Panel Report with regard to an issue that had not been appealed. The EC agreed with the Panel's result that Article III of GATT 1994, not XI, applied to the bond requirement. Since this was an internal measure, the EC considered that the conclusion that Article XI was inapplicable was rather straightforward, so it was not entirely clear why the Panel had considered it was necessary to make so many additional findings on Article XI. Among these (notably in paragraphs 7.258, 7.261 and 7.263) were some statements which could be read to suggest that indirect restrictions on importation or exportation were perhaps not covered by Article XI. The EC had doubts in that regard given that indirect restrictions were also restrictions and, therefore, reserved its judgment on this question.

89. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS302/AB/R and the Panel Report contained in WT/DS302/R, as modified by the Appellate Body Report.

5. Proposed nomination for the indicative list of governmental and non-governmental panellists (WT/DSB/W/286)

90. The Chairman drew attention to document WT/DSB/W/286, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panellists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he proposed that the DSB approve the name contained in document WT/DSB/W/286.

91. The DSB so agreed.

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

(a) Statement by the United States

92. The representative of the United States, speaking under "Other Business", said that her country was pleased to report that it had implemented the DSB's recommendations and rulings in the case "United States – Final Dumping Determination on Softwood Lumber from Canada", as adopted at the DSB meeting of 31 August 2004. She said that on 15 April 2005, the US Department of Commerce had issued a new final determination, in which it had calculated new rates of dumping with respect to its antidumping duty investigation on certain softwood lumber products from Canada. In its new determination, the Department of Commerce had revised its calculations in a manner consistent with the DSB's recommendations and rulings. On 27 April 2005, the Department of Commerce's new determination had been implemented as a matter of US law. Accordingly, the dumping margins calculated in the Department of Commerce's new determination applied to entries of softwood lumber from Canada that were entered, or withdrawn from warehouse for consumption, on or after that date that otherwise would have been subject to the original investigation margins.

93. The DSB took note of the statement.

94. Prior to the closure of the meeting, the Chairman said that he wished to say a few words to the US Ambassador, Ms Linnet Deily, since this was the last DSB meeting that she was attending in her present capacity. He said that by consistently representing her country in person at meetings of the DSB she had not only contributed in substance, but had also signalled the importance which she and her country attached to the DSB. He thanked her wholeheartedly for this and wished her all the best for the future.