WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/178
17 January 2005

(05-0188)

Dispute Settlement Body
24 and 26 November 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 24 and 26 November 2004

Chairperson: Ms Amina Mohamed (Kenya)

Prior to the adoption of the agenda, the Chairperson said that, in light of certain differences, the consideration of the item related to the requests for suspension of tariff concessions and other obligations *vis-à-vis* the United States in the Byrd Amendment dispute would have to be postponed in order to enable further consultations in an effort to finding a solution. Accordingly, she proposed that the DSB agree to suspend the proceedings of the present meeting in respect of the agenda item to which she had just referred with a view to re-convening as soon as possible.

The DSB so agreed.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.32 – WT/DS162/17/Add.32)

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.25)

(c) United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan: Status report by the United States (WT/DS184/15/Add.25)

(d) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.10 – WT/DS234/24/Add.10)

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

(f) United States – Final countervailing duty determination with respect to certain softwood lumber from Canada: Status report by the United States (WT/DS257/14)

1. The Chairperson 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". She proposed that the six sub-items to which she had just referred be considered separately.

(a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.32 – WT/DS162/17/Add.32)

2. The Chairperson drew attention to document WT/DS136/14/Add.32 – WT/DS162/17/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 the US Anti-Dumping Act of 1916.

3. The representative of the United States said that her country was pleased to report that, since the United States had submitted its status report in these disputes on 10 November 2004, the US Congress had completed steps to repeal the 1916 Act, thereby implementing the DSB's recommendations and rulings in this matter. On Friday, 19 November 2004, the US Senate had passed the Miscellaneous Trade and Technical Corrections Act of 2004, which included a provision

repealing the 1916 Act. The US House of Representatives had earlier approved the Act, on 8 October 2004. The President would be signing the Act in the near future.

4. The representative of the European Communities said that the EC welcomed the repeal of the 1916 Anti-Dumping Act by the US Congress. The EC hoped that the US administration would now stand by its declaration made in the DSB and would take the necessary final steps for that repeal to become effective. The EC noted that the repeal would not affect on-going court cases. In this respect, the EC wished to make clear that its satisfaction expressed at the present meeting should not be understood as a change of the EC's position, namely, that a proper solution to this case called for a repeal of the 1916 Anti-Dumping Act and a termination of the on-going court cases. The issue had become moot for the EC since to the best of the EC's knowledge no cases were currently active against the EC companies. Therefore, no further action on the part of the EC would appear to be necessary. However, the EC reserved its rights if it became apparent that there were cases currently open against the EC companies

5. The representative of Japan said that his country welcomed the fact that the Conference Report, which contained the bill, Miscellaneous Tariff Act, H.R. 1047, repealing the 1916 Anti-Dumping Act, had been passed by the US House of Representatives on 8 October, and then on 19 November, in the US Senate. Japan urged the United States to put this bill into effect as soon as possible. However, Japan must again register its regret over continued suffering imposed upon the Japanese company, as a result of the judgment by a Federal District Court in the state of Iowa, in May 2004, upholding the order imposing on that Japanese company a payment of damages amounting to US$30 million. The fact was that the bill, which had just been passed in the House and in the Senate, had explicitly stated that "the repeal made shall not affect any action under Section 801 of the Act that was commenced before the date of the enactment of that Act and is pending on such date". More simply, the bill did not have any retroactive effect and did not save that Japanese company from the judgment issued in May. Japan had repeatedly asked the United States to take some action in order to prevent such incidents from recurring, in case the bill repealing the 1916 Anti-Dumping Act did not apply retroactively. To Japan's regret, so far, the United States had not taken any positive step to respond to Japan's calls in this regard. At the present meeting, Japan wished to reiterate its call for the United States to do its utmost in order to prevent further damages from being inflicted upon Japanese companies.

6. The DSB took note of the statements.

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.25)

7. The Chairperson drew attention to document WT/DS176/11/Add.25, 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.

8. The representative of the United States said that her country had provided a status report in this dispute on 10 November 2004, in accordance with Article 21.6 of the DSU. As noted in the report, legislation amending or repealing Section 211 was pending in the US Senate and the US House of Representatives, and the Senate had held hearings on this legislation in July. The US administration would continue to work with the US Congress concerning appropriate statutory measures to resolve this matter.

9. The representative of the European Communities said that time for action was running out. He noted that the time-period for implementing the DSB's recommendations in the dispute under consideration would expire at the end of 2004. The EC recalled that two bills pending respectively in the Senate and in the House of Representatives would allow to bring a solution to this dispute to the

benefit of all. The enactment of the "US - Cuba Trademark Protection Act" would not only repeal Section 211, a special interest and discriminatory legislation. It would also ensure enhanced and effective protection of intellectual property rights both in Cuba and in the United States. Passage of these bills would also demonstrate that the United States was eager to provide to others an efficient and non-discriminatory protection of intellectual property rights, which it was promoting worldwide. The EC expected that the US administration would support the "US - Cuba Trademark Protection Act" as an appropriate solution to this dispute.

10. The representative of Cuba said that her delegation wished to point out that the objective of the dispute settlement mechanism was to secure prompt and positive solutions to disputes, thereby guaranteeing security and predictability in the multilateral trading system. However, the US status report, far from reporting on progress made, was confined to repeating literally the same excuses already contained in previous reports. She noted that the third time-period granted for compliance with the DSB's recommendations would expire in December 2004. The US failure to comply highlighted, yet again, the US indifference and disrespect for the WTO obligations. It was also a clear sign of indolence in the face of claims by its own companies, which saw the fate of their trademarks jeopardized in Cuba, as had already been stated by representatives of those companies in the US Senate Judicial Committee and indicated in some articles published in the US press. It was an open secret that Section 211, which Cuba had already denounced in the DSB, had been made to meet the interests of a non-US company – the Bacardi Company – which had for decades been involved in shady political intrigues against Cuba. Furthermore, in the area of trade, it was the only one that benefited from the Act, that had prevented free and fair competition on the US territory in products covered by the "Havana Club" trademark, lawfully registered in that country after a declaration of legal abandonment by its original owner, Arechabala S.A. Section 211 was in breach of the internationally accepted principle that the original owners of abandoned trademarks lacked any rights to use them. Cuba condemned, once again, the absence of any progress by the United States in this dispute. Convinced that this legal mess was inadmissible, Cuba continued to maintain that the only possible solution to this dispute was to repeal Section 211.

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

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.25)

12. The Chairperson drew attention to document WT/DS184/15/Add.25, 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.

13. The representative of the United States said that her country had provided a status report in this dispute on 10 November 2004, in accordance with Article 21.6 of the DSU. The US administration would continue to work with the US Congress with respect to the recommendations and rulings of the DSB that had not been already addressed by the US authorities by 23 November 2002.

14. The representative of Japan said that, in July 2004, it had been agreed that the reasonable period of time for the United States to secure the DSB's recommendations and rulings be re-extended until 31 July 2005. Japan had, by no means, taken lightly the fact that the United States had twice missed its deadline for compliance. On the contrary, Japan had agreed to the extension of the time-period on the premise that the United States would fully implement the DSB's recommendations and rulings during the third reasonable period of time, at long last. Japan noted the US status report, which stated that the US administration continued to support specific legislative amendments with respect to the US anti-dumping statute and was working with the US Congress to pass these

amendments. Almost identical words had been repeated by the United States at each DSB meeting. It would be an understatement to say that Japan was extremely dismayed by the fact that it was yet to see a bill that would rectify the violation by the United States of the WTO law. The United States must recognize that every delay in implementation undermined the credibility of the WTO dispute settlement mechanism. This was a regrettable situation indeed. If by the end of the reasonable period of time, the United States fell short of fully-fledged implementation, Japan would have no option, but to have recourse to the relevant provisions provided for under the DSU.

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

(d) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.10 – WT/DS234/24/Add.10)

16. The Chairperson drew attention to document WT/DS217/16/Add.10 – WT/DS234/24/Add.10, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

17. The representative of the United States said that her country had provided a status report on 10 November 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003, legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with US WTO obligations had been introduced in the US Senate (S. 1299). On 10 March 2004, legislation repealing the CDSOA had been introduced in the US House of Representatives (H.R. 3933). In addition, on 2 February 2004, the US administration had, once again, proposed repeal of the CDSOA in its budget proposal for fiscal year 2005. The US administration would continue to work with Congress to achieve further progress in resolving these disputes with the complaining parties.

18. The representative of the European Communities said that the EC wished to reserve its intervention on the CDSOA case in the context of the agenda item regarding the EC's recourse to Article 22.7 of the DSU and would, consequently, not elaborate at this stage. The EC only wished to note with great disappointment that the US status report could, again, be described in two words: i.e. no progress.

19. The representative of Chile said that, once again, his country was obliged to express concern about the lack of progress in complying with the DSB's recommendations and rulings in this dispute. With a few days left before the end of the session of the US Congress, neither of the two Chambers had discussed the bills mentioned in the US status report. Indeed, recently the US Congress had adopted the Omnibus Appropriations Bill for Fiscal Year 2005, which was one of the last opportunities to approve a repeal of the Byrd Amendment, as proposed by the US administration early in the year. Unfortunately, this option was now lost. In the course of the present meeting, under another agenda item, seven Members would be requesting authorization from the DSB to suspend concessions or other obligations *vis-à-vis* the United States due to the lack of compliance for almost a year. As confirmed in the recent award of the arbitrator, the Byrd Amendment caused economic harm to those Members who were subject to anti-dumping and countervailing measures, because the duties charged were being given to US firms competing with exporters from those countries. Chile supported the seven requests for retaliation and was still assessing what steps to take and was consulting with all interested sectors in the hope of reaching a prompt decision. Chile reiterated its call for the United States to comply as soon as possible and to redouble its efforts so that the elimination of the CDSOA would be approved in the few days that had been left before the end of the current legislative session. Chile would closely follow the next steps by the US administration and the US Congress. If no proper progress was made, Chile would be obliged to use its rights and would

join Brazil, Canada, the EC, Korea, India, Japan and Mexico in requesting authorization from the DSB to apply tariff surcharges on certain products from the United States.

20. The representative of Canada said that in what had become a constant refrain, Canada continued to be disappointed by the failure of the United States to bring itself into compliance with its obligations under the WTO Agreement. Canada was all the more concerned because, as a result of the US failure, Canada had been put in the undesirable position of seeking authorization to retaliate, pursuant to the Award of the Arbitrator. The amounts at issue were not insignificant. To date, nearly US$3 billion in duties had been collected in one sector alone. Canada certainly hoped that the United States would repeal the offending measure before further illegal disbursements were to be made, and before Canada was forced to take additional measures.

21. The representative of Japan said that much to his country's dismay, the most recent status report of the United States had again failed to provide any information on progress toward the implementation of the DSB's recommendations and rulings in this proceeding. He recalled that the United States should have complied with the DSB's recommendations and rulings before 27 December 2003. Despite repeated calls by Japan and other co-complainants, the United States had not shown any tangible proof to that effect. This was a very serious situation that Japan and the whole Membership could not overlook. As notified, Japan, together with Brazil, Canada, the EC, India, Korea and Mexico had requested authorization from the DSB to suspend concessions or other obligations, following the Arbitrator's Award on the level of such suspension. These requests had been placed on the agenda of the present meeting and Japan wished to revert to these issues at a later stage. Japan hoped that the United States would take seriously the fact that these seven Members were making such requests. Japan urged the United States to make every effort to have the CDSOA repealed as soon as possible.

22. The representative of Brazil said that his country wished to put on record its disappointment with the continued lack of compliance by the United States in this matter. Brazil wished to recall that almost one year had already passed since the end of the reasonable period of time for compliance and more than one billion dollars had already been disbursed under that illegal measure.

23. The representative of India said that his delegation wished to join previous speakers in expressing disappointment that no further progress had been made by the United States to repeal the CDSOA. India would request the United States to redouble its efforts to repeal the CDSOA and to bring its measure into consistency and conformity with the WTO Agreements.

24. The representative of Korea said that his country was disappointed that no progress had been made by the United States towards implementation in the Byrd Amendment dispute. Therefore, the complaining parties were making recourse to Article 22.7 of the DSU. Korea urged the United States to redouble its efforts to bring its measures into conformity with the DSB's rulings and recommendations.

25. The representative of Malaysia said that her delegation wished to express her country's disappointment with the lack of progress on this matter. Malaysia would like to encourage the United States to bring its anti-dumping legislation into conformity with the Anti-Dumping Agreement and the Subsidies Agreement, as soon as possible, in line with the DSB's recommendations.

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

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

27. The Chairperson drew attention to document WT/DS160/24, 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.

28. The representative of the United States said that her country had provided a status report in this dispute on 10 November 2004, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration had been consulting with the US Congress on this matter. The US administration would continue to work with the US Congress and confer with the EC in order to reach a mutually satisfactory resolution of this matter.

29. The representative of the European Communities said that the status report submitted by the United States could not be more disappointing: i.e. three years after the adoption of the Panel Report, the United States had merely stated that it was consulting with the US Congress with a view to finding a solution. Unfortunately, the EC was bound to note that compliance with WTO rulings was not a top priority for the United States. Moreover, it was ironic that one of the Members that put most emphasis on the worldwide protection of intellectual property rights was also the Member with the worst record as regards non-implemented adverse rulings on TRIPS matters. Charity must start at home. The US legitimacy to ask for respect of TRIPS obligations would be questioned as long as the United States did not take the necessary steps to bring its legislation into compliance with its international obligations. However, the EC was, of course, ready to hold discussions with the United States with a view to finding a solution to this dispute.

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

(f) United States – Final countervailing duty determination with respect to certain softwood lumber from Canada: Status report by the United States (WT/DS257/14)

31. The Chairperson drew attention to document WT/DS257/14, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning final countervailing duty determination with respect to certain softwood lumber from Canada.

32. The representative of the United States said that her country had provided a status report on 10 November 2004, in accordance with Article 21.6 of the DSU. As noted in the report, the US Department of Commerce had been collecting and analyzing information relevant to the DSB's recommendations and rulings in its countervailing duty investigation of softwood lumber products from Canada and, on the basis of that information, it intended to issue a determination in that investigation in the near future. Indeed, the US Department of Commerce had already drafted a determination, and had provided that draft to the interested parties in the investigation for comments.

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

2. Adoption of the 2004 draft Annual Report of the DSB (WT/DSB/W/269 and Add.1)

34. The Chairperson recalled that, in pursuance of the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO contained in document WT/L/105, she was submitting for adoption the draft text of the 2004 Annual Report of the DSB contained in document WT/DSB/W/269 and Add.1. This report covered the work of the DSB since the previous Annual

Report contained in documents WT/DSB/34, WT/DSB/35 and Add.1. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2004, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. She proposed that after the adoption of the Annual Report at the present meeting, the Secretariat be authorized to update this Report under its own responsibility in order to include actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would then be submitted for consideration by the General Council at its meeting in December 2004. Finally, she said that it was her understanding that the Secretariat had already received some comments of a typographical nature on the draft Annual Report, which would be taken into account in the final version of the Annual Report.

35. The DSB took note of the statement and adopted the draft Annual Report of the DSB contained in WT/DSB/W/269 and Add.1 on the understanding that it would be further updated by the Secretariat[1].

3. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/270)

36. The Chairperson drew attention to document WT/DSB/W/270 which contained an additional name proposed for inclusion on the indicative list, in accordance with Article 8.4 of the DSU. Unless there was any objection, she proposed that the DSB approve the name contained in document WT/DSB/W/270.

37. The DSB so agreed.

4. United States – Tax treatment for "Foreign Sales Corporations"

(a) Statement by the United States regarding the implementation of the DSB's recommendations and rulings

38. The representative of the United States, speaking under "Other Business", said that in connection with the dispute on: "United States – Tax Treatment for 'Foreign Sales Corporations'" (DS108), her delegation was pleased to inform the DSB that on 22 October 2004, President Bush had signed into law the American Jobs Creation Act of 2004 ("AJCA"). The AJCA had repealed the tax exclusion of the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000" ("ETI Act"). It had thereby withdrawn the subsidy found to exist and brought the measure in question into conformity with US WTO obligations. The repeal of the ETI provision was effective for transactions occurring after 31 December 2004. This was the most significant piece of US tax legislation in 20 years. In terms of the volume of trade which the arbitrator had found to be involved, the AJCA was undoubtedly the most significant act of compliance with a DSB recommendation in the history of the WTO. While the scale, complexity and sensitivity of this tax issue required a lengthy legislative process, the United States, at the outset, had stated that it would implement the DSB's recommendations and rulings in this dispute, and it had done so. The United States expected and looked forward to the withdrawal of the suspension of concessions by the EC.

39. The representative of the European Communities said that the EC welcomed the efforts made by the United States in this matter, but had concerns with regard to the WTO conformity of some aspects of the new legislation. That was the reason why the EC had requested consultations with the United States pursuant to Article 21.5 of the DSU. The EC confirmed that it was in the process of preparing legislation that would suspend the application duties to the US.

[1] The Annual Report was subsequently circulated in document WT/DSB/37 and Add.1.

40. The representative of the United States said that her country was surprised and disappointed by the EC's request to consult, given that US congressional leaders had consulted frequently with the EC in the course of the legislative process. Nonetheless, the United States recognized that the EC had a right to request consultations and the United States was looking forward to this opportunity to explain to the EC how the AJCA addressed the concerns expressed by EC representatives to congressional leaders.

41. The representative of Norway said that he did not wish to make comments on the "Foreign Sales Corporations" dispute, but with regard to the agenda item that had been postponed at the opening of the present meeting. Norway understood and supported the procedural solution to suspend the consideration of that agenda item. He noted that a similar solution had been proposed in 1999 in the course of the "Banana" dispute. He said that he hoped that it would also be possible for other Members to express their views on this matter in order to ensure that any solution, which would be found in the consultations to be held by the Chairperson, did not prejudice or set a precedent with regard to the interpretation of Article 22.7 of the DSU or the interpretation of the negative consensus rule. This could be done through consultations directly with the Chairperson or in the form of an informal meeting prior to the resumption of the formal meeting or in any other way that the Chairperson considered to be appropriate.

42. The Chairperson said that Members would be duly informed in case it was necessary to hold an informal meeting prior to a formal one. However, she hoped that that would not be necessary. The time was needed to hold consultations and she hoped that during these consultations there would be no issue that could raise concerns to other Members. She asked Members for their understanding and said that she would keep them informed in relation to this matter.

43. The representative of Canada said that, in view of the statement made by the representative of Norway, he wished to stress that in Canada's view, nothing in the course of informal consultations or whatever a solution the parties might come up with respect to the postponed agenda item, should be viewed as compromising, in any way, the negative consensus rule that Canada believed applied in respect of Article 22.7 of the DSU.

44. The representative of Brazil said that his country wished to echo Canada's statement. In Brazil's view, nothing in the consultations nor the solution to suspend the meeting and to reconvene later would, in any circumstances, affect the interpretation of Article 22.7 of the DSU.

45. The Chairperson recalled that the consideration of the item related to the Byrd Amendment dispute had been suspended. She indicated that after the consultations on this matter were concluded, the Secretariat would send a fax reconvening the meeting.

46. The DSB took note of the statements and suspended the proceedings of the meeting.

47. Upon the resumption of the meeting on 26 November 2004, the Chairperson recalled that on 24 November, in light of certain differences between the United States and the Members requesting the DSB's authorization to suspend concessions and other obligations *vis-à-vis* the United States in the Byrd Amendment dispute, the DSB had agreed to postpone the consideration of that agenda item to allow the parties to the dispute and the Chair to consult with a view to finding a solution. Over the course of the past several days, the parties and the Chairperson had been engaged in intensive consultations and, at the present meeting, she was in a position to announce that these consultations had yielded a successful outcome. She thanked the delegations involved in these consultations for their cooperative efforts and their constructive attitude. She also wished to thank all the other Members of the DSB for allowing a suspension of the DSB meeting and for their patience and understanding during the process of consultation. The positive outcome in this matter and the way it had been achieved was an excellent example of the collaborative spirit that existed in the DSB, which

was absolutely essential for the resolution of problems as they arose and she was honoured to have been part of it. She then proposed that the DSB take up the following item:

5. United States – Continued Dumping and Subsidy Offset Act of 2000

(a) Recourse to Article 22.7 of the DSU by Brazil (WT/DS217/38)

(b) Recourse to Article 22.7 of the DSU by the European Communities (WT/DS217/39)

(c) Recourse to Article 22.7 of the DSU by India (WT/DS217/40)

(d) Recourse to Article 22.7 of the DSU by Japan (WT/DS217/41)

(e) Recourse to Article 22.7 of the DSU by Korea (WT/DS217/42)

(f) Recourse to Article 22.7 of the DSU by Canada (WT/DS234/31)

(g) Recourse to Article 22 of the DSU by Mexico (WT/DS234/32)

48. The Chairperson proposed that the seven sub-items to which she had just referred be considered together since they pertained to the same matter. First, she drew attention to the communication from Brazil contained in document WT/DS217/38 and invited the representative of Brazil to speak.

49. The representative of Brazil recalled that on 15 January 2004, given the continued non-compliance by the United States in the case on: "United States – Continued Dumping and Subsidy Offset Act of 2000", Brazil had requested the DSB's authorization to suspend the application of tariff concessions and related obligations to the United States. Since the United States had objected to the level of suspension proposed, the matter had been referred to arbitration pursuant to Article 22.6 of the DSU. The Arbitration Award, which had been circulated on 31 August 2004, had clearly reaffirmed the illegality of the Byrd Amendment and had defined the right of Brazil to suspend concessions or other obligations *vis-à-vis* the United States up to an amount of 72 per cent of the disbursements made under the CDSOA and related to anti-dumping and countervailing duties paid on imports from Brazil. Brazil recalled again that, if the Arbitrators had found that 72 per cent of the disbursements had caused nullification or impairment, a 100 per cent of all disbursements had been found by the Appellate Body to be incompatible with the WTO Agreements and continued, therefore, to be 100 per cent illegal. As stated previously before the DSB, the CDSOA had been described as a "double hit", intended to provide an additional, and clearly illegal, remedy to dumping and subsidy. It had been designed to assist US companies at the expense of their foreign competitors. That assistance amounted already to more than US$1 billion. This illegality was aggravated by the fact that almost 11 months had passed since the end of the long reasonable period of time (also 11 months) that had been granted to the United States and which had ended in December 2003.

50. Since the circulation of the Arbitrator's Award, the United States had given no concrete sign of implementation. At the present meeting, therefore, fully aware of the obligation set out in Article 22.7 of the DSU that the DSB "shall.....grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator", Brazil was submitting to the DSB its request for suspension of concessions, contained in document WT/DS217/38, which was made in full compliance with the Award of the Arbitrator. Finally, Brazil still expected the United States to abide by its multilateral obligations and to adjust or repeal the Byrd Amendment without delay. Given the number of Members that were being affected by that illegal measure and could still be affected in the future, all WTO Members, and not only the complainants, should be concerned about the lack of implementation by the United States.

51. The Chairperson drew attention to the communication from the European Communities contained in document WT/DS217/39 and invited the representative of the European Communities to speak.

52. The representative of the European Communities said that since the enactment of the CDSOA, more than US$800 million had been collected on foreign products to subsidize the directly competing US products. The fourth distribution that had started on 1 October 2004 could amount to more than US$290 million, which meant that the threshold of US$1 billion distributed would soon be reached. In August 2004, the Arbitrators had clearly rejected the US assertion that the CDSOA was harmless and had not caused any nullification or impairment to other WTO Members. On the contrary, they had concluded that every year, the CDSOA had nullified or impaired EC benefits at a level equivalent to 72 per cent of the payments made under the CDSOA from duties paid on imports from the EC for the most recent year for which data were available at that time. In the absence of any credible sign that the US Congress was working on implementation, the EC had sent, on 10 November 2004, a request for the DSB's authorization to suspend the application to the United States of tariff concessions and related obligations under the GATT 1994 at a level that would be equivalent, every year, to the annual level of nullification or impairment determined, in accordance with the Arbitration Award.

53. The EC was fully convinced that the present request was made in compliance with the Award of the Arbitrator circulated on 31 August 2004 (WT/DS217/ARB/EEC) and requested, at the present meeting, that the DSB grant authorization, in accordance with Article 22.7 of the DSU. The suspension of concessions would be in the form of an additional duty on imports from the United States of certain products that would be selected from the indicative list attached to the EC request. Before applying the additional import duty, the EC would notify the specific list of products that would be effectively subject to the additional import duty. The same notification would be made before the application of any new level of suspension. The EC wished to underline that the extent of the concerns raised by the CDSOA was apparent from the fact that six other Members were making the same request at the present meeting. The EC called on the US administration to transmit that message to the US Congress and to defend the importance for the US credibility in the WTO to comply with its obligations without further delay. The EC hoped that implementation would soon follow and that it would not be necessary to make use of the DSB's authorization.

54. The Chairperson drew attention to the communication from India contained in document WT/DS217/40, and invited the representative of India to speak.

55. The representative of India said that through its communication, dated 10 November 2004, his country had made a request to the DSB to consider its recourse to Article 22.7 of the DSU in the dispute "Unites States - Continued Dumping and Subsidy Offset Act of 2000" (WT/DS217/40). The finding of the Panel and the Appellate Body that the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) was inconsistent with the US obligations under the WTO had been adopted by the DSB on 27 January 2003. The United States had not implemented the DSB's recommendations and rulings within the reasonable period of time available to it, which had expired on 27 December 2003. On 15 January 2004 India had requested authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU. The United States had objected to it on 23 January 2004 and the matter had been referred to arbitration. Consequently, on 31 August 2004, the Arbitrator had issued an award (WT/DS217/ARB/IND). Now, pursuant to Article 22.7 of the DSU, India was requesting the DSB's authorization to suspend the application to the United States of tariff concessions and other obligations under the GATT 1994, in the form of the imposition of additional import duties on products originating in the United States, at a level not exceeding every year 72 per cent of the amount of CDSOA disbursements relating to anti-dumping or countervailing duties paid on imports from India for the most recent year for which data were available at that time. India wished to take this opportunity to reaffirm its commitment to strictly comply with the Award of the Arbitrator, dated

31 August 2004 (WT/DS217/ARB/IND). In accordance with the Award, India would notify the DSB every year, prior to the entry into force of a level of suspension of concessions or other obligations, the list of products on which the additional import duty would apply. That list would be drawn from the indicative list attached to India's request contained in document WT/DS217/40.

56. The Chairperson drew attention to the communication from Japan contained in document WT/DS217/41, and invited the representative of Japan to speak.

57. The representative of Japan said that on 10 November 2004, his country, along with six other co-complainants, had requested authorization from the DSB to suspend concessions or other obligations *vis-à-vis* the United States, in view of the fact that the United States had failed to implement the DSB's recommendations and rulings regarding the CDSOA. Almost two years had already lapsed since the DSB's ruling in January 2003. The reasonable period of time had expired in December 2003. While the WTO-inconsistent law continued to nullify or impair benefits accruing to Japan and other Members under the WTO Agreements, it had been reported that the United States was ready to execute yet another round of disbursements to its domestic companies under the CDSOA, amounting to US$294 million. Japan could not overlook this disregard by the United States of its obligations under the WTO. It was under those circumstances that Japan was seeking recourse to the procedures set forth in Article 22.7 of the DSU. Japan thus asked the DSB to grant authorization to Japan as requested in document WT/DS217/41. Japan, once again, called for the prompt repeal of the CDSOA by the United States, so that Japan would not need to exercise its rights under Article 22.7 of the DSU.

58. The Chairperson drew attention to the communication from Korea contained in document WT/DS217/42, and invited the representative of Korea to speak.

59. The representative of Korea said that his country wished to refer to the detailed history of this dispute, which previous speakers had already mentioned at the present meeting. As the United States had failed to comply with the DSB's rulings and recommendations by the end of the reasonable period of time, Korea had requested, on 15 January 2004, authorization to suspend the application to the United States of tariff concessions and other obligations under GATT 1994, and as the result of the US objection to the level of the suspension proposed, the matter had been referred to arbitration. Subsequently, the Arbitrators had issued their decision on 31 August 2004. Korea was seriously concerned that the United States had still not brought its measures, which were found to be inconsistent with the WTO Agreements, into conformity with the DSB's rulings and recommendations. In this connection, pursuant to Article 22.7 of the DSU, Korea was requesting the DSB's authorization to suspend the application to the United States of tariff concessions and other obligations with respect to imports of products from the United States at a level not exceeding every year 72 per cent of the amount of CDSOA disbursements relating to anti-dumping or countervailing duties paid on imports from Korea. Further details were contained in document WT/DS217/42, dated 11 November 2004. As Members were aware, the amount of suspension authorized by the Arbitrators depended upon the amount of disbursements under the Byrd Amendment for the most recent year for which data was available. The level of suspension imposed would, by necessity, vary from year to year, but would be consistent with this decision of the arbitrator. As mentioned at the DSB meeting on 26 January 2004 in the context of Korea's request under Article 22.2, Korea was exercising its right under Article 22.7 of the DSU for the purpose of ensuring prompt compliance by the United States with the DSB's recommendations or rulings. This was critical for effective resolution of disputes to the benefit of all Members and the integrity of the WTO dispute settlement system.

60. The Chairperson drew attention to the communication from Canada contained in document WT/DS234/31, and invited the representative of Canada to speak.

61. The representative of Canada said that it was unfortunate that Canada must now seek final retaliation authorization from the WTO because of the US continued failure to repeal the WTO-inconsistent Byrd Amendment. Canada's request followed the 31August WTO Arbitrator's decision, which had recognized the existence of a direct adverse effect on trade amounting to 72 per cent of the level of disbursements in a given year. The Arbitrator had also rejected the US assertion that the Byrd Amendment did not cause any adverse effect. Members might be aware that recently Canada had launched a month long public consultation with Canadians on its retaliatory options. He noted that the Secretariat was distributing, as a room document, the Canada Gazette Notice launching these consultations and its attached draft list of products subject to a possible surtax. Canada was asking that the Gazette Notice with its attachment be included in Canada's formal request for retaliation authorization. Of course, Canada would not be taking any decisions on retaliatory options until that process was completed. As had been made clear in Canada's retaliation authorization request, however, if a decision was taken to retaliate, Canada would notify the DSB of the terms of the retaliatory measures that would be implemented. It had been nearly two years since the DSB had adopted the Report of the Appellate Body and the United States could not point to any progress for the repeal of the Byrd Amendment. This despite the US statement that it remained committed to implementing the DSB's recommendations and ruling in this dispute. The United States did not hesitate to remind Members through its unchanged status reports that implementation measures were before Congress. However, once again, the United States did not provide Members with any timelines for the passage of that measure. The United States had received ample time to bring itself into compliance. It was one thing to state intentions and it was quite another to act on those intentions. It was time that the United States made the repeal of this measure a priority. Once again, Canada asked the United States when it would implement the DSB's recommendations of the rulings. Throughout this dispute, Canada had stated the systemic and direct commercial harm caused to Canada by the continued operation of that measure. These were well-known and, therefore, he would not repeat them again at the present meeting. What was worth noting, however, was that Canada was taking this action in concert with six other WTO Members. This was the largest group of WTO Members to ever request an Article 22.7 authorization in regards to the same dispute. It was the clearest possible signal of the breadth and depth of concern about that measure among the membership. Again, Canada's preferred option was not retaliation, but to have the US repeal the Byrd Amendment. Canada urged the United States to live up to its WTO obligations, end this dispute, and repeal the Byrd Amendment. Canada called upon the DSB to authorize its request.

62. The Chairperson thanked the representative of Canada and asked if there was any objection to have the Gazette Notice referred to by Canada circulated as an addendum to Canada's request for retaliation.

63. The representative of the United States said that Canada had suggested that the room document be attached to its request submitted some ten days ago and circulated ten days ago. He was a bit surprised since the suggestion was new to him, he had not heard about it before and so he certainly would not be in a position to agree to the request as formulated by Canada. Should Canada wish to have the document circulated in a different fashion that might be a different question. He noted that the Chairperson had suggested that that document be circulated as an addendum, presumably as one submitted at the present meeting. If that were what Canada were to request, the United States could certainly consider that possibility.

64. The Chairperson invited Canada to make comments.

65. The representative of Canada said that his delegation had hoped that it could have the Notice circulated as an attachment to Canada's formal request for retaliation. His delegation realized that the Notice was published after that request had been circulated. He had received the Notice only two days prior to this meeting: i.e. as soon as it had been published. That was why his delegation had asked if Members could accept that the Notice be attached to Canada's request for retaliation. If,

however, there was an objection, his delegation was open to any suggestions the United States might have. He did not think that there was any requirement to provide a list of products subject to import duties, but Canada had provided such a list for information. Finally, he said that Canada was open to any suggestion that the United States might have regarding this matter.

66. The representative of the United States said that he did not think that he had anything to add. He would not be in a position to agree to the request formulated by Canada. He could not agree to have the document considered as part of the Article 22.7 request that was being considered by the DSB at the present meeting. Should Canada wish to have it circulated in some other fashion, the suggestion made by the Chairperson might work: i.e. that the Notice be circulated bearing the date of the present meeting for information purposes. However, he would not be in a position to agree to the precise proposal that Canada had put before the DSB since he had literally seen the Notice just a few moments earlier.

67. The Chairperson asked if Canada objected to having the Notice circulated as an addendum with the date of the present meeting.

68. The representative of Canada said that his delegation had no objection.

69. The Chairperson drew attention to the communication from Mexico contained in document WT/DS234/32, and invited the representative of Mexico to speak.

70. The representative of Mexico said that since the Byrd Amendment had come into force in the year 2000, the US industries were benefiting from illegal contributions of more than US$750 million. The Byrd Amendment was a remedy against unfair trade practices, one which was contrary to the WTO, which at the same time created an incentive for the US industry to support the imposition of trade remedies. Notwithstanding its international responsibility and the unfavourable effects for its trading partners, the United States simply had not complied with the DSB's recommendations and rulings. The suspension of obligations was not Mexico's preferred option, even less, against a trading partner with such an importance as the United States. Nevertheless, this was the only legal tool available to Mexico in order to induce the United States to comply with the DSB's recommendations and rulings, and which would prevent the interests of Mexico's exporters from continuing to be impaired. At the DSB meeting on 26 January 2004, Mexico, together with other complainants, had requested authorization to suspend obligations *vis-à-vis* the United States, due to its lack of compliance. The United States had challenged the level of suspension proposed by Mexico, and the matter had been referred to arbitration. The Award of the Arbitrator under Article 22.6 of the DSU had been circulated on 31 August 2004. With the statement and in conformity with Article 22.7 of the DSU, Mexico requested the DSB's authorization to suspend obligations against the United States, in accordance with the Arbitrator's award circulated in document WT/DS234/ARB/MEX. Mexico wished to reaffirm its intention to comply with that Award in relation to suspension of concessions. Unfortunately, Members found themselves in a situation that best demonstrated the central problem of the DSU. In other words, the scheme of incentives to impose or maintain the illegal measures or the de facto waiver. If there was something to be resolved in the DSU negotiations, it was precisely the problem at hand.

71. The Chairperson invited the representative of the United States to speak.

72. The representative of the United States said that his country wished to reiterate at the outset that it intended to comply with the DSB's recommendations and rulings in these disputes. Thus, while the United States understood that the DSB would, at the present meeting, be authorizing the suspension of concessions or other obligations, the United States did not believe that it would be necessary for Members to exercise that authorization. At this point he wished to thank the Chairperson for the consultations that she had held over the past several days. The United States very

much appreciated the personal efforts of the Chairperson to address the concerns of the various parties. The United States also wished to take the opportunity to thank the Arbitrators and the Secretariat for their hard work in these proceedings. He noted that the requesting parties had commented on these awards at the DSB meeting on 27 September and the United States also wished to comment briefly on the Awards at the present meeting.

73. First, the United States welcomed the Arbitrators' recognition of the distinction between, on the one hand, the failure of a Member to carry out its obligations under a covered agreement and, on the other, the nullification or impairment of benefits that may – or may not – result from that failure. The Arbitrators had correctly rejected the related argument that the level of nullification or impairment was automatically equivalent to the amount of CDSOA disbursements. The United States also welcomed the Arbitrators' rejection of the argument that the "ultimate goal" of the suspension of concessions or other obligations was to "induce compliance". The Arbitrators had noted that inducing compliance was, "at most," only one objective, and that the DSU "equivalence" requirement suggested that suspension was also intended to provide a form of "temporary compensation". In addition, the United States welcomed the Arbitrators' decision to examine the "trade effects" of the CDSOA in order to determine the level of nullification or impairment. The United States noted that the language in the final decision referring to suspension of concessions or other obligations on a list of US products "covering ... a total value of trade" not exceeding 72 per cent of the CDSOA disbursements relating to the relevant Member was important in this regard.

74. But the United States disagreed that the "trade effect" approach was just one of many possible measures of nullification or impairment. In light of the actual awards, the Arbitrators' comments about the theoretical possibility of a broader "economic effects" test were merely dicta. They also demonstrated a misunderstanding of Article 22.6 and prior arbitrations. For example, if there could be various legitimate ways to measure the level of nullification or impairment in any given dispute, there would naturally be multiple levels of nullification or impairment. However, the DSU only provided for a single level of nullification or impairment. Moreover, it was not clear how one could ensure that "the level" of suspension was "equivalent to the level of nullification or impairment", if there were multiple levels of nullification or impairment.

75. The Arbitrators' citation to the case on United States – Section 110 arbitration as the origin of an "economic" effects test was also misplaced. The CDSOA Arbitrators had incorrectly stated that "no actual trade took place" in that dispute because it involved intellectual property rights. However, the Section 110 dispute involved the Agreement on Trade-Related Aspects of Intellectual Property Rights. In fact, the United States doubted the Section 110(5) Arbitrator had thought it was creating an alternative measure of nullification or impairment, separate and distinct from – and broader than – a "trade effects" test. Likewise, referring to the 1916 Act dispute, the Arbitrator had asserted that "[s]ince a judicial decision or settlement under the 1916 Act did not automatically restrict trade, the broader concept of economic effect was more appropriate". In the US view, however, one could not argue that a trade effects test was inappropriate simply because it had not yielded the desired result. The United States was also disappointed that the Arbitrators had found the Article 22.2 requests to be sufficiently specific. As the Arbitrator had stated in the "Hormones" dispute: "the Member requesting suspension . . . has to identify the level of suspension of concessions it proposes in a way that allows [the arbitrator] to determine equivalence". Here, the Arbitrators had found that "nothing in the [requesting party's] proposal enables us to conclude at this stage that [the requesting party's] proposed suspension of concessions or other obligations will or will not be equivalent to the level of nullification or impairment[.]" This was hard to square with the Arbitrator's finding that the requests were sufficiently specific.

76. The United States remained concerned that the Arbitrators had decided that a Member could adjust the level of suspension from year to year. Providing for varying levels of suspension on an annual basis was difficult to reconcile with the language in the DSU calling for a single level. The

Arbitrators noted that adjustments would be permissible, so long as "unpredictability is not increased as a result". But, in these cases, the annual adjustments would increase unpredictability. For example, suppose a Member retaliated based on CDSOA disbursements for Year 1 and began that retaliation shortly before US authorities published more recent data on the amount of CDSOA disbursements for Year 2. Could that Member base its retaliation on Year 1 data for a full twelve-month period, or must it immediately modify the level of suspension to account for the more recent data?

77. While the Arbitrators assured the United States that it had recourse to dispute settlement procedures if it disagreed with an adjustment, the fact that the Arbitrators already anticipated disputes over these adjustments hardly suggested the predictability that one would expect at the conclusion of an arbitration. Finally, while the Arbitrators had found the level of nullification or impairment to be greater than that which the United States had argued for, it would not, at the present meeting, address the specifics of the Arbitrators' methodologies, as these specifics did not appear to raise systemic issues.

78. He had heard the delegate of one of the requesting parties say that he was convinced that his delegation's request for authorization was consistent with the Award of the Arbitrator. As he was aware, the United States had expressed concerns about whether or not that was so, and those concerns had led to the temporary suspension of this agenda item. On this topic, suffice it to say that the United States had wanted to make absolutely sure that the authorization that the DSB would grant at the present meeting was limited to the decisions reached by the Arbitrators; that the other parties had ultimately understood the US concern; and that the parties had worked out a way forward. In light of the history of this arbitration and the Arbitrators' Awards, the application of Article 22.7 of the DSU to these requests was a matter of particular importance.

79. Again, the United States wished to thank the Arbitrators and the Secretariat for their efforts, and the Chairperson for hers.

80. The Chairperson proposed that the DSB take note of the statements. As provided in Article 22.7 of the DSU, and in response to the requests by Brazil, the European Communities, India, Japan, Korea, Canada and Mexico contained in documents WT/DS217/38; WT/DS217/39; WT/DS217/40; WT/DS217/41; WT/DS217/42; WT/DS234/31 and WT/DS234/32, the Chair proposed that the DSB agree to grant authorization to suspend the application to the United States of tariff concessions and other obligations, as provided in the Decisions by the Arbitrators contained in documents: WT/DS217/ARB/BR; WT/DS217/ARB/EEC; WT/DS217/ARB/IND; WT/DS217/ARB/JPN; WT/DS217/ARB/KOR; WT/DS234/ARB/CAN and WT/DS234/ARB/MEX.

81. The representative of Chile said that his country supported the requests submitted by seven Members because it considered that the Byrd Amendment, as confirmed by the recent Award of the Arbitrator, caused economic prejudice to Members such as Chile that had been subject to anti-dumping and countervailing measures. Chile, therefore, continued to consider what steps to take. It was consulting with all of the interested sectors in the hope of reaching a rapid decision. Chile regretted that it had not been consulted during these past few days. Chile had an interest in this dispute and considered that the parties must "accept the arbitrator's decision as final". Since Chile had not participated in the consultations on this matter, it did not know the context underlying the Chair's statement and hence, it did not know possible implications thereof. While Chile was not opposed to the Chair's proposal, it had no choice but to reserve its rights until it had a clear understanding of the implications of the Chair's statement. It was Chile's understanding that the Chair's statement as well as the statements by Brazil, Canada, the European Communities, Korea, India, Japan, Mexico and the United States had been made in connection with the individual requests listed on the agenda of the present meeting. These statements did not, in any way, alter the rights and obligations of the other

Members, in particular Chile, nor did they alter the content, meaning and scope of the Award of the Arbitrator circulated in document WT/DS217/ARB/CHL.

82. The Chairperson said that she was pleased that Chile would go along with the draft decision that she had just read out. Therefore, if there were no other requests from the floor, she wished to ask the DSB to agree to the draft decision that she had just proposed.

83. The DSB so agreed.