# WORLD TRADE ORGANIZATION

RESTRICTED

**WT/DSB/M/192**
15 July 2005

(05-3147)


**Dispute Settlement Body**
**20 June 2005**

**MINUTES OF MEETING**

Held in the Centre William Rappard
on 20 June 2005

*Chairman: Mr. Eirik Glenne (Norway)*

Subjects discussed: Page

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

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.32)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.32)

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.17 – WT/DS234/24/Add.17)

(d) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.7)

(e) Mexico – Measures affecting telecommunications services: Status report by Mexico (WT/DS204/9/Add.6)

(f) European Communities – Conditions for the granting of tariff preferences to developing countries: Status report by the European Communities (WT/DS246/16/Add.2)

(g) Canada – Measures relating to exports of wheat and treatment of imported grain: Status report by Canada (WT/DS276/20/Add.1)

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.32)

2. The Chairman drew attention to document WT/DS176/11/Add.32, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 9 June 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 Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that the implementation deadline was just about to expire and the EC was seriously concerned that the United States would again fail to comply with the DSB's rulings and recommendations by that deadline. 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. The EC invited the United States to consider the implications beyond the narrower confines of this dispute. Lack of action by the United States was a serious blow to its commitment to promote effective and non-discriminatory protection of intellectual property rights.

5. The representative of Cuba said that her country considered that it was unacceptable that, only 10 days before expiry of the extended deadline for implementation, which had been granted to the United States by the EC, the United States had again informed the DSB that it was still examining draft legislation that would resolve this matter. The fact that three years after the adoption of the DSB's recommendations the United States had not yet found a satisfactory solution to this dispute – which could only be the repeal of Section 211 – plainly betrayed a lack of respect towards other WTO Members and in particular the country affected. She underlined that the fact that the United States had submitted another status report, which was identical to that submitted at the previous meeting, showing no trace of progress towards a solution, was beyond belief. With non-compliant Members such as the United States, it was very difficult for the DSB to function properly. Indeed, the problem of compliance with the DSB's recommendations had turned into a major defect of the dispute settlement mechanism, which contained no provision to encourage or enforce compliance with the DSB's recommendations. She noted that that matter was being discussed in the context of the negotiations on clarifications and improvements to the DSU. In this connection, Cuba urged Members to work towards DSU provisions that would ensure compliance with the DSB's decisions. Once again, Cuba reminded the United States that it had only 10 days to implement the DSB's recommendations and rulings in the dispute under consideration. Cuba also urged the United States, at long last, to honour its WTO commitments and 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.32)

7. The Chairman drew attention to document WT/DS184/15/Add.32, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

8. The representative of the United States said that his country had provided a status report in this dispute on 9 June 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, on 19 May 2005, legislation had been introduced in the US House of Representatives (H.R. 2473) that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute. The US administration would continue to work with the US Congress to enact this legislation.

9. The representative of Japan said that his country was pleased that a bill to amend the US anti-dumping statute had been introduced to the US House of Representatives on 19 May 2005. He recalled that in 2004 based on the understanding and trust that the United States would finally secure the implementation of the DSB's recommendations and rulings in this dispute, Japan had agreed to a one-year extension of the reasonable period of time; i.e. until 31 July 2005. That reasonable period of time would expire within the next six weeks. Japan urged the United States to take further steps promptly with regard to the consideration by the US Congress of the bill (H.R. 2473) so that the necessary legislative amendments would finally be secured before the end of July 2005. He reiterated that if the United States fell short of implementation by 31 July 2005, Japan would be entitled to the recourse provided under the DSU.

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

(c) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.17 – WT/DS234/24/Add.17)

11. The Chairman drew attention to document WT/DS217/16/Add.17 – WT/DS234/24/Add.17, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

12. The representative of the United States said that his country had provided a status report on 9 June 2005, in accordance with Article 21.6 of the DSU. As noted in that status report, the US administration had proposed repeal of the CDSOA in its budget proposal for fiscal year 2006. In addition, legislation that would repeal the CDSOA had been introduced in the US House of Representatives. The US administration would continue to work with the US Congress to enact legislation, and to confer with the complaining parties in these disputes, in order to reach mutually satisfactory resolutions of these matters.

13. The representative of the European Communities said that on 1 June 2005, the US Customs had published a notice of intent to distribute offset payments under the CDSOA. That document was the first step in the process that would eventually result in a new distribution after 1 October, thus adding to the impairment and nullification already caused not only to the co-complainants in this dispute, but actually to the whole WTO Membership. By contrast, the status report did not record any progress in the implementation process. The EC recalled that since 1 May 2005, it had been applying retaliatory measures on certain US products. The EC had not taken this decision lightly and hoped that it would focus minds and energies on the need to bring rapidly a satisfactory solution to this dispute.

14. The representative of Canada said that his country noted the US status report concerning the Continued Dumping and Subsidy Offset Act of 2000. 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 by repealing the Byrd Amendment.

15. The representative of Korea said that his country noted the statement made by the United States and its status report regarding implementation of the DSB's recommendations and rulings in the dispute: "United States – Continued Dumping and Subsidy Offset Act of 2000" (CDSOA). Korea also observed that the legislation repealing the CDSOA had been introduced in the US House of Representatives and had subsequently been referred in March to the Committee on Ways and Means. These developments were positive signs for resolving this prolonged dispute, and Korea hoped that the introduced bill would pass through the US Congress and be enacted into law in the near future. As previously mentioned, eight complaining parties to this dispute, including Korea, had handed the USTR an Aide Memoire on 3 June 2005 that stressed the importance and urgency of implementation of the DSB's recommendations and rulings. Korea hoped that this joint effort by the complaining parties would help facilitate the US implementation.

16. The representative of Japan said that his country took note of the status report of the United States and welcomed the fact that the bill to repeal the CDSOA had been introduced to the US Congress in March. Japan was eagerly awaiting the consideration and passage of the bill by the US Congress without delay. Japan had taken up every opportunity to urge the early repeal of the CDSOA. The importance of complying with the WTO obligations was well-recognized by the United States, as stated expressly during the recent Japan/US bilateral economic-trade talks. Japan strongly called on the United States to take a concerted action towards a prompt implementation of the DSB's recommendations and rulings in this dispute. As from 1 May 2005, Canada and the EC had been imposing additional duties on some US products. In the beginning of June, eight complaining parties, including Japan, had submitted to the US Trade Representative, Mr. Robert Portman, an Aide

Memoire urging the prompt repeal of the CDSOA. Japan was also aware that voices had been raised within the United States to the same effect. Japan was observing carefully how the US Congress might proceed with the consideration of the Bill H.R.1121. Should the United States fail to make any progress, 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.

17. The representative of India said that his country thanked the United States for the status report on this agenda item and noted with great concern that the report showed no change or progress from the one that had been submitted before the DSB at its meeting on 19 May 2005. As his delegation had stated at that meeting, India preferred full compliance by the United States with the DSB's decision rather than the suspension of concessions and other obligations, pursuant to the DSB's authorization, which had already been granted to India. Like previous speakers, India urged the United States to take the necessary steps required to fully comply with its obligations immediately, so that India would not need to be compelled to take steps, like others, to suspend concessions or other obligations.

18. The representative of Brazil said that his country noted with disappointment the US status report in the CDSOA dispute because no substance had been added since the previous reports that had been submitted before the DSB thus far. Like previous speakers, Brazil urged the United States to repeal the Byrd Amendment as promptly as possible.

19. 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.7)

20. The Chairman drew attention to document WT/DS160/24/Add.7, 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.

21. The representative of the United States said that his country had provided a status report in this dispute on 9 June 2005, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration continued to work with the US Congress on this matter. The US administration would continue its consultations with the US Congress and confer with the EC in order to reach a mutually satisfactory resolution of this matter.

22. The representative of the European Communities said that almost five years after the adoption of the Panel Report by the DSB, his delegation was still bound to note that the United States had not brought its Copyright Act into conformity with the TRIPS Agreement. This was a cause of great concern for the EC and, he believed, for the WTO Membership as a whole. Therefore, action by the United States to remedy this unfortunate situation would be important not only from the point of view of EC right holders, but also from a more general perspective, as it would dispel any doubts about the US commitment to appropriate copyright protection. The EC expected that the United States would accord the highest priority to the resolution of this issue of great 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.

23. 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.6)

24. The Chairman drew attention to document WT/DS204/9/Add.6, 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.

25. The representative of Mexico said that on 2 June 2004, his country and the United States had reached an agreement on the implementation in the case on "Mexico – Measures Affecting Telecommunications Services". He recalled that that 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 13 months following the adoption of the Panel Report, the regulations needed to authorize, under Mexican law, the issuing of permits for resale of switched international long-distance telecommunications services.

26. He recalled that since 2004 Mexico had complied with the first of its commitments by eliminating the aspects of its International Long-Distance Rules that the Panel Report considered to be WTO-inconsistent. In that respect, in April 2005, Mexico had issued a draft regulation for the marketing of telecommunications services. Under the provisions of this instrument, companies established in Mexico, whatever their country of origin, may 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 all comments on the draft had been received, and the necessary domestic procedures for the final publication of the regulation had been 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.

27. The representative of the United States said that his country thanked Mexico for its status report. The expiration of the reasonable period of time was now close at hand, and the United States hoped that Mexico would be able to successfully implement its proposed regulations for the resale of telecommunications services, the last element of their implementation agreement.

28. 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.2)

29. The Chairman drew attention to document WT/DS246/16/Add.2, 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.

30. The representative of the European Communities said that on 20 April 2004, the EC had confirmed its intention to implement fully the DSB's recommendations and rulings in this dispute. Already on 20 October 2004, the European Commission had 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, that proposal was currently under discussion within the EC Council.

31. The representative of India said that his country wished to thank the EC for its third status report regarding the 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 that had been received by the DSB. However, India recognized that the EC had until 1 July 2005 to comply with the DSB's decision. India hoped that the EC would take 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.

32. 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/Add.1)

33. The Chairman drew attention to document WT/DS276/20/Add.1, 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.

34. The representative of Canada said that his country was pleased to inform the DSB that legislation to bring Canada into compliance with its WTO obligations had been passed on 19 May 2005. This legislation, along with associated regulatory changes now under way, would come into force on 1 August 2005, the agreed upon deadline for compliance. Canada welcomed this opportunity to provide a status report on its implementation of the rulings and recommendations in this matter. He noted that Canada's written report had been filed with the DSB on 4 May 2005.

35. The representative of the United States said that his country thanked Canada for its status report. The United States appreciated the additional information provided therein in response to its questions raised at the previous DSB meeting. At the present meeting, the United States asked two follow-up questions to confirm its understanding of that information. The United States understood, based on Canada's status report, that Canada intended to promulgate a new regulation requiring elevator operators to notify the Canadian Grain Commission of the origin of all grain. The United States asked if Canada could confirm that this was the only new regulation it intended to promulgate to replace the old measures related to mixing foreign grain with Canadian grain and entry of foreign grain into Canadian grain elevators. In addition, the United States asked if Canada could confirm that it did not intend to introduce any new regulations related to the extension of the rail revenue cap to cover foreign grain shipments.

36. The representative of Canada said that both questions were pertinent and, quite naturally, as Canada had chosen to implement in good faith, it would not seek to undo by other means what it was doing through the implementation measures. To the best of his understanding, the answer to the first question was that Canada did not intend to promulgate new regulations relating to the origin of grain, other than that which it had notified. With respect to the second question, Canada did not intend to introduce new measures in respect of the revenue cap, other than that which it had indicated. That was his understanding of the situation. Nevertheless, he would undertake to refer these issues to his authorities and in the next status report, which he hoped would be the final report, Canada would confirm the state of affairs at that point.

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

## 2. Egypt – Anti-dumping duties on matches from Pakistan

(a) Request for the establishment of a panel by Pakistan (WT/DS327/2)

38. The Chairman drew attention to the communication from Pakistan contained in document WT/DS327/2, and invited the representative of Pakistan to speak.

39. The representative of Pakistan said that his country welcomed the opportunity to state the views of Pakistan regarding its request for the establishment of a panel, set out in document WT/DS327/2. On 21 February 2005, Pakistan had requested consultations with Egypt regarding definitive anti-dumping duties imposed on imports of matches in boxes from Pakistan. Consultations had been held with Egypt on 21 March and 3 June 2005. Despite Pakistan's efforts, and contrary to its intentions, those consultations had failed to resolve Pakistan's concerns about the Egyptian measure at issue. Pakistan regretted that the consultations process had proved not to be an adequate forum in which to fully address Pakistan's concerns. Pakistan, therefore, continued to consider that Egypt's actions leading to, and the imposition of, the anti-dumping duties at issue in this dispute to be inconsistent with Egypt's obligations under Article VI of GATT 1994 and the provisions of the Anti-Dumping Agreement cited by Pakistan. Pakistan, therefore, felt that it had no option, but to request the establishment of a panel to address the matter set out in the panel request. Pakistan trusted that the panel process would provide a full opportunity to address and resolve all of its concerns regarding the measure at issue.

40. Pakistan's panel request spoke for itself, and at the present meeting he did not wish to repeat all of Pakistan's specific concerns. He only wished to emphasize that in Pakistan's view, the imposition of definitive anti-dumping duties was inconsistent with the obligations of Egypt under Article VI of GATT 1994 and the provisions of the Anti-Dumping Agreement that had been cited by Pakistan. Furthermore, this imposition frustrated the efforts taken by Pakistan to promote its exports in the context of South-South trade. Egypt was one of Pakistan's biggest markets for the products at issue. Exports to Egypt had been severely affected since the imposition of the contested measures. Therefore, it was particularly important for Pakistan that a panel be established at the present meeting, and that the Panel complete its task within the six-month time-frame envisaged in Article 12.8 of the DSU.

41. He noted that Article 3.10 of the DSU stated that "the use of dispute settlement procedures should not be ... considered as [a] contentious act". That same Article obliged WTO Members to engage in dispute settlement procedures in good faith in an effort to resolve disputes. In requesting a panel in this dispute, Pakistan had been guided by that Article. Pakistan enjoyed excellent relations with Egypt, and viewed this dispute as simply a disagreement between friends that would not affect the valued relationship between the two countries. Pakistan was confident that Egypt would share a common goal with Pakistan; i.e. to assist the panel and expedite the proceedings, with a view to finding a positive solution to this dispute. Pakistan, therefore, hoped that Egypt would join in the consensus to establish a panel at the present meeting.

42. The representative of Egypt said that, like Pakistan, Egypt valued the relationship between the two countries. Egypt was also a strong believer in South-South trade as the main engine for development and Pakistan was one of those countries which had been trading with Egypt for a long time. Therefore, his delegation shared the feelings expressed by Pakistan. However, Egypt found it really regrettable that Pakistan had decided to pursue this matter further by requesting the establishment of a panel for several reasons.

43. First, Egypt believed that it had done its utmost to resolve this dispute in a mutually satisfactory manner. As stated by Pakistan, during the two rounds of consultations that had been held in Geneva on 21 March and 3 June 2005, Egypt had addressed all the concerns of Pakistan and had provided a full explanation of the various aspects of its anti-dumping investigation concerning the

import of matches in boxes imported from or originating in, *inter alia*, Pakistan. It was, therefore, surprising that some of the issues appeared to have been cleared through the consultations were still included in the panel request. For example with regard to the treatment reserved by the investigating authority to cooperating exporting producers to take into account the difficulties faced by them; or, for example, with regard to the use of best information available.

44. Second, Egypt noted that Pakistan's request for the establishment of a panel had failed to satisfy the requirements of Article 6.2 of the DSU. The list of measures set forth in footnote 1 was not exhaustive. It only referred to some of the determinations issued by the Egyptian authorities in the course of the investigation. In addition, in its request for the establishment of a panel, Pakistan had raised claims outside the purview of the consultations. For example, Pakistan had cited breaches of Article 12.1 of the Anti-Dumping Agreement, a provision never addressed during the consultations. Moreover, some of the claims raised by Pakistan, particularly with regard to the injury determination, were insufficiently specific to present clearly the legal problems that were alleged to be the issue.

45. Third, the proceedings concerning the anti-dumping measures imposed by Egypt on matches in boxes imported from Pakistan were still pending before the Administrative Court in Egypt. Since the Court's ruling was expected in the near future, Egypt considered that Pakistan's decision to proceed further by requesting the establishment of a panel was premature. Finally, despite the claims raised by Pakistan in its request for the establishment of a panel, Egypt was confident that these measures were consistent with the relevant provisions of Article VI of GATT 1994 and of the Anti-Dumping Agreement. In light of the foregoing, Egypt unfortunately was not in a position to accept Pakistan's request for the establishment of a panel at the present meeting.

46. The representative of Pakistan said that his country was disappointed that Egypt had chosen not to join in the consensus to establish a panel at the present meeting. The companies affected by the imposition of anti-dumping duties issues in this case were small and vulnerable and depended on their market access to Egypt. Any further delay in resolving this issue would be detrimental to their survival. Pakistan, therefore, looked forward to this matter being discussed at the next meeting of the DSB on 20 July 2005 and to the panel being established on that date.

47. The DSB took note of the statements and agreed to revert to this matter.

**3. European Communities – Measures affecting trade in commercial vessels**

(a) Report of the Panel (WT/DS301/R)

48. The Chairman recalled that at its meeting on 19 March 2004, the DSB established a panel to examine the complaint by Korea pertaining to this matter. The Report of the Panel, contained in document WT/DS301/R had been circulated on 22 April 2005 as an unrestricted document, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. He said that the Panel Report was now before the DSB for adoption at the request of Korea. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

49. The representative of Korea said that first his country wished to express its gratitude to the members of the Panel and the Secretariat for their hard work in this case "European Communities – Measures Affecting Trade in Commercial Vessels". Korea considered this an important case in defense of the WTO dispute settlement system. As Members were aware, there had been a long-running disagreement between Korea and the EC regarding shipbuilding. The failure of the consultations between the parties had led the EC to initiate the Panel's proceedings in "Korea – Commercial Vessels" (DS273) on 21 July 2003. Had that been the only result of the failure of the consultations, Korea would have been satisfied with seeing the disagreement resolved within the context of the WTO dispute settlement system. Unfortunately, however, the EC had chosen to impose

a retaliatory measure, the so-called "Temporary Defense Mechanism", against Korea, at the time of the initiation of DS273. The EC's measure and accompanying EC member States' measures had resulted in discriminatory payments of six per cent *ad valorem* being granted to EC shipbuilders whenever they were competing against Korean shipbuilders.

50. On 7 March 2005, the DS273 Panel had rightly found that the measures related to restructuring of Korean shipyards, which was the basis of the EC's retaliatory measures, were not subsidies. It had now become clear that Korea had suffered for three years as a result of these groundless and unilateral retaliatory measures taken by the EC. This demonstrated perfectly why Members should not try to take the law into their own hands, and prejudge the outcome of WTO dispute settlement proceedings with their own unilateral measures. The Panel Report in this case (DS301) had made a strong statement against unilateralism: "Members may not seek to obtain results that can be achieved through the remedies of the DSU by means other than recourse to the DSU."[1] The settlement of disputes regarding WTO obligations must remain within the confines of the dispute settlement system. This was the most important lesson that the Panel had brought to Korea. While Korea was satisfied with the Panel's important findings and rulings on the issue of unilateralism, it did have some concerns with the Panel's ruling regarding Article 32.1 of the SCM Agreement. With respect to Article 32.1, the Panel had made a factual finding that the EC measures were "counter-subsidies". The Panel had considered that such counter-subsidies had satisfied the first part of the test under Article 32.1 in that they were "specific action" related to the alleged Korean subsidization. However, the Panel had found that they were not "against" alleged Korean subsidies. Given the factual finding that the EC measures were counter-subsidies, it was inexplicable how such measures could not be considered as being against the alleged Korean subsidies. That was precisely what it meant to be "counter" to something. Strangely, the Panel had argued that there must be something more to the measure than just being "against". As an additional element to be sufficiently "against", the Panel had given an example that "the counter-subsidy was funded through a transfer of financial resources between the foreign producer/exporter and the domestic competitor."[2]

51. This example had no basis in the treaty language. There was no further test saying that it must be very much against the alleged subsidies or must be against such alleged subsidies in a form that required a transfer of financial resources. As had been noted in this case, there were relatively few imports of ships into the EC. In such situations, there was no jurisdictional basis for the EC to compel such a financial transfer industry from the Korean shipyards to the EC industry. Korea was of the view that the Panel had erred in its legal interpretation of Article 32.1 of the SCM Agreement. However, despite Korea's concerns about some aspects of the Panel's decision, Korea had decided not to appeal, in consideration that this dispute was fundamentally about unilateralism and the integrity of the WTO dispute settlement system. Korea considered this a very important decision applying Article 23 of the DSU and welcomed the Panel's decision. A sense of responsibility as a leading shipbuilding industry was also considered in reaching the decision not to appeal. Both Korea and the EC were major leaders in the world shipbuilding industry. Given the magnitude of shipbuilding industry within, and its importance to, the global economy, further confrontation between the major leaders might bring adverse effects on a global scale. Certainly, that was not what Korea wanted to see happen. Korea wished to turn back from the past now, and to step forward with the EC in the direction of enhancing the shipbuilding industry so that all participants shared the benefits. While the EC's measure had expired, it was important to note that the EC member States were permitted for up to three years after the authorization of funding to actually make the implementing transfers of such funds. In light of this, and the Panel's statements that such continuing implementation would be covered by the Panel's recommendations, Korea urged the EC and its member States to immediately halt these illegal transfers of funds. Korea reserved the right to request consultation with the EC on this matter whenever necessary. Before concluding, Korea wished, once again, to thank the Panel for its hard work and requested that the DSB adopt the Panel Report as contained in WT/DS301/R.

[1] Panel Report at para. 7.196.
[2] Panel Report at para. 7.194.

52. The representative of the European Communities said that, first of all, the EC wished to thank the Panel and the Secretariat for their work. While disagreeing with some aspects of the findings reached, the EC had agreed with many other aspects of this Report and had acknowledged the time and efforts dedicated to this dispute. The EC welcomed the fact that the Panel had dismissed the vast majority of the claims made by Korea and had found that the Temporary Defensive Mechanisms (TDMs) did not violate any of the obligations under the GATT 1994 and the SCM Agreement. However, the EC failed to understand how the TDM which was not a specific action against subsidization under Article 32.1 of the SCM Agreement was nevertheless an attempt to induce Korea to stop subsidization of its shipyards and, therefore, did not respect the obligation under Article 23.1 of the DSU to use exclusively the WTO dispute settlement system to solve a dispute over Korean subsidization of shipyards. Actually, the introduction of the TDM had responded mainly to the non-implementation by Korea of a bilateral agreement on injurious pricing, not to an alleged breach of WTO obligations. To this end, the TDM Regulation had provided for a limited introduction of subsidies under strict State aid rules. To achieve this, the EC had applied objective criteria in terms of market – only where there was competition from Korea – and in terms of timing – until 31 March 2005 at the latest or earlier should the WTO dispute settlement be resolved. All that the EC was trying to do was to allow all EC shipyards to receive assistance in the sectors and circumstances where unfair competition had been established. The TDM had never been conceived as a unilateral act falling within the sphere of WTO law. The EC had always been and continued to be a key promoter of multilateralism in the WTO and elsewhere. Despite these reservations, the EC had decided not to appeal. Since the TDM regulation had expired on 31 March 2005, the question had now become theoretical and the EC did not wish to overburden the Appellate Body and the dispute settlement system. Finally, he said that the Panel's recommendations did not address the issue of payments. Actually, despite Korea's specific request, the Panel had expressly declined to make recommendations in this respect.

53. The representative of Korea said that his country did not wish to repeat the legal arguments that it had exchanged with the EC during the Panel's proceedings, but felt obliged to respond briefly to the statement made by the EC on the TDM measures. Korea considered that statement to be factually incorrect. While the ability to authorize new financial supports had expired as of 31 March 2005, that did not mean that the measures were not in effect. This was because the TDM permitted that the actual disbursements could take place for up to three years after the date of granting. Thus, it was Korea's understanding that payments were still being made under the previous authority of the EC's unilateral measure, the TDM. Those payments must cease immediately. There had been discussions on this issue before the Panel. Korea had argued that any such disbursements must end as the measure authorizing them had been found to be inconsistent with the EC's WTO obligations. The EC had never firmly stated that it considered that further implementing steps would be covered by the Panel's ruling. Korea had asked the Panel to make an affirmative statement that such disbursements would be covered. This situation was the reason for a part of the Panel's conclusion that Members might find difficult to understand without further explanation. In paragraph 8.4 of its Report, the Panel stated: "Therefore, the Panel considers that its recommendation does not apply to the schemes that have expired, but except to the extent that those schemes continue to be operational". The Panel had not wished to either make a finding that a party would act in bad faith in implementation by continuing to implement impugned measures, nor had the Panel wished to prejudge the facts. Nonetheless, the Panel had made it abundantly clear that its recommendation to terminate illegal measures did apply to the extent that the schemes remained operational; i.e., if the funds were still being disbursed. In light of this, Korea looked forward to hearing from the EC what steps it was going to take to end the disbursement of funds pursuant to the measures that had been found inconsistent with the EC's WTO obligations.

54. The representative of the United States said that when Korea had first requested the establishment of a panel, the United States had indicated that it would be following this dispute with the utmost interest. At the present meeting, the United States wished to draw Members' attention to a few points that should, in fact, be of interest. His delegation first wished to turn to the Subsidies

Agreement aspects of this dispute. The United States noted that with respect to its claim under Article 32.1 of the Subsidies Agreement, Korea had relied on the reasoning of the Appellate Body in the CDSOA dispute. The Panel had rejected Korea's claim, but it had done so by relying upon an analysis that was difficult to reconcile with the outcome in the CDSOA dispute.

55. In the Report before the DSB at the present meeting, the Panel had noted that the provision of subsidies in response to subsidies provided by another Member could not by itself give rise to a violation of Article 32.1, because that would be tantamount to creating a new class of prohibited subsidies. Rather, the Panel had concluded that there must also be some additional element beyond the effect of the subsidy, such as a "transfer of financial resources" between foreign producers/exporters and their domestic competitors, in order to dissuade subsidization. However, the Panel's analysis of Article 23.1 of the DSU had generated inconsistencies with its analysis of Article 32.1 of the SCM Agreement. First, notwithstanding its SCM Agreement discussion, the Panel in fact had created a new category of prohibited subsidy – subsidies prohibited by Article 23.1 of the DSU. Second, the Panel had found that, for purposes of Article 23.1, the EC subsidies created "an incentive for Korea to alter its conduct" with respect to Korea's own subsidies. In so finding, the Panel had arguably undermined its finding under Article 32.1 that the EC subsidies did not have the effect of dissuading subsidization by Korea. Furthermore, the United States had found quite startling the Panel's reasoning that it was a breach of Article 23.1 of the DSU for a Member to take any steps outside of formal WTO dispute settlement to seek to have another Member remove a WTO-inconsistent measure. This reasoning would have profound implications. It was quite surprising that a panel would think that a Member could not pursue informal means to resolve a dispute, but must instead commit the time and resources needed for formal dispute settlement. Further, under the Panel's reasoning, it would be a breach of Article 23.1 for a Member to simply ask another Member to remove a WTO-inconsistent measure. More specifically, in the context of subsidies, it would be a breach for a Member to do anything to seek to influence the conduct of another Member so that the other Member would remove the adverse effects of a subsidy. However, it was difficult to see how an action that mitigated the adverse effects would not affect the subsidizing Member's conduct. And the Panel's test of "designed to influence the conduct" would appear to be a subjective test, although in other contexts the Panel had emphasized that it did not endorse subjective tests. The United States took no position on whether the EC's measures at issue were consistent or inconsistent with the EC's WTO obligations. However, it did wish to note some of the logical conundrums posed by this Report.

56. The DSB took note of the statements and adopted the Panel Report contained in WT/DS301/R.

**4. Appointment of Appellate Body members**

57. The Chairman said that the appointment of any individual to serve on the Appellate Body required a formal decision of the DSB. Similarly, the reappointment of Appellate Body members for a second term was not automatic and required consideration by, and a formal decision of, the DSB. He recalled that Messrs. Luiz Olavo Baptista, John Lockhart, and Giorgio Sacerdoti had all been appointed by the DSB on 11 December 2001 to serve as Appellate Body members. Their four-year terms would end on 11 December 2005. Pursuant to Article 17.2 of the DSU, they were eligible to be reappointed by the DSB for a second term. All three gentlemen had indicated that they would welcome the opportunity to serve on the Appellate Body for a second term. He further stated that either the reappointment of these three existing Appellate Body members or the appointment of new Appellate Body members to replace them would require a process to be followed by the DSB that would permit a decision to be taken well in advance of the expiry of the terms of Messrs. Baptista, Lockhart, and Sacerdoti so as not to disrupt the smooth and continuous functioning of the Appellate Body. In the light of WTO Members' anticipated focus in the Autumn on work towards the Hong Kong Ministerial Conference, he believed that it was advisable to seek to resolve this issue as expeditiously as possible in the next few months. The DSB had two options to address the expiry of the terms of Messrs. Baptista, Lockhart, and Sacerdoti: (i) reappointment of some or all three

gentlemen for a second term, or (ii) depending on the DSB's decision on reappointment, the appointment of new Appellate Body members for any or all of the three positions for which there was no reappointment. In the past, the DSB had always reappointed Appellate Body members who had expressed a desire to serve a second term, having so renewed the terms of eight Appellate Body members.[3] The DSB's decision on reappointment in those instances had followed a process of informal consultations with delegations conducted by the Chair of the DSB. This process had worked well on previous occasions. At the present meeting, he would, therefore, submit that the DSB follow a similar process to address the expiry of the terms of Messrs. Baptista, Lockhart, and Sacerdoti, and in particular the following four points: (i) to launch, as from 20 June 2005, the process leading up to a decision on the positions held by Messrs. Baptista, Lockhart, and Sacerdoti; (ii) as regards the possible reappointment of Messrs. Baptista, Lockhart, and Sacerdoti, that the Chairman would consult with interested delegations over the next three weeks, with a view to informing the DSB, by 20 July 2005, of the results of these consultations; (iii) that, if his consultations with delegations revealed significant support for the reappointment of all three gentlemen, the DSB be so informed on 20 July and that a formal decision on the reappointment of these three individuals be taken at an early subsequent DSB meeting; and (iv) that, if WTO Members reveal a preference for appointing one or more new Appellate Body members, a process be initiated at the 20 July DSB meeting for the consideration and possible selection of new individuals to serve on the Appellate Body based on past practice. Finally, he invited delegations to comment upon the suggestions outlined by him for arriving at a decision on the positions held by Messrs. Baptista, Lockhart, and Sacerdoti.

58. The representative of the European Communities said that the EC welcomed the Chairman's initiative and agreed with his proposal on this matter.

59. The DSB took note of the statements.

60. The Chairman invited any delegations with views on the positions currently held by Messrs. Baptista, Lockhart, and Sacerdoti to contact him before 15 July 2005 so as to ensure that their views were considered. He would inform the DSB at the 20 July meeting of the results of his consultations with WTO Members. He said that he looked forward to receiving their views.

61. The DSB took note of the statement.

**5. European Communities – Definitive safeguard measure on salmon**

(a) Statement by Chile

62. The representative of Chile, speaking under "Other Business", said that her delegation wished to draw Members' attention to the fact that Chile had withdrawn its request for consultations pertaining to the case: "European Communities – Definitive Safeguard Measure on Salmon". This was due to the fact that the EC had terminated its measures that had been considered by Chile to be inconsistent with the WTO Agreement. She said that the withdrawal of this request had been notified to the DSB and circulated in document WT/DS326/4 on 17 May 2005. In this connection, Chile wished to note that there was a number of requests for consultations, initiated under the DSU provisions, which had neither been the subject of mutually agreed solutions nor had proceeded to the panel stage. Chile would wish to see that this situation be remedied with regard to as many as possible of such requests.

63. She underlined that Chile's decision to withdraw its request on no account prejudged its right to oppose or challenge a similar measure or any other measure affecting farmed salmon or other

[3]Terms were renewed for Appellate Body members in 1997 (for Messrs. Ehlermann, Feliciano, and Lacarte-Muró), 1999 (for Messrs. Bacchus and Beeby), and 2003 (for Messrs. Abi-Saab, Ganesan, and Taniguchi).

products or services of Chilean origin in the EC market. Chile hoped that the EC market would remain open to Chilean exports, and that access would not be inhibited by other protective measures in the future.

64. The representative of the European Communities said that the EC welcomed Chile's initiative to withdraw its consultation request pertaining to the Salmon case.

65. The DSB took note of the statements.