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Dispute Settlement Body
21 November 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 November 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

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.48)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.48)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.23)

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 three 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.48)

2. The Chairman drew attention to document WT/DS176/11/Add.48, 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 November 2006, in accordance with Article 21.6 of the DSU. As noted in the status report, several legislative proposals 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 continued to work with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, again, the EC had to stress the continuous inaction of the United States in this dispute. The United States had repeated every month that its administration was working with the US Congress to implement the DSB's rulings and recommendations. The EC wished to learn more about those efforts and to see some results. However, since March 2005 the EC had seen, each month, status reports which were identical. And, for more than four and a half years, the EC had not seen any serious progress towards complying with the DSB's ruling. The EC regretted that situation as much as the United States might regret it. But, the fact remained that the persistent ignorance of core obligations of the TRIPS Agreement undermined the authority of that agreement. The recent decision by the US administration to refuse, on foreign policy grounds, the specific licence that would have allowed the renewal of the registration of the Havana Club trade mark had also sent the wrong message. The renewal would not have given away or granted rights. It would have only preserved the status quo and would have thus allowed US courts to decide, in pending proceedings, who was the legitimate owner of that mark. Ownership of intellectual property rights should be decided in courts on the basis of the rule of law and free from the interference of political considerations. If the example set by this decision were to be followed by others, this would seriously undermine the efforts aimed at promoting rules-based protection of intellectual property rights worldwide. Therefore, the EC invited the United States to reconsider its position, in light of seriously damaging effects. Finally, the EC urged the United States, the only WTO Member that consistently did not comply with panel rulings under the TRIPS Agreement, to bring itself into compliance.

5. The representative of Cuba said that the United States had failed to implement the recommendations and rulings in the Section 211 dispute despite the fact that almost five years had passed since their adoption by the DSB. Furthermore, the United States had continued to submit empty reports that lacked any commitment towards the task that the US administration claimed to be carrying out with a view to reaching a solution or setting the date when such a solution could be reached. Since the beginning of this dispute, Cuba had systematically denounced the undisputed motives and circumstances which had led the United States to adopt Section 211 as part of its Appropriations Act of 1998, which only satisfied the interests of the Bacardi company, so as to deprive the owners of the Havana Club trademark of their rights within the US territory. The US attitude had set a negative precedent with regard to the protection of intellectual property rights by any other WTO Member in that territory and was completely different from the protection that his country provided to thousands of US trademarks registered in Cuba.

6. Despite the irrefutable truth of the above, the United States had stated at the previous DSB meeting that the rulings and recommendations in this dispute had not referred or related to any proceeding regarding any trademark. Even worse, the United States was attempting to justify its unacceptable decision to refuse the request for the renewal of the Havana Club trademark with dubious arguments relating to foreign policy consideration. Section 211, which had been declared incompatible with the basic rules and principles of the WTO, should have been repealed a long time ago. However, it was still in force and thus the legitimate rights of Cuban and French businessmen continued to be prejudiced. The United States had a very bad reputation in the WTO due to its repeated failures to implement the DSB's rulings. Evidence of that was provided by the fact that long-standing disputes such as the one under consideration had appeared under agenda Item 1 of the most recent DSB meetings. This situation increasingly eroded the credibility of the dispute settlement mechanism and affected the multilateral trading system. Several WTO Members had already been alerted by this development. Cuba reiterated, once again, its call that the United States take prompt and effective action to enforce the DSB's rulings and recommendations and the WTO Agreements by removing Section 211, since that was the only possible solution to this dispute.

7. The representative of Brazil said that by stating twice – in Articles 3.3 and 21.1 of the DSU – that prompt compliance was essential to the proper functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members, the DSU was absolutely clear that prompt compliance was one of the cornerstones of the WTO dispute settlement mechanism. Brazil stated that situations like the one under consideration were not in harmony with this fundamental principle. Moreover, non-compliance situations lacking any perspective of a solution altered the carefully negotiated balance of rights and obligations to the detriment not only of the complaining party, but also the whole Membership. In view of these considerations, Brazil urged the United States to take the necessary and urgent steps to put an end to the violations found in this dispute.

8. The representative of India said that his country wished to thank the United States for the status report and its statement. However, India felt compelled yet again to stress that the principle of prompt compliance with the DSB's rulings and recommendations appeared to be missing in this dispute. This was a matter of great systemic concern, since almost five years had elapsed since the adoption of the DSB's recommendations and rulings in this case. India again urged the parties to this dispute to inform the DSB as to how they intended to fulfil the objective of prompt settlement.

9. The representative of the Bolivarian Republic of Venezuela said that his delegation thanked Cuba for the statement made at the present meeting and wished to be fully associated with that statement. His country considered Cuba's claim to be just. This had been demonstrated by the DSB when it had adopted the conclusion that Section 211 was incompatible with the WTO Agreements and its basic principles. His country had also noted the US status report in which the United States, once again, had clearly displayed that it had little interest in complying with the Panel's recommendations. The situation, which once again was being discussed at the present meeting, was of great concern to

his country. He noted that in most cases in which panels had found in favour of developing countries, the recommendations had not been implemented. This not only harmed Cuba, but also undermined the DSU, which his country considered to be an essential element in bringing security and predictability to the multilateral trading system. A failure to comply on the part of the United States also affected the basic pillars on which the TRIPS Agreement was based as well as the credibility of the WTO. Furthermore, the arbitrary and discretionary behaviour of the United States in the implementation of the recommendations of panels had resulted in a legitimate reluctance on the part of his country to negotiate and accept new commitments in the DSU negotiations as well as in the Doha Round negotiations. His country wished to express, once again, its great concern at the recent decision by the US Patent and Trademark Office to reject the request for the renewal of the registration of the "Havana Club" trademark, which had been submitted by the Cuban company that owned that trademark. This was possible through recourse to the arbitrary and illegal Section 211, which had enabled a powerful North American company to appropriate the Havana Club trademark. However, his delegation once again urged the parties to find a rapid solution to this dispute, which would be in line with the WTO Agreements.

10. The representative of China said that his country thanked the Unites States for its status report and its statement. As other delegations had stated, it had been about five years since the DSB had adopted both the Panel and the Appellate Body Reports in this dispute. However, the issue of implementation was still being discussed in the DSB. It was regrettable that the status report before the DSB at the present meeting was identical to the report which had been submitted in the previous month, and did not provide any new information as to when this matter would be resolved to the satisfaction of the parties to the dispute and other WTO Members. Although China was conscious of possible difficulties involved in implementation, the undue delay of full implementation of the DSB's rulings had caused systemic concerns about the functioning and efficiency of the dispute settlement system. He noted that Article 21.1 of the DSU provided that prompt compliance with the DSB's recommendation or rulings was essential to ensure effective resolution of disputes to the benefit of all Members. Therefore, China again urged the United States to fully implement the DSB's decisions in this dispute as soon as possible.

11. The representative of Bolivia said that his delegation, after hearing the statement by the United States, wished to reiterate its concern at the lack of progress by the United States towards removing Section 211, in accordance with the DSB's rulings and recommendations. The failure to comply with the DSB's recommendations undermined the credibility of the multilateral trading system, which provided all Members with rights and obligations, whether developed, developing or least developed countries. At this stage, the continued postponement of compliance with the DSB's decision was regrettable on account of systemic implications and the failure to comply with the obligations resulting from intellectual property rights under the TRIPS Agreement, thereby harming a developing country for over four years. Once again, Bolivia, like other Members, urged the United States to implement the DSB's rulings and recommendations in this dispute.

12. The representative of Argentina said that his delegation wished to support the statements made by previous speakers, and once again, reiterated its appeal for full and rapid compliance with the DSB's recommendations and rulings in this dispute. He noted that in addition to legal obligations Members had also undertaken moral commitments. That implied that those commitments would also have to be respected even if outcomes would be less favourable.

13. The representative of the United States said that his country assured Members that the United States took its responsibility to implement the DSB's recommendations and rulings seriously. In response to the suggestion that the US compliance record was poor, the facts simply did not support that assertion. Indeed, the record showed that the United States had fully complied in the vast majority of its disputes. As for the remaining few, the United States was actively working towards compliance. In response to a comment regarding a trademark registration, none of the

recommendations or rulings of the DSB in this proceeding related to the renewal of specific trademarks, so this was not an issue related to the implementation of the DSB's recommendations and rulings.

14. The representative of Cuba said that, at the past three sessions, his delegation had heard the same arguments being put forward by the United States. However, what the United States had been stating was not valid. The decision of the DSB with regard to Section 211 had to be looked at in connection with the "theft" of the trademark. What the United States was saying was simply not credible. Cuba was only asking the United States to comply. The United States, in a gesture of good faith, could have at least maintained the status quo instead of worsening the situation by denying to recognize the intellectual property rights of Havana Club in the United States. At the next DSB meeting, Cuba would provide more details regarding this important issue.

15. 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.48)

16. The Chairman drew attention to document WT/DS184/15/Add.48, 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.

17. The representative of the United States said that, as of 23 November 2002, prior to the deadline for implementation, the US authorities at the US Department of Commerce 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. The US administration continued to support legislative amendments that would modify the US anti-dumping duty statute so that the WTO-inconsistencies would not occur in the future and was working with the US Congress to pass such amendments. But the United States emphasized that the issue in this particular investigation had been resolved.

18. The representative of Japan said that his country noted the statement made by the United States together with its latest status report. Japan was encouraged that the US administration would continue to work with the US Congress to enact legislation H.R. 2473. However, one and a half years had already passed since the legislation had been introduced in the US Congress. In the meantime, Japan had not seen any tangible development regarding this legislation. A full and prompt implementation of the DSB's recommendations and rulings was essential for maintaining the credibility of the WTO dispute settlement system and this view was shared by other Members including the United States, as a major and responsible WTO Member. Japan wished to renew its strong hope that the US administration would accelerate its efforts to work with the US Congress.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.23)

20. The Chairman drew attention to document WT/DS160/24/Add.23, 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 again assured Members that the United States took its responsibility to implement the DSB's recommendations and rulings seriously. As noted in the US status report, the US administration was working closely with the US Congress, and conferring with the EC, to reach a mutually satisfactory resolution of this matter.

22. The representative of the European Communities said that his delegation had been instructed to make the following intervention and hoped that this might be more easily received: "Intellectual property protection has been put in place to protect creativity. But in the US status reports, creativity is a scarce commodity. Always the same lack of compliance with the rules agreed by the international community. Five years of reporting no progress at all, that is a pity. We don't understand why the United States wants to continue to be guilty. Come on, United States, do comply, that would be good for humanity. And make happy this Committee".

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

2. Implementation by the European Communities of the recommendations and rulings of the DSB in relation to "European Communities – Regime for the Importation, Sale and Distribution of Bananas"[1] and related subsequent WTO proceedings

(a) Statements by Honduras and Panama

24. The Chairman said that this item was on the agenda of the present meeting at the request of Honduras and Panama, and invited the representatives of the respective countries to speak.

25. The representative of Honduras said that his country wished to refer to its earlier statements regarding this dispute. As his delegation had stated in previous DSB meetings, Honduras continued to be concerned about the WTO-inconsistency of the measures that had been taken by the EC to comply with the Bananas III decisions. Indeed, Honduras was still awaiting the EC's compliance with the Bananas III report nearly a decade after its adoption by the DSB. The consultations held with the EC in January 2006 had not resolved the existing differences. On the contrary, throughout 2006, the EC had failed to provide any kind of commercial satisfaction. As Honduras had indicated repeatedly to the EC and in the DSB, the banana sector was vitally important to its developing economy. More than 72 per cent of its banana output was exported. The banana exports generated an annual income of more than US $200 million. The banana sector represented one of the main sources of employment in Honduras, with the banana industry comprising more than 20,000 banana producers and more than 82,000 organized workers. In view of the fact that the EC trade data confirmed month after month that, under the illegal EC regime, Honduras' banana industry suffered substantial losses in terms of export volumes to the EC and its market share, finding a solution to Honduras' access remained a priority in the short term. Accordingly, Honduras again requested Members' assistance in promoting a prompt and full settlement of this trade dispute, in line with all rights and obligations under the dispute settlement system.

26. The representative of Panama said that his country's position on this subject had not changed. If there was no improvement regarding this illegal regime in the near future, Panama would have more to lose than most countries with MFN supplier interests. Panama was one of the two "principal suppliers" of bananas to the EC market. Bananas were Panama's most important agricultural commodity. Nearly all Panama's banana exports went to the EC. Under the current discriminatory arrangement, Panama's share of the EC market had already declined by more than 11 per cent. Panama's reduced export volumes to the EC market were being sold at a much smaller profit. The lost returns, income and employment that Panama experienced would disproportionately affect its

[1] WT/DS27.

poorest rural populations. The EC was aware of these difficulties. It had been reminded of them at each DSB meeting over the past 11 months. The EC's own statistical information from internal sources showed the investment shifts and transfers in Panama. Instead of seeking to bring its present regime into line with its WTO obligations, the EC had continued to ask for more time to review the statistics, while making it clear that it considered the present arrangements to be acceptable as they stood. Given the social and economic importance of this matter for Panama, his country had no option but to insist on prompt compliance and was working with other interested parties to achieve that result.

27. The representative of Nicaragua said that her delegation wished to briefly underline the importance of the banana sector for Nicaragua. The banana sector in Nicaragua provided thousands of jobs for its rural population, with almost 70 per cent of that population living below the poverty line. The cultivation of bananas, covering 26 per cent of Nicaragua's agricultural land, represented a high percentage of the agricultural revenue of the country. Despite the fact that Nicaragua's banana industry, with its many natural advantages, had traditionally directed its exports towards the EC, Nicaragua was now totally excluded from the EC's banana market. The advantage arising from the price of US$4.22/box granted to the preferential suppliers meant that Nicaragua's sales to the EC had ceased to be profitable. This in turn had held back investment to the extent that it had put the whole of Nicaragua's industry at risk. When the free-trade agreements between the EC and the ACP countries had come into force, the discriminatory incentives that were now diverting investments and decisions regarding supply away from countries such as Nicaragua could only make the situation worse. Even though Nicaragua had sought to obtain a satisfactory solution to its commercial concerns for the past 12 years, nothing had been achieved in this regard. This issue did not only concern bananas. For Nicaragua's sectors to attract investment and generate employment, there would have to be confidence that Nicaragua's commercial concerns would be resolved in conformity with WTO rights and obligations. Accordingly, it was her delegation's duty to request WTO Members to join Nicaragua and others in seeking a solution to this issue that would be in line with the compliance objectives of the DSU and would take into account the needs of developing countries.

28. The representative of the European Communities said that the EC wished to refer to its prior statements as to why this matter was not an "implementation issue" covered by Article 21 of the DSU. The EC remained open to addressing the concerns of Latin American suppliers in relation to its import regime in the appropriate fora. The EC was well aware of the importance of the banana industry for Latin American countries and ACP countries, and had always taken these interests into consideration. The EC was in regular contact with WTO Members involved to discuss this issue, including the rebinding of the MFN tariff. The EC had always been and remained committed to maintaining access to the EC's market by all banana supplying countries. Contrary to the statements made by Honduras, Nicaragua and Panama at the previous DSB meeting as well as at the present meeting, data on overall MFN imports available to date gave no reason to believe that such access was not maintained. The new EC tariff had thus far resulted in the increase in imports from both MFN and ACP suppliers as compared to previous years. The EC commitments did not include a commitment to "guarantee specific market shares", but only equivalent market access.

29. The representative of Brazil said that his country wished to thank Honduras and Panama for bringing this matter to the attention of the DSB. As stated previously, this issue had systemic implications and concerned all WTO Members. In recalling that the implementation of the banana disputes had not yet been completed, Brazil noted that the EC had not established a definitive tariff regime for MFN bananas. Brazil acknowledged the EC's efforts in initiating Article XXVIII negotiations with banana suppliers, but pointed out that a new bound tariff on bananas had not yet been defined. In this regard, Brazil urged the EC to complete negotiations with all qualifying MFN suppliers under Article XXVIII of the GATT 1994, with a view to finishing this process as soon as possible. While Brazil did not oppose the existence or maintenance of preferential schemes by the EC

for bananas, it understood that MFN suppliers were entitled to clear and transparent rules that would provide predictability concerning market access conditions to the EC and future investment decisions.

30. The DSB took note of the statements.

3. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB

(a) Statements by Canada, the European Communities and Japan

31. The Chairman said that this item was on the agenda of the present meeting at the request of Canada, the European Communities and Japan, and invited the respective representatives to speak.

32. The representative of Canada said that while his country appreciated the steps the United States had taken towards implementing the DSB's rulings and recommendations in this dispute, the United States had only prospectively repealed the Byrd Amendment. Anti-dumping and countervailing duties collected up to 30 September 2007 could still be disbursed to US producers under the terms of this legislation. As such, Canada believed that the US claim – made in its last status report from over nine months ago – that it had "taken the actions necessary to implement the rulings and recommendations" in this dispute was not accurate. Canada, therefore, called on the United States to resume the submission of status reports and to repeal the Byrd Amendment.

33. The representative of the European Communities said that, at the end of this month, the United States would have completed its sixth distribution of collected anti-dumping and countervailing duties to the US Industry under the CDSOA. In addition, for the first time, duties collected on products from NAFTA partners would not be distributed following an order of the Court of International Trade that the CDSOA could not apply to them. It went without saying that treating imports subject to anti-dumping measures differently depending on their origin did not solve the problem of compliance for WTO Membership as a whole. The CDSOA distributions should have been stopped by 27 December 2003, but they would instead continue until at least the fiscal year of 2010, starting on 1 October 2009 according to the US Congressional Budget Office. By denying its obligation to take further steps so as to stop immediately the distributions under the CDSOA, the United States granted itself the right to comply with its WTO obligations at some undetermined date in clear violation of Members' duty to comply promptly with the DSB's rulings. Indeed, as long as those transfers continued, the United States would be in breach of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement and full implementation would still have to be delivered. The EC would, therefore, ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

34. The representative of Japan said that his country had to reiterate its disappointment that the United States, once again, had not submitted a status report this month regardless of Japan's statements in previous DSB meetings. Despite the enactment of the Deficit Reduction Act of 2005, illegal distribution still continued. In light of the DSB's discussions thus far, Members except for the United States were convinced that, as long as this situation did not change, the United States had not fully implemented the DSB's recommendations and rulings. Japan acknowledged that duties collected on products from NAFTA partners would not be distributed following an order of the Court of International Trade ruling that the Byrd Amendment could not apply to them. The United States shall stop illegal distribution under the CDSOA for all WTO Member countries immediately. Japan urged the United States to provide its status reports and comply fully with the DSB's recommendations and rulings as soon as possible. Japan reserved all the rights under the DSU until full implementation by the United States had been achieved.

35. The representative of Brazil said that, once again, his country thanked Canada, the EC and Japan for raising this issue in the DSB. For Brazil, the "issue" had not been resolved in this dispute within the meaning of Article 21.6 of the DSU. The prospective repeal of the Byrd Amendment, in reality, had postponed the resolution of this dispute until the date at which disbursements would cease altogether. Members were still very far from that day, which, according to US authorities, might be as late as 2010. Until then, the co-complainants could not be deprived of any right conferred by the DSU with respect to this situation of non-compliance. However, this was not the most important element of the discussion. Members should be seriously concerned about systemic implications of the interpretation that the United States, without much explanation, sought to advance before the DSB. Such interpretation could only undermine the ability of the dispute settlement system to provide timely and effective solutions to all disputes. If a Member was allowed to relieve itself from its implementation burden by simply stating that it had passed a law that would come into effect in five, ten or 15 years, the credibility of the whole system would be at stake. Recalling that the major players bore greater responsibilities, Brazil invited the United States to reflect upon its course of action and consider alternatives to stop the WTO-inconsistent payments under the Byrd Amendment.

36. The representative of Thailand said that his country thanked Canada, the EC, and Japan for bringing this item before the DSB. Thailand remained disappointed at the United States' continued illegal disbursement of funds under the CDSOA. Likewise, Thailand remained disappointed at the Unites States' continued refusal to submit any status report on its outstanding implementation in this dispute. At this time, Thailand therefore repeated its call that the United States cease its illegal disbursements, immediately repeal the Byrd Amendment and resume providing status reports until such actions had been taken and this matter had been fully resolved.

37. The representative of China said that his country thanked and supported the EC, Canada and Japan for raising this item at the present meeting. China shared the views expressed by the previous speakers that the implementation issue had not been resolved in this dispute within the framework of Article 21 of the DSU. Implementation was critically important to the credibility and efficiency of the dispute settlement system. Should the prospective repeal of a WTO-inconsistent measure be treated as equal to immediate compliance, the legal basis of the DSU regarding prompt and full compliance with the DSB's recommendations and rulings would be greatly undermined. Therefore, China wished to join previous speakers in urging the United States to comply fully and promptly with the DSB's rulings.

38. The representative of India said that his country wished to thank Canada, the EC and Japan for raising this issue at the DSB again. In spite of its exhortations at past meetings, India was still awaiting a response from the United States to its long-standing question as to how the United States squared up their compliance obligations with the continued disbursement of collected anti-dumping and countervailing duties to their industry, almost fours years after they should have stopped them. It was regrettable that the United States did no more than re-iterate its indefensible position on compliance. This in the face of new administration action based on the very CDSOA that it had admitted had been found inconsistent with WTO rules, and had asserted that it had been withdrawn. Such unilateral action undermined the WTO dispute settlement system. India, therefore, again urged the United States to inform the DSB of the steps it proposed to take to ensure full compliance, and reiterated its request that the United States resume submitting status reports in this dispute.

39. The representative of the United States said that, as his country had already explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

40. The DSB took note of the statements.

4. Statement by Ecuador regarding the European Communities' regime for the importation, sale and distribution of bananas

41. The Chairman said that this item was on the agenda of the present meeting at the request of Ecuador and invited the representative of Ecuador to speak.

42. The representative of Ecuador said that his country was strongly committed to the multilateral trading system and wished to see it increasingly strengthened through the implementation of rules that were clear, transparent, fair, non-discriminatory, predictable, and unambiguously directed towards the promotion of development. Thus the DSB had to ensure the implementation of the Agreements and the full enforcement of the WTO rules and principles as well as to judge disputes between WTO Members, seek a compromise between the parties and set out the rules that would ensure respect for rights and legitimate interests. The DSB was the body in the multilateral trading system that was legally competent to judge and resolve – as it had done on previous occasions – a subject of undoubted complexity and importance for a number of WTO Members; i.e. the EC's regime for the importation of bananas.

43. Ecuador, a developing country, which based its foreign policy on the implementation of international law, was the world's leading banana exporter. Over a million Ecuadorians worked directly or indirectly in the bananas sector. Consequently, the importance of bananas for Ecuador transcended the strictly commercial aspects and had a profound significance in the social, political and economic areas. Since the end of 1991 when consultations had been initiated regarding the establishment of a common organization of markets in the bananas sector, Ecuador had advocated a realistic and pragmatic regime of free trade and competition, which took into account the interests of all the parties involved. During those years the sensitivity of the issue and deep differences between the EC's member States had once again been revealed. Regulation No. 404/93, which had established the single regime for the importation of bananas into the EC, had come into force in July 1993; six months after the formal commencement of the European single market. The reasons for the delay were obvious: the complexity of the issue, many different interests of those involved in the banana sector and divergent positions of the EC's member States. Ecuador had challenged on both technical and legal grounds the restrictive nature of the regime and had initiated its accession process to join the multilateral trading system. Other Latin American countries had brought the case to the GATT and had achieved a framework agreement with the EC. The Uruguay Round was then at a crucial stage, but a definitive solution to the banana issue continued to be a long way off.

44. Once it had become a Member of the WTO, Ecuador had taken legal action against those instruments. That action, known as "Bananas III", had finally achieved a result favourable to the Ecuadorian position in 1997. Subsequently, in April 2001, Ecuador had signed with the EC an understanding on bananas, which laid down an obligation to establish, by 1 January 2006 at the latest, a "tariff only" system that would at least maintain full access for Ecuador's bananas to the EC's market. In November 2001, a Ministerial Decision had been approved in Doha, with its corresponding annex, which had placed the above-mentioned obligation in a multilateral context and had established a mechanism with two arbitration rounds in order to determine whether the tariff proposed by the EC for the tariff regime for the importation of bananas fulfilled the commitment to maintain total access for Ecuador's bananas to that important market.

45. Regrettably, that procedure had not given the arbitrators the power to establish an appropriate tariff. In 2005 the two arbitration awards had rejected the tariff proposals of the EC, but, surprisingly, in November 2005, the EC approved a new banana import regime, which was not only tariff based, did not meet the requirements of Articles I, II and III of the GATT 1994 and had provided, in the case of MFN suppliers, such as Ecuador, for a tariff of 176 €/mt, established unilaterally and independently, which had not been WTO bound. Ecuador and the other Latin American banana-exporting countries had constantly demonstrated their willingness to negotiate with the EC a

mutually agreed solution that would take account of the legitimate interests of all the parties involved. The Summits of Heads of State in Quito and San José, held in January and July 2005, as well as the active participation during the last ten months in the good offices process agreed in Hong Kong, under the auspices of the Foreign Minister of Norway, had corroborated the assertion.

46. On 16 November 2006, Ecuador had formally requested consultations with the EC, pursuant to Article 21.5 of the DSU. Ecuador's request, which had been circulated to all WTO Members, rested on solid technical and legal bases and clearly highlighted the failures to fulfil the obligations laid down in the above-mentioned legal instruments. Ecuador had legitimately sought a satisfactory solution for all the parties involved that naturally encompassed the obligations entered into by the EC. The consultations provided a favourable context for seeking such an agreement between the parties. The relations between Ecuador and the EC were based on long-standing historical and cultural links and on shared values, such as respect for the rules of international law, the defence of democracy and human rights, regional integration, free trade and the strengthening of the multilateral trading system. The decision to deepen their relations, adopted by the heads of state of the Andean community and the EC, should not be affected by the exercise of a legitimate right in the WTO, which was a pillar of the multilateral system and a guarantee for reaching a just settlement of differences among its member States. The whole world had changed since the 1990s, but the problem of bananas still remained. Ecuador wished to reiterate once again its commitment to working together with others, constructively and realistically, to reach a satisfactory solution, which would take account of WTO rules and principles, the legitimate rights and interests of all the parties involved and the legal obligations.

47. The representative of the European Communities said that the EC had always favoured and remained in favour of a negotiated solution with interested MFN suppliers regarding the import regime for bananas, including the question of rebinding. It was unfortunate that Ecuador had opted for litigation rather than to give the monitoring process, under the good offices of Norway, a chance to lead to a solution. The EC had been quite satisfied with the way this process had been conducted thus far with the help of the good offices under the auspices of Norway. The EC would have been ready to draw the necessary conclusions from this process when representative data had been examined. The EC would participate constructively in the consultations requested by Ecuador in the past week, but the EC wished to reiterate its disagreement with any characterization of this matter as an issue of "implementation of the DSB rulings and recommendations" covered by Article 21 of DSU. The EC referred to its earlier interventions in this respect made under Item 2 of the agenda of the present meeting.

48. The representative of Colombia said that her country noted the statement made by Ecuador regarding the EC's regime for the importation, sale and distribution of bananas. Colombia had always favoured a negotiated solution to the banana problems regarding access to the EC's market. Consequently, Colombia regretted the fact that it had not been possible in the course of the year to advance the negotiations to resolve the differences regarding this matter. It was Colombia's view that the current importation regime was not in conformity with the WTO rules. Consequently, Colombia had participated in the good offices process carried out by Norway and hoped that by such means, or by any other expeditious means, this dispute could be fully resolved. Colombia sought an effective outcome that could be applied rapidly and be bound within the WTO framework. For the above reasons, Colombia wished to participate in any initiative, including the consultations requested by Ecuador on 16 November, since it provided an opportunity for seeking a solution to the bananas problem.

49. The representative of Brazil said that his country wished to thank Ecuador for its statement. Ecuador's request for consultations constituted further confirmation of the relevance of the implementation in the bananas dispute. As stated previously, a thorough discussion of the issues raised at the present meeting would benefit not only the parties directly involved in the dispute, but all

WTO Members. Therefore, Brazil would follow all new developments regarding this dispute. Brazil hoped that the parties would arrive expeditiously at a definitive solution to this dispute.

50. The representative of Ecuador said that his delegation wished to briefly follow up on the statement made by the EC at the present meeting. Ecuador had clearly and consistently shown its willingness to negotiate and to look at the matter with a broad vision in order to find a solution. This was a matter of great importance to Ecuador and to many other WTO Members. Ecuador had participated actively, constructively and in good faith in the good offices process carried out by Norway and recognised that this was a valid effort. Unfortunately current circumstances, the suspension of the Doha Round negotiations and a lack of action in this area, had prompted Ecuador to take this action. The consultations requested by Ecuador could be an effective way to finding a solution. Ecuador looked forward to negotiating and to bringing positions closer. Ecuador would do so with the best possible will to find a solution which would be mutually acceptable.

51. The representative of the United States noted that Ecuador had just expressed many of the same concerns about the EC's bananas regime that Honduras, Panama, Nicaragua, Brazil, and Colombia had raised previously under Item 2 or under the present item. The United States too had serious concerns about the EC's regime. In light of Ecuador's request for consultations, the United States would again urge the EC to engage in a meaningful dialogue with interested Members with a view to resolving this dispute. Given the significant social and economic sensitivities involved – and the deteriorating market conditions – the United States urged the EC to do so quickly.

52. The representative of Honduras said that the statement made by his delegation under Item 2 of the agenda of the present meeting should also apply to the item under consideration.

53. The representative of Nicaragua said that his country wished to make the same request that Honduras had just made, namely that the statement made by Nicaragua under Item 2 should also apply to the item under consideration.

54. The representative of Panama said that his delegation supported the statements by Honduras and Nicaragua and wished that Panama's statement made under Item 2 of the agenda of the present meeting be considered in the same way.

55. The DSB took note of the statements.

5. United States – Customs Bond Directive for merchandise subject to anti-dumping/countervailing duties

(a) Request for the establishment of a panel by India (WT/DS345/6)

56. The Chairman recalled that the DSB considered this matter at its meeting on 26 October 2006 and had agreed to revert to it. At the present meeting, he drew attention to the communication from India contained in document WT/DS345/6, and invited the representative of India to speak.

57. The representative of India said that, as noted by the Chairman, the DSB had first examined India's request for the establishment of a panel in this dispute on 26 October 2006. India's request had been circulated to WTO Members as document WT/DS345/6. Since India had already described in detail the reasons for its request to establish a panel during the 26 October DSB meeting, his delegation did not intend to repeat those details at the present meeting. Suffice it to say that the United States continued to impose the WTO-inconsistent continuous bond requirement on importers of certain warm water shrimp from India in an arbitrary and discriminatory manner. Furthermore, in the period between the 26 October DSB meeting when India's panel request had been considered for the first time and the present meeting, the United States had failed to address India's concerns.

Therefore, India was compelled to seek recourse to dispute settlement. Accordingly, India requested the establishment of a panel to examine this matter pursuant to Article 6 of the DSU with standard terms of reference.

58. The representative of the United States said that his country remained disappointed that India had chosen to pursue this matter further by requesting the establishment of a panel. Members had the right to ensure that importers paid duties owed. The United States was confident that the panel would recognize that fact and would find these measures consistent with US WTO obligations. Nonetheless, the United States understood that a panel would be established at the present meeting to consider India's claims.

59. The representative of Thailand said that his country was disappointed that it seemed from the silence of the United States that a joint panel under Article 9.1 of the DSU would not be established to examine both the matter raised by Thailand in WT/DS343/7 for which the DSB established a panel on 26 October 2006, and the matter now raised by India in WT/DS345/6. Thailand recalled that Article 9.1 of the DSU provided that a single panel should be established to examine complaints related to the same matter wherever this was feasible. Thailand considered it more than feasible that a single panel could have been established to consider Thailand's and India's complaints relating to the same matter of the continuous bond. In any case, Thailand hoped that all the parties involved, in particular the United States, would cooperate to ensure that the panels pertaining to DS343 and DS345 cases consisted of the same persons working on a harmonized time-table pursuant to Article 9.3 of the DSU.

60. The representative of the United States said that a panel requested by Thailand had already been established at the previous DSB meeting. At the present meeting, the DSB was establishing a separate panel in response to India's request. However, the United States noted that Article 9.3 of the DSU provided the same result – the same panelists could consider on the same timetable the matters in the two requests.

61. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

62. The representatives of Brazil, China, the European Communities, Japan and Thailand reserved their third-party rights to participate in the Panel's proceedings.

6. European Communities – Measures affecting the approval and marketing of biotech products

(a) Reports of the Panel (WT/DS291/R & Corr.1; WT/DS292/R & Corr.1; and WT/DS293/R & Corr.1)

63. The Chairman recalled that at its meeting on 29 August 2003, the DSB had established a single panel to examine the complaints by the United States, Canada and Argentina pertaining to this matter. The Reports of the Panel contained in WT/DS291/R and Corr.1; WT/DS292/R and Corr.1; WT/DS293/R and Corr.1 had been circulated on 29 September 2006 as an unrestricted document. The Reports of the Panel were now before the DSB for adoption at the request of the United States, Canada and Argentina. The adoption procedure was without prejudice to the right of Members to express their views on the Reports.

64. The representative of Canada recalled that, on 27 August 2003, at the request of Canada, Argentina and the United States, the DSB had established a panel to resolve the matter on: "EC – Measures Affecting the Approval and Marketing of Biotech Products". On 10 May 2006, the Panel had released its confidential final report to the parties, followed by the public final report on

29 September 2006. Canada wished to express its gratitude to the Panel, the scientific advisors retained by the Panel and the Secretariat for their considerable effort during these unusually lengthy proceedings. Canada commended the Panel for its careful and considered analysis of the issues in dispute, made all the more difficult by the scientific and legal complexity and the volume of information submitted during the proceedings.

65. Canada was generally satisfied with the Panel's findings in its final Report. The Report had confirmed that the EC maintained a general moratorium on the approval of biotech products and that this general moratorium had resulted in undue delay in the processing of biotech applications in a manner inconsistent with the EC's obligations under the SPS Agreement. Furthermore, the Report had confirmed that certain safeguard measures adopted by the EC member States had not been based on a risk assessment, again in contravention of the SPS Agreement. Lastly, the Report had confirmed the scientific conclusions of many scientific bodies, including the EC's own scientific committees, that the objections raised against the specific biotech products under review were not scientifically justified. With a Panel Report of this complexity and size, it was not unexpected that a party that had put the Report up for adoption would disagree with some of the findings and conclusions contained therein.

66. While this Report on the whole provided a solid basis for achieving a satisfactory settlement of this matter, in accordance with the rights and obligations of WTO Members, Canada wished to identify several concerns with the Panel's findings and recommendations. First, Canada disagreed with the Panel's narrow interpretation of what constituted an "SPS measure", as defined in Annex A (1) of the SPS Agreement. In Canada's view, this interpretation was not consistent with the plain meaning of the text of the SPS Agreement. Second, Canada disagreed with the Panel's application of its definition of an "SPS measure" to the measures at issue in this case, in particular, the general moratorium. Third, Canada had disagreed with the Panel's finding that Articles 5.1, 5.5, 5.6 and 7 had not been applicable to the general moratorium. While largely based on the Panel's narrow interpretation of the definition of an SPS measure, the Panel's finding of inapplicability involved interpretations of these provisions that again, in Canada's view, had not reflected the text of the SPS Agreement. Lastly, Canada disagreed with the Panel's interpretation of the relationship between Article 5.7 and other provisions of the SPS Agreement. While Canada had agreed with the Panel's conclusions that Article 5.7 did not apply in the case of the EC member State safeguard measures, the Panel's conclusion that Article 5.7 was not an "exception" to the basic obligation in Article 2.2, but an "autonomous right" appeared to be inconsistent with the explicit text of Article 2.2 as well as the overall structure of the SPS Agreement. As noted by the Panel, its interpretation had implications for the allocation of the burden of proof.

67. However, these were matters that had to be left for another day. Canada hoped that there would be an occasion for the first and last issues to be addressed and clarified in a future SPS-related panel or Appellate Body report. Notwithstanding these reservations, Canada wished to reiterate its gratitude to the Panel for its careful and detailed analysis of the many complex issues in dispute in this matter. Canada was hopeful that, with the benefit of the guidance contained in the Report, the EC would now remove its WTO-inconsistent measures and that the way would have been paved to improve trade in agricultural products of biotechnology and would open doors to bilateral cooperation in the field of agriculture biotechnology. Canada, therefore, respectfully requested, pursuant to Article 16 of the DSU, that the DSB adopt this Report.

68. The representative of the United States said that his country was pleased to request that the DSB adopt the Report of the Panel in WT/DS291, the dispute which had been brought by the United States. Before initiating this dispute in May 2003, the United States had waited patiently for five years for the EC to follow the WTO rules, as well as its own published procedures and the recommendations of its own scientists. Pursuing this case in the WTO had taken an additional three years and thousands of pages of factual and legal argumentation, resulting in the longest Panel Report

in the history of the WTO. The Panel had undertaken a thorough, well-reasoned analysis of both the extensive factual information submitted by the parties and of the applicable WTO obligations. In a report of this length, there were bound to be discrete elements of analysis with respect to which the United States was not in full agreement. But the report on the whole was prepared with care and written with clarity. The United States wished to thank the Panel, the Secretariat, and the scientific experts for the countless hours that they had spent during the course of the proceedings.

69. The United States was gratified that the Panel had agreed with the United States that the measures at issue of the EC, Austria, France, Germany, Greece, Italy and Luxembourg were inconsistent with the obligations set out in the SPS Agreement. In particular, the Panel had found that the EC adopted a *de facto*, across-the-board moratorium on the final approval of biotech products, starting in 1999 up through the time the panel had been established in August 2003. The Panel had found that the EC had presented no scientific or regulatory justification for the moratorium, and thus that the moratorium resulted in "undue delays" in violation of the EC's obligations under Annex C of the SPS Agreement. The Panel had also identified specific, WTO-inconsistent "undue delays" with regard to 24 of the 27 pending product applications that were listed in the US panel request. And the Panel had upheld the United States' claims that, in light of positive safety assessments issued by the EC's own scientists, the bans adopted by six EC member States on products approved in the EC prior to the moratorium were not supported by scientific evidence and were thus inconsistent with WTO rules. Although the EC had approved a handful of biotech applications following the initiation of the dispute in 2003, the EC had yet to lift the moratorium in its entirety. Some biotech product applications had been pending for ten years or more, and applications for many commercially important products continued to face unjustified, politically-motivated delays. The United States urged the EC to comply with its WTO obligations, and to proceed to consider all outstanding biotech product applications in the time necessary to evaluate their scientific merits, in accordance with the EC's own laws, and without undue delays.

70. The United States believed that in addition to the importance of the Panel's findings with regard to the specific measures at issue of the EC, Austria, France, Germany, Greece, Italy and Luxembourg, the Panel Report was equally important in illustrating the successful operation of the rules-based trading system. The findings of the Panel upheld the principle of science-based policymaking over unjustified, anti-biotech policies. Such policies, as represented by the EC moratorium and the bans of Austria, France, Germany, Greece, Italy and Luxembourg, had perpetuated an unjustified trade barrier that had impeded both US exports and the global use of a technology that promised great benefit to farmers and consumers around the world. Food and animal feeds produced from biotech crops were safe and widely used around the world. Biotech crops helped nourish the world's hungry population, offered tremendous opportunities for better health and nutrition, and protected the environment by reducing soil erosion and pesticide use. The United States recognized that despite the EC's moratorium and the member State product bans, there was considerable support for agricultural biotechnology within the EC. The United States looked forward to working with the EC, Austria, France, Germany, Greece, Italy and Luxembourg to enhance the availability of this technology to farmers and consumers throughout the world.

71. The representative of Argentina said that his country wished to express its appreciation for the commitment and work of the Panel and the Secretariat at the conclusion of a period of over three years' proceedings aimed at achieving a solution to this dispute. The sheer length of this report, which greatly exceeded the usual average, together with the complexity of the subjects discussed and other special circumstances, clearly revealed the time and effort expended by all those involved. Accordingly, Argentina wished to draw attention to the observation made by the Panel in paragraph 7.46 of its Report in which it had recognized the difficulties which Argentina, as a developing country, had had to overcome in order to substantiate its case within the prescribed time-limits. It was necessary to stress the importance that the Panel's findings had for his country, in view of its position as the world's second producer and exporter of biotech products, and it was for this

reason that Argentina had received the Panel's findings with great satisfaction. In particular, Argentina wished to draw attention to the finding regarding the existence of a "*de facto*" moratorium applied by the EC for the approval of biotech products between June 1999 and August 2003, and also the existence of a particular moratorium applied to the procedures for the approval of products of interest to Argentina, leading to the conclusion that the EC had failed to fulfil its obligations under Article 8 and the first clause of paragraph 1(a) of the SPS Agreement, thereby demonstrating that it was possible to challenge an unwritten measure in the WTO.

72. With regard to the general moratorium, the Panel had concluded in paragraph 7.1272 that between June 1999 and August 2003 the EC had applied a general *de facto* moratorium "[...] i.e. without having been adopted through a formal EC rule […] and, more particularly, that the final approval of applications had been prevented by the Group of Five countries and/or the Commission through their actions and/or omissions". In addition, with regard to the claim concerning undue delay, Argentina considered that attention should be drawn to the analysis carried out by the Panel on the developments in scientific knowledge and the application of a prudential or precautionary approach to justify the delays. Argentina also wished to emphasize another fundamental aspect of the Panel Report with regard to the safeguard measures on specific products adopted by some EC member States. The Panel had concluded that such measures had not been based on an assessment of risk as required under Article 5.1 of the SPS Agreement, nor were they compatible with the provisions of Article 5.7 of that Agreement. Finally, the Panel had rejected the EC argument under Article 5.7 that the insufficiency of relevant scientific evidence should be assessed in relation to the importing Member's appropriate level of protection. Consequently, for the above reasons, Argentina requested that the DSB adopt the Panel Report and trusted that the application of the recommendations and the rulings of the DSB in this case would signify an important advance in the application of the rules for marketing biotech products.

73. 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 agreed with other aspects of this Report and acknowledged the time and efforts dedicated to this dispute. The EC wished to make a few comments with respect to the Panel Report. First, the Panel Report had confirmed the right of WTO Members to regulate GM products. The violation findings of the Panel Report were mostly limited to the way the regulatory procedures a WTO Member might chose to establish should work. Second, the EC GMO approvals regime had been functioning normally. Ten GM products had been authorised since the establishment of the WTO panel and some 30 more were being duly examined. As a result, most of the findings of the Panel had become theoretical. Therefore, despite many reservations as to the argumentation and conclusions of the Panel Report, the EC had decided not to appeal. Thereby, the EC wanted to avoid overburdening the Appellate Body and the dispute settlement mechanism. There was no basis for claiming that the EC was maintaining a moratorium on authorisations of GM products. Applications were being processed normally and ten authorisations had already been granted since the establishment of the WTO panel and others were on the pipeline (including some on applications for cultivation). With respect to the national bans, the EC was considering any appropriate measures. The EC would ask for a reasonable period of time to deal with this issue.

74. The representative of China said that his country was a third party to this dispute, but China would not comment on the Reports. Instead, China wished to draw Members' attention to a communication from the Panel concerning the breach of confidentiality requirement during the panel stage, especially concerning the leakage of the interim report and its possible negative impact on the deliberation of the Panel. China thought this issue deserved the notice of all Members

75. The representative of the United States said that his country did not agree with a number of elements of the EC's statement. For example, although the EC had granted approvals to a handful of products after the case had been initiated, the EC continued to block applications based solely on

political, rather than scientific concerns. Some applications had been pending for over ten years. Also, each one of the handful of EC approvals had to be accomplished in an exceptional, politically controversial procedure in which the EC Commission had granted approval in the absence of action by the EC member States. The procedure involved needless delays. Moreover, the EC had not been willing to allow most of the pending applications to reach final decision under this exceptional procedure. In short, in not one single case had a biotech product application reached final decision under the normal procedures set out in the EC's own rules.

76. The representative of Canada sought some clarification with respect to the EC's statement. He understood that the EC had stated that it would require a reasonable period to time only in respect of national measures. He wished to know if his understanding was correct.

77. The representative of the European Communities said that this was exactly what he had stated.

78. The DSB took note of the statements and adopted the Panel Reports contained in WT/DS291/R & Corr.1; WT/DS292/R & Corr.1; and WT/DS293/R & Corr.1.

7. Adoption of the 2006 draft Annual Report of the DSB

79. The Chairman said 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, he was submitting for adoption the draft text of the 2006 Annual Report of the DSB contained in document WT/DSB/W/334 and Add.1. This report covered the work of the DSB since the previous annual report contained in document WT/DSB/39 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 2006, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He wished to propose 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 on 14 December.

80. The representative of Ecuador said that his delegation wished to thank the Secretariat for the Annual Report and noted that his delegation had provided some comments regarding the Addendum, which it considered to be very useful because it covered the entire history of the dispute settlement mechanism since 1995. However, Ecuador did not wish to increase the workload of the Secretariat since a great deal of excellent work had already been done.

81. The DSB took note of the statements and adopted the draft Annual Report of the DSB contained in WT/DSB/W/334 and Add.1 on the understanding that it would be further updated by the Secretariat.[2]

8. United States – Subsidies on upland cotton

(a) Statements by the United States and the EC concerning Brazil's intervention made at the 26 October 2006 DSB meeting regarding the composition of the Article 21.5 panel.

82. The representative of the United States, speaking under "Other Business", recalled that at the previous DSB meeting held on 26 October 2006, Brazil had intervened under "Other Business" concerning the panel composition in the Article 21.5 proceedings in "United States – Subsidies on Upland Cotton". The United States had had time to reflect on that statement. The United States was

[2] The Annual Report was subsequently circulated in document WT/DSB/42 and Add.1.

raising this matter at the present meeting because of the broad systemic problems presented by Brazil's intervention, a problem that should be of concern to any Member that had ever participated in a panel selection process or who might participate in such a process in the future. The United States was deeply troubled by Brazil's disclosure of what it had claimed were US positions in the panel composition process. Even leaving aside the numerous inaccuracies in Brazil's DSB statement, Brazil was well aware that the panel composition process was confidential.

83. Brazil's intervention represented an unprecedented and extremely serious breach of the confidentiality of this process. No other WTO Member to date had purported to disclose the positions of another party concerning the selection of panelists. There was a very good reason for this: the integrity and credibility of the panel composition process served as the foundation of the integrity and reliability of the Panel's findings and the DSB's recommendations and rulings that resulted from that process. The United States believed that all Members should be concerned not only with Brazil's actions in this dispute, but with the prospect that Brazil's actions might be repeated in future disputes. The United States expected that no Member, including Brazil, would be pleased to hear other Members claiming to disclose its positions on proposed panelists upon completion of, or during, panel composition. This would undermine the ability of Members to agree upon panelists in an orderly fashion. In addition, the United States was very troubled that Brazil had chosen to criticize the decision by the Director-General, who was acting pursuant to the provisions of the DSU. Brazil might disagree with the panelists appointed by the Director-General, but there was no basis for approaching the DSB to complain about that decision or to claim that the Director-General had breached the DSU in making his decision. Again, Brazil's actions undermined the integrity of the panel composition process.

84. The representative of the European Communities said that the EC was of the view that a party to Article 21.5 of the DSU proceedings could not, where the original panel was still available, withdraw its prior agreement in the original proceedings to accept citizens of third parties serving as panellists. The EC was considering commenting further on this matter in its third-party submissions in this case.

85. The representative of Canada said that, at this time, his country did not have a position on this particular issue and, specifically, on the US statement. The reason was that this matter had not been placed on the agenda of the present meeting to give notice to Members. Of course, Members could raise issues under "Other Business", but this matter appeared, as the United States had stated, to be of significant systemic importance. Given the fact that it had been raised at the previous DSB meeting, and that the United States had had ample time to consider whether or not to make a statement on this matter, it would have been preferable for it to be included on the main agenda of the present meeting, so that Members could have the opportunity to discuss it with capital and to provide considered views on such an important matter: confidentiality of the proceedings in panel selection. Canada had already made known its concerns about substantive agenda items under "Other Business" and wished that Members could give advance notice, to the extent possible, regarding issues to be raised in the DSB.

86. The representative of Brazil said that his delegation wished to start by referring to the statements made by Brazil at the 26 October DSB meeting, and wished to invite all Members to take a deep look at them and to point out where, in those statements, had Brazil ever breached the confidentiality of the panel composition process. What the United States could not get out of this was a cover for its objection to the original panelists and was thus accusing Brazil of a serious breach of confidentiality. The same invitation was also directed to all Members to point out where had Brazil ever criticized the Director General for doing what he had done. If any Member could do this, Brazil would agree, but he assured Members that they would find no citation or line that would even imply any of the accusations made by the United States. The substantive point was even more important and referred to the possibility that a Member – having no objections to the panelists in the original

proceedings; having no objections to the panelists to serve as Article 22.6 arbitrators; and having accepted third party nationals panelists in previous disputes – objected to the original panelists to serve on Article 21.5 procedures. If this was the system that Members wanted, Brazil would have no objection, but Brazil did not think this was really the case. Finally, he concluded by reiterating that Brazil was very confident that the new panelists had the capacities and skills to perform their task and would find again that the United States was in violation of its WTO obligations.

87. The representative of the United States said that Brazil's intervention only reinforced US concern with disclosing positions allegedly taken during the panel composition process, and the decision-making of the Director-General when called upon to compose a panel. Members must be able to express their views during that process without fear that they would be publicly and inaccurately disclosed by the other party. The United States too invited Members to read Brazil's 26 October DSB statement closely, including, for example, the third and fourth paragraphs.[3] In any event, as the United States had pointed out at the 26 October DSB meeting, the rules of the DSU with regard to service on a panel by third party nationals were clear and had until now been non-controversial. As the United States had explained, previous compliance proceedings had been confronted with precisely the issue that arose in this proceeding, and the parties dealt with it cooperatively and responsibly. It was regrettable that Brazil was unwilling to resolve the issue in like fashion in this dispute, and had instead adopted the untenable position that it was somehow exempt from the rules applicable to every other Member.

88. The representative of Brazil said that with regard to responsibility and cooperation, Brazil was better equipped than the United States to speak, but he suspected that whatever Brazil referred to now would be treated as a breach of confidentiality by the United States.

89. The DSB took note of the statements.

[3] See paragraph 75 in document WT/DSB/M/221.