WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/142
6 March 2003

(03-1293)

Dispute Settlement Body
27 January 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 January 2003

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Prior to the adoption of the agenda, the representative of the United States said that her delegation wished to be informed which Member had requested that item 4 be placed on the agenda of the present meeting. The Chairman stated that item 4 had been placed on the agenda at the request of Canada. The United States noted that the agenda item 4 called for the adoption of the Panel and Appellate Body Reports reflecting all the Panel requests in these disputes. Therefore, she said that the United States wished to be clear if it was true that no other Member placed any of these Reports on the agenda. The Chairman reiterated that item 4 had been placed on the agenda at the request of Canada only.

The DSB took note of the statements and adopted the proposed agenda.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB 2

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States 2

(b) United States – Anti-Dumping Act of 1916: Status report by the United States 2

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States 3

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States 4

2. United States – Countervailing measures concerning certain products from the European Communities 4

(a) Implementation of the recommendations of the DSB 4

3. European Communities – Conditions for the granting of tariff preferences to developing countries 5

(a) Request for the establishment of a panel by India 5

4. United States – Continued Dumping and Subsidy Offset Act of 2000 8

(a) Report of the Appellate Body and Report of the Panel 8

5. Proposed amendments to the *Working Procedures for Appellate Review* 18

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States

(b) United States – Anti-Dumping Act of 1916: Status report by the United States

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States

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

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.11)

2. The Chairman drew attention to document WT/DS160/18/Add.11 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.

3. The representative of the United States said that her country had provided an additional status report in this dispute on 16 January 2003, in accordance with Article 21.6 of the DSU. As noted in that report, the United States and the EC had been seeking a positive and mutually acceptable resolution of the dispute. She noted that, as Members might be aware, the US Congress had been out of session. The 108th Congress was now getting organized and preparing to resume work. The US administration would continue to engage the Congress on this issue with a view to concluding a mutually acceptable resolution consistent with WTO rules.

4. The representative of the European Communities said that his delegation regretted that its first statement in 2003 on this issue had to be substantially the same as the previous statements made in 2002 on the same subject – except that one more month had lapsed. The EC was very disappointed by the lack of action of the United States thus far. The EC urged, once again, the United States to take rapid and concrete action to settle this dispute and to comply with the DSB's recommendations. The EC could only hope that the 108th Congress would be more diligent than the 107th Congress as regards the implementation of the DSB's recommendations and rulings.

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

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.11 - WT/DS162/17/Add.11)

6. The Chairman drew attention to document WT/DS136/14/Add.11 – WT/DS162/17/Add.11 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.

7. The representative of the United States said that her country had provided an additional status report in this dispute on 16 January 2003, in accordance with Article 21.6 of the DSU. As the new US

Congress resumed work, the US Administration would continue to work with it to achieve further progress in resolving this dispute with the EC and Japan.

8. The representative of Japan said that the US Congress had not passed the bills repealing the 1916 Anti-Dumping Act before the end of its session in 2002. It was truly regrettable and disappointing that the United States was yet to implement the DSB's recommendations and rulings even though more than two years had passed since the adoption of the Reports of the Appellate Body and the Panel. As Japan had repeatedly pointed out, such a delay in implementation damaged the credibility of the WTO dispute settlement system. Japan strongly urged the United States that the repealing bills be submitted to and passed in the 108th session of the Congress, which would resume its work this month. There was no reason whatsoever for this task to be difficult or time-consuming, as the bills had indeed been submitted to the 107th session. He stressed that the proceedings in the US domestic courts had reopened as of 8 August 2002 and, as a result, the respondent Japanese companies were suffering real financial consequences, including litigation costs. His delegation wished to remind the United States of Japan's right to suspend concessions or other obligations.

9. The representative of the European Communities said that the US status report referred to the two repealing bills that had been introduced in December 2001 and April 2002. However, the US administration should make clear to the US Congress that the lack of implementation of this ruling was seriously affecting the credibility of the US commitment to the WTO dispute settlement system. The implications of such lack of US compliance with WTO rulings went well beyond the particular circumstances of this case. Moreover, the EC recalled that a repeal of the 1916 Anti-Dumping Act with effects to future cases only could not be considered a satisfactory solution, and would only serve to prolong the dispute.

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

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.4)

11. The Chairman drew attention to document WT/DS176/11/Add.4 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.

12. The representative of the United States said that her country had provided a status report in this dispute on 16 January 2003, in accordance with Article 21.6 of the DSU. As noted in that report, on 20 December 2002, the United States and the EC had informed the DSB that they had agreed to extend the reasonable period of time for implementation of the DSB's recommendations and rulings until 30 June 2003. As the new US Congress resumed work, the US administration would work with it with a view to resolving this dispute.

13. The representative of the European Communities said that the EC had agreed to give more time to the United States to comply with the DSB's rulings and recommendations. The EC considered that a satisfactory settlement to this dispute was more important than a strict adherence to the initial deadline. The EC expected the US administration to work now actively with the new Congress to fully implement the DSB's rulings and recommendations. In this respect, the EC would like to restate its position expressed in the previous DSB meetings on the legal status of abandoned trademarks under Section 211. To find Section 211 consistent with the TRIPS Agreement, the Panel had relied on the US representation that this provision did not apply in the particular circumstances where a trademark had been legally abandoned. US courts had not interpreted Section 211 in conformity with the affirmations made by the United States during the Panel's proceeding. Therefore, it should be clarified that Section 211 did not apply to a new trademark after a former trademark, to which Section 211 might have applied, had been abandoned.

14. The representative of Cuba said that her delegation, once again, deplored the lack of progress in implementation by the United States of the DSB's recommendations and rulings with regard to Section 211 of the Omnibus Appropriations Act of 1998. She recalled that in its latest report, the United States had announced that the new Congress would meet early this year to take decisions on this matter. However, Cuba was concerned that there was no evidence of any change thus far. Her delegation wished to reiterate, once again, that it stood by the statements it had made in the DSB on 1 February 2002 and, more recently, on 19 December 2002. Cuba insisted that Section 211 of the Omnibus Appropriations Act of 1998 should be repealed to the extent that it violated basic principles of the WTO, such as national treatment and most-favoured-nation treatment. Moreover, its inconsistency with the US intellectual property undertakings had been demonstrated in the Appellate Body's examination of the matter. She noted that the United States had always accorded special importance to intellectual property matters and had staunchly defended them by repeatedly demanding strict compliance with the rules of the TRIPS Agreement. In this case, it was a matter for the United States to apply the same standards to itself and to comply with the DSB's recommendations and rulings. Cuba considered that, in practice, the United States had committed an infringement in failing to meet the initial deadline of 3 January 2003, and requested that the United States comply with the new deadline. From both the legal and the ethical standpoint, the solution to this dispute would be to repeal Section 211.

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

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.4)

16. The Chairman drew attention to document WT/DS184/15/Add.4 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 her country had provided a status report in this dispute on 16 January 2003, in accordance with Article 21.6 of the DSU. With respect to the recommendations and rulings of the DSB that had not been addressed in the 22 November 2002 anti-dumping duty determination of the US Department of Commerce, the US administration would continue to consult and to work with the Congress once it resumed its work with a view to resolving this matter in a mutually satisfactory manner.

18. The representative of Japan said that although he would prefer not to repeat similar statements, he had to express Japan's regret and concern, once again, about the delay in implementation by the United States of the DSB's recommendations and rulings. Non-compliance by the United States was affecting the confidence in the dispute settlement system, which was fundamental for the WTO to work effectively. Japan urged the United States, once again, to make best efforts to implement the DSB's recommendations and rulings as early as possible, including having the necessary legislation passed in the 108th Congress.

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

2. United States – Countervailing measures concerning certain products from the European Communities

(a) Implementation of the recommendations of the DSB

20. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to

ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 8 January 2003, the DSB had adopted the Appellate Body Report in the case on "United States – Countervailing Measures Concerning Certain Products from the European Communities" and the Panel Report on the same matter, as modified by the Appellate Body Report.

21. The representative of the United States said that her delegation wished to inform Members that the United States intended to implement the DSB's recommendations and rulings in a manner that respected its WTO obligations. The United States would need a reasonable period of time in which to do so, and it stood ready to discuss this matter with the EC, in accordance with Article 21.3(b) of the DSU.

22. The representative of the European Communities said that, as the EC had already noted in its remarks at the time of the adoption of the Reports, this dispute had a long history. The principle underlying the findings in this case had been established long ago by the Appellate Body in the case on: "United States – Imposition of Countervailing Duties on Lead and Bismuth Carbon Steel from the United Kingdom" (DS138). Therefore, this was the second time, in two years, that the United States had been requested by the DSB to change its methods in conducting CVD investigations when changes in ownership were involved. He then pointed to the Latin adage: "*repetita iuvant*": i.e. "to repeat something helps in doing it better". Therefore, the EC hoped that this time the United States would ensure a prompt and good faith implementation of the WTO rulings. A reasonable period of time for the implementation of this case – if at all necessary – should be extremely short. The EC would be ready to discuss as a matter of urgency both the reasonable period of time and other aspects or the US implementation process in this case, so as to avoid the need to meet for a third time in a couple of years to discuss a new WTO-inconsistent implementation.

23. The representative of Mexico said that his country had participated as a third party in this dispute as well as in the British steel dispute referred to by the EC. Mexico had a direct interest in the compliance by the United States and had requested consultations with the United States on other revisions with regard to the countervailing duties and the methodology. Mexico wished to see prompt compliance with the decisions in this case.

24. The DSB took note of the statements and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations in this case.

3. European Communities – Conditions for the granting of tariff preferences to developing countries

(a) Request for the establishment of a panel by India (WT/DS246/4)

25. The Chairman recalled that the DSB had considered this matter at its meeting on 19 December 2002 and had agreed to revert to it. He drew attention to the communication from India contained in document WT/DS246/4.

26. The representative of India said that, at the 19 December DSB meeting, while presenting this panel request, India had explained the reasons for seeking the establishment of a panel to examine this matter. At the present meeting, he did not wish to repeat those reasons. He noted that the unconditional most-favoured-nation (MFN) treatment under the GATT 1994 was at the heart of this dispute. The generalized system of preferences (GSP) under the Enabling Clause was an exception to this MFN obligation, only to the extent that it allowed discrimination in favour of developing countries. The objective of the exception was "to facilitate and promote the trade of developing countries". Imposition of conditions unrelated to this objective violated the MFN treatment obligation

and the Enabling Clause. Since the previous regular DSB meeting, and even prior to that meeting, India had taken up these issues bilaterally with the EC hoping that the EC would be sensitive and responsive to India's concerns. India's hope, however, had been belied. Consequently, India was left with no choice, but to press for the establishment of a panel at the present meeting and, thus, India was requesting that a panel be established.

27. The representative of the European Communities said that the EC wished to express its regret over India's insistence on requesting the establishment of a panel. In particular, it was regrettable that India had chosen to ignore that the EC's GSP scheme was an autonomous regime granted on a non-reciprocal, generalized and non-discriminatory basis. The EC was acting in full conformity with its GATT/WTO commitments including the prescriptions of the Enabling Clause. The EC wished to remind Members that its special incentive under the GSP to combat drug production and trafficking, as well as the special incentive arrangements for labour and the environment, were fully in line with internationally recognized objectives aimed at the promotion of sustainable development. They were also aiming at responding to the developmental, financial and trade needs of developing countries. The EC was surprised that India appeared to question the validity of such internationally recognized objectives. The EC would, therefore, appeal to India to reflect very carefully upon its course of action as it would hamper all developed countries efforts to address the developmental problems of developing countries that urgently needed assistance. The EC was convinced that the only sensible course of action for India was to withdraw its request for the establishment of a panel. Nevertheless, if India remained committed to pursuing this regrettable action, the EC would vigorously defend its interests and those of all GSP beneficiary countries in the framework of the WTO dispute settlement system.

28. The representative of Colombia said that the fight against drugs had taken an extremely severe toll on her country's economy, with excessive costs in terms of security and institutional deterioration, and had undermined progress because of the many victims claimed by the violence caused by drug trafficking. The preferential access granted by the EC simply facilitated trade, met trade and development needs and was based on the principle of shared responsibility among all those who were committed to combating the international scourge of drug trafficking. In this connection, Colombia wished to stress that the issue raised by India had high political overtones. She noted that a complex debate on this matter had already taken place in other WTO bodies. Colombia deplored the fact that India had not considered that the absence of consensus on the review of these issues in other bodies and the vast economic and political implications of a ruling on the subject were matters that called for special attention in the present circumstances. Colombia wished to reiterate its concern at India's decision to request the establishment of a panel to examine the alleged inconsistency of the EC's scheme of generalized preferences for a group of countries, as set out in Council Resolution (EC) No. 2501/2001.

29. The representative of Ecuador recalled that, at the previous regular DSB meeting, India had requested the establishment of a panel to examine the issue of the EC's preference system. Ecuador was concerned that India had decided to go forward and to request the establishment of a panel given that the consequences of this process could be negative for some developing countries and not only for those who benefited from the GSP applied by the EC. Ecuador urged India and the EC to continue the consultation process in order to settle this dispute without a need to resort to a panel.

30. The representative of Peru said that her delegation, like Colombia and Ecuador, also regretted that India had decided to proceed with its panel request and that it had not yet been possible to find a bilateral solution to this dispute.

31. The representative of Bolivia said that his delegation wished to echo the statements made by Colombia, Ecuador and Peru and urged India to consider how to settle this dispute.

32. The representative of Malaysia said that his country considered that this dispute had serious systemic implications. His country might not be able to participate as a third party in the panel's proceedings due to the lack of resources, but would follow this dispute closely. Malaysia recognized that India wished to pursue this dispute, but hoped that a mutually acceptable solution could still be found outside this process even once a panel was established since such a panel would have to be established automatically at the present meeting.

33. The representative of India said that his delegation wished to respond to some comments made at the present meeting, in particular those made by developing countries. A suggestion was made by Ecuador that India and the EC should continue their consultations to resolve this dispute. India had been consulting with the EC for almost a year and, as had been mentioned previously, these consultations had not led to any concrete suggestions by the EC that would have allowed India to reconsider its panel request. Malaysia had suggested that even if a panel was established, consultations should continue with a view to finding an amicable solution. India was prepared to continue with consultations even if the panel was established. However, there was a need to have a proper appreciation as to what India was trying to achieve through this panel. As had been mentioned at the previous regular DSB meeting, India was one of the major beneficiaries of the scheme and it was not an easy decision to bring a case of this nature to the WTO. Colombia had mentioned that the fight against drugs was posing enormous costs to its economy and that schemes to compensate this should not be challenged. India agreed that Colombia needed to be compensated and that countries in a similar situation might also have a claim for compensation for the fight against drugs. However, the question was whether this should be at the cost of India. What had been done might not be at India's cost, but a scheme introduced by the EC 17 months ago had affected India's trade directly. He noted that about 18 per cent of what had been given by the EC to one particular country was coming out of India's pocket. It was affecting India's trade to the extent of about 300-350 million of dollars in just one sector. By the most conservative estimate, this meant a loss by India's industry of 70 to 80 thousand jobs. These were direct jobs, but there was also an indirect loss of jobs as a result. Given the fact that an average family in India consisted of five to six persons, this would mean a half a million people depended on exports of these products for their livelihood. The EC had urged India to reflect very carefully on its course of action. India had reflected carefully on this matter for the past year and a half and had put forward concrete suggestions to the EC in Brussels. Even in the past week, India had made an effort in this regard and the high officials from India had held discussions in Brussels, but the EC did not seem to appreciate India's problem. Therefore, India had no choice, but to request the establishment of a panel.

34. The representative of Paraguay said that his delegation wished to express concern about the matter under discussion and believed that a panel would be able to determine what had not been possible to settle during consultations, as well as whether the GSP was WTO-compatible or not. If it was not, one would have to see how to bring it in line with the WTO Agreements. Paraguay was also concerned that a panel would be established, but at the same time it recognized that India had made all the efforts in order to come to a solution to this dispute, but this had not been possible and India had now been obliged to request a panel. Paraguay believed that not only India had to consider how to solve this dispute, but also the EC and other countries granting preferential treatment, which might be discriminatory, would have to think how to solve this dispute.

35. 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.

36. The representatives of Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, Sri Lanka, the United States and Venezuela reserved their third-party rights to participate in the Panel's proceedings.

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

(a) Report of the Appellate Body (WT/DS217/AB/R – WT/DS234/AB/R) and Report of the Panel (WT/DS217/R – WT/DS234/R)

37. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS217/10 – WT/DS234/18 transmitting the Appellate Body Report on "United States – Continued Dumping and Subsidy Offset Act of 2000", which had been circulated in document WT/DS217/AB/R – WT/DS234/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

38. The representative of Canada recalled that on 16 January 2003, the Appellate Body had issued its Report in the dispute concerning the Continued Dumping and Subsidy Offset Act of 2000 (the CDSOA) or the so-called "Byrd Amendment". In its Report, the Appellate Body had upheld the Panel's finding that the CDSOA was inconsistent with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994, because it was a specific action against dumping or a subsidy that was not permitted by those Agreements. Canada welcomed this finding. This measure was fundamentally misguided and it was recognized by both the Panel and the Appellate Body as an illegal instrument. It continued to have far-reaching consequences for the international trading system. For Canadian industries in one sector alone, $500 million in cash deposits had been collected and could be distributed under the CDSOA. Canada asked the DSB to adopt the Reports and recommended that the United States bring itself into conformity with its obligations as soon as possible. Canada expected the United States to fully comply with this decision and looked forward to an indication of its plans to do so. In particular, Canada supported the suggestion of the Panel on implementation, made in its Report pursuant to Article 19.1 of the DSU. The Panel had found that "it is difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the CDSOA measure. For this reason, we suggest that the United States bring the CDSOA into conformity by repealing the CDSOA." Canada similarly asked that the United States bring itself into conformity by repealing the CDSOA.

39. The representative of Chile noted that this was an important occasion for the WTO, the multilateral trading system, and in particular for Chile as well as for those who had witnessed with concern the growing misuse of trade defence legislations. The so-called Byrd Amendment, the subject of this dispute, was a measure which was not only contrary to certain provisions of the WTO Agreements, but also undermined the basic principles of the system. Its scale and effect were such that it was no longer a poorly applied measure, but a new instrument which conflicted with a fundamental element of the rules on action to counteract the injury caused by dumping or subsidization. Since 1947 there had been agreement on what measures could legitimately be adopted to deal with this type of injury. This had been explicitly confirmed in the Uruguay Round Agreements. The Appellate Body, in its Report in the case on: " United States – Anti-Dumping Act of 1916" had already made the same point. It had now been repeated by the Panel in this dispute, and upheld by the Appellate Body. No doubt should be left as to what tools were available to Members to deal with situations of unfair competition.

40. An important element of the Appellate Body Report was its analysis of the term "against" ("en contra de"), in which it had rejected the interpretation of the United States, which was based on a secondary definition of "against". The Appellate Body had correctly determined that a measure or action operated against dumping or subsidization when it was designed or structured to deter such

practices or when it created an incentive to terminate such practices. Chile welcomed that conclusion, which strengthened the fundamental purpose of the Anti-Dumping Agreement and the Agreement on Subsidies with regard to limiting the measures that might be adopted unilaterally by Members in order to combat such unfair actions. To have left the door open to actions over and above the remedies provided for in the WTO Agreements would imply legitimizing double punishment. Chile wished to highlight two additional points in the Appellate Body Report which it considered important and the effects of which went beyond this particular case. The first related to the use of definitions from dictionaries, a practice frequently employed by some Members and one which Chile had rejected because it implied disregarding the context of the provisions in question as well as the two other versions of the WTO Agreements, which were equally valid. Accordingly, Chile underscored the affirmation by the Appellate Body to the effect that dictionaries were important guides to, not dispositive statements of, definitions. The second point concerned the reaffirmation of the importance of the principle of good faith enshrined in Article 26 of the Vienna Convention, as applied in the WTO. The Appellate Body added that panels could and had to determine, in an appropriate case, whether or not a Member had acted in good faith. It was difficult for the Panel to conceive of any more appropriate and/or effective method for the United States to bring the Byrd Amendment into conformity with the WTO system than to repeal the Amendment. Chile could not envisage another alternative. The Panel's suggestion – contained in paragraph 8.6 of its Report – formed part of the DSB's recommendations and rulings. Chile looked forward to the early repeal of the Continued Dumping and Subsidy Offset Act of 2000 and noted with satisfaction the initial reaction of the US administration in this regard.

41. The representative of India said that, like other co-complainants, India was concerned about the so-called Byrd Amendment. The effect of the Byrd Amendment was to borrow the memorable expression of a US Senator to give a "double hit" to foreign exporters, thereby affording double protection to the US industry. This joint action was indeed a clear indication of the important systemic concerns that this legislation had raised among both the developing and developed Members. WTO rules did not permit Members to offset dumping and subsidization by redistributing duties to the petitioners. This was an illegal response to dumping and subsidization. The United States had done precisely this by enacting this Amendment. It was a matter of some satisfaction to the complainants that the Panel and, subsequently, the Appellate Body had upheld their concerns in this regard by finding that the Byrd Amendment violated the provisions of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. The United States should recognize the sentiment of a large number of WTO Members and should immediately repeal this legislation in the face of various inconsistencies found by the Panel and the Appellate Body. As stated by Canada and Chile, the Panel had, in fact, recommended that the United States repeal the Byrd Amendment. India joined Canada and Chile in urging the United States to comply with this recommendation in good faith at the earliest.

42. The representative of Korea said that his country welcomed the Panel and the Appellate Body Reports before the DSB at the present meeting and fully supported the adoption of these Reports. The Appellate Body had correctly found that the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) was non-permissible specific action against dumping or a subsidy, and had concluded that the CDSOA was inconsistent with certain provisions of the Anti-Dumping Agreement and the SCM Agreement. The Appellate Body had confirmed rulings in the case on: "United States – Anti-Dumping Act of 1916" in this regard, and then it had developed its analysis on the term "against" in Article 18.1 of the Anti-Dumping Agreement. In this way, the Appellate Body had stressed the importance of limiting the method of trade remedy actions against dumping and a subsidy to permissible actions under the WTO Agreement, including anti-dumping duties and countervailing duties. Korea believed that this had significant implications on the possible protectionist attempt to nullify the purpose of WTO Agreement on anti-dumping and subsidy as well as on the CDSOA. However, Korea disagreed with the Appellate Body's rulings on Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. Korea did not wish to repeat the argument contained in its written submission, but would like to make some comments on the Appellate Body's interpretation of both provisions. The Appellate Body had disagreed with the Panel's approach in this

regard and had expressed its view that "the Panel dismissed all too quickly the textual analysis of those provisions as irrelevant". In Korea's view, however, the Appellate Body appeared to take opposite approach by focusing on the textual analysis without enough consideration of the objective and purpose of those provisions. The Appellate Body simply stated: "[b]y their terms, those provisions require no more than a formal examination of whether a sufficient number of domestic producers have expressed support for the application". Korea disagreed with this approach and believed that the treaty interpreter should read the text of provisions in light of the objective and purpose of the provisions. Thus, the first paragraph of Article 5.4 should be read to require Members to consider not just the number of domestic support, but the quality of that support. Finally Korea would wished to point out that the Panel in its Report had suggested that the United States should bring the CDSOA into conformity, specifically, by repealing the CDSOA. The Panel stated: "[a]lthough there could potentially be a number of ways in which the United States could bring the CDSOA into conformity, we find it difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the CDSOA measure". In this regard, Korea now expected the United States to comply promptly by way of repealing the existing CDSOA.

43. The representative of Brazil said that his country, like all the other co-complainants, welcomed the adoption of the Appellate Body Report in the case on the so-called Byrd Amendment. The number of parties and third parties involved in this case indicated – right from the start – that Members were faced with a measure perceived to be flagrantly inconsistent with the multilateral trading rules. Brazil was satisfied that the Panel and the Appellate Body had found that the Byrd Amendment was a specific action against dumping or subsidy not permitted under the covered agreements. The Appellate Body Report had accepted the main arguments brought forth by the co-complainants. It represented an important victory against the misuse of trade remedies instruments for protectionist purposes. The Byrd Amendment distorted the conditions of competitiveness in favour of US companies and stimulated the proliferation of investigations in the trade remedies area, since the companies were enticed not only by the protection given by anti-dumping or countervailing duties, but also by the monetary reward they became entitled to. In order to bring its measure into conformity, as recommended by the Panel and the Appellate Body, the United States should repeal the Act and should cease, as promptly as possible, the distribution to its national companies of the resources collected from anti-dumping and countervailing duties.

44. The representative of Indonesia expressed his country's appreciation to the members of the Appellate Body and the Panel, and the WTO Secretariat for their hard work to make a ruling in this case. Indonesia welcomed the Panel and the Appellate Body Reports and sought adoption of both Reports. Indonesia was pleased with the result of both the Panel and the Appellate Body that had confirmed that the CDSOA was rightly found to be in breach of provisions in the Anti-Dumping Agreement, the SCM Agreement and the WTO Agreement. The rulings of the Panel and the Appellate Body had confirmed the view of the complainants that the CDSOA was a measure which was not permissible under Article 18.1 of Anti-Dumping Agreement and Article 32.1 of the SCM Agreement. Indonesia agreed with the decision of the Panel and Appellate Body that the CDSOA was a specific action against dumping or a subsidy within the meaning of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement. However, in the view of Indonesia, the Appellate Body had failed to address the claim of complainants on Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, by reversing the Panel's finding that the CDSOA was inconsistent with Article 5.4 of the Anti-Dumping Agreement, and Article 11.4 of the SCM Agreement. Indonesia agreed with the Panel's conclusion that the CDSOA defeated the objects and purpose of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. As a result, the United Sates was not in a position to reach a proper determination of support before initiating an investigation. Finally, it was Indonesia's expectation that the United States would promptly and fully implement the rulings and recommendations of the Appellate Body in this dispute by bringing the CDSOA into conformity with its obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. Indonesia supported the Panel's recommendation that the United States should repeal the CDSOA.

45. The representative of Mexico said that the Continued Dumping and Subsidy Offset Act of 2000, known as the Byrd Amendment, was a law that granted direct subsidies to US producers having requested or supported the initiation of an anti-dumping investigation or an investigation aimed at imposing countervailing duties. It, therefore, operated against dumping and artificially increased the competitiveness of US producers, at the expense of Mexican and other foreign exporters. As the Appellate Body had pointed out in its Report, the US legislation "has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors". The Byrd Amendment affected all Mexican exports to the United States and the damage suffered by Mexico extended far beyond the US$270 million distributed in 2001 and the US$330 million distributed in 2002. This was why on 21 May 2001 Mexico and Canada had jointly sought consultations and subsequently, on 10 August 2001, had requested the establishment of a panel. He noted that the US legislation had been condemned by both the Panel and the Appellate Body. The adjudication phase was being completed with the adoption of the Reports of the Panel and the Appellate Body. Therefore, Mexico would be extremely watchful of the United States' prompt compliance with the DSB's recommendations and rulings in repealing this legislation and reserved all its rights in this dispute.

46. The representative of Thailand said that, like other countries, Thailand also welcomed the Appellate Body Report on the so-called "Byrd Amendment". Thailand wished to thank the Appellate Body and the Panel for their rulings and recommendations in favour of the complaining parties. His country appreciated that its arguments and rationales put forward were justified. Thailand also thanked the Secretariat for the time devoted to this case. His country looked forward to discussions on a reasonable period of time with other parties concerned in this regard.

47. The representative of Australia said that his country welcomed the DSB adoption at the present meeting of the Panel and the Appellate Body Reports. The outcome confirmed Australia's view that the anti-dumping and subsidies and countervailing measures agreements regulated the universe of permissible responses to dumping and subsidization. Australia looked forward to early implementation of the findings by the United States, which it expected would be the withdrawal of the legislation. Australia noted that rights and obligations accruing from the adoption of these Reports at the present meeting extended to all parties to the dispute.

48. The representative of Japan said that his country wished to thank the Panel and the Appellate Body, as well as the Secretariat, for their work in the proceedings. Japan supported the adoption of the Reports, and was pleased that the DSB would adopt the Reports at the present meeting. He said that the Appellate Body had crystallized the fundamental problem of the Continued Dumping and Subsidy Offset Act of 2000, known as the Byrd Amendment. It had confirmed that the distribution of the collected anti-dumping duties and countervailing duties to the related domestic industry was not justifiable under the WTO Agreement. Japan appreciated and welcomed the conclusion of the Appellate Body in this respect. However, Japan was concerned about the finding of the Appellate Body regarding Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. In Japan's view, the Byrd Amendment did distort the standing requirement for the initiation of investigations stipulated in these provisions. The Byrd Amendment was found to be inconsistent with the United States' obligations under the WTO Agreement. Japan wished to join other countries in urging the United States to repeal the Byrd Amendment at the earliest possible time. Japan also wished to reserve all its rights under the DSU in this regard.

49. The representative of China said that his country supported the Appellate Body Report. He said that China was a major victim of the US antidumping practices and the Byrd Amendment provided incentives to these antidumping practices. China hoped that the United States would comply with the rulings in good faith and would repeal the Byrd Amendment promptly.

50. The representative of the European Communities said that the EC wished to thank the members of the Appellate Body, the Appellate Body Secretariat, the members of the Panel and the WTO Secretariat for their work. It was with great satisfaction that the EC welcomed the clear and definitive condemnation of a measure, which was so disruptive to the international trading environment. Dumped or subsidized exports to the United States were already subject to often very heavy anti-dumping and anti-subsidy duties. The Byrd Amendment imposed a "double penalty " by providing subsidies on the products they would compete with. The Byrd Amendment also provided to the US companies a direct financial interest in the imposition of anti-dumping and anti-subsidy duties and could only lead to a proliferation of investigations and measures. In this respect, the EC was concerned with the Appellate Body's ruling that the Byrd Amendment did not breach the US obligation to assess the domestic industry's support for the application before an investigation was initiated. The Appellate Body's interpretation could reduce the obligation on the investigating authorities to merely counting the declarations of support without mistake. The EC noted, however, that the Appellate Body had stated that at least a measure that would coerce or require domestic producers to declare its support for the application, could be declared WTO-incompatible. The EC, in any event, noted that the very limited aspect on which the Appellate Body had departed from the Panel's ruling did not detract it from the clear finding that the Byrd Amendment *per se* was contrary to fundamental WTO provisions. The EC, like all the co-complainants, welcomed and supported the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body, and expected that prompt and full compliance would follow through a repeal of the WTO-inconsistent legislation. Like Australia, the EC also noted that the rights and obligations accruing from this adoption of the Reports by the DSB extended to all the co-complainants to this dispute.

51. The representative of Hong Kong, China said that his delegation wished to thank the Appellate Body and the Panel for their efforts in considering the case and preparing the Reports. Hong Kong, China wished to share with Members its observations regarding the findings contained in the Reports. It welcomed the Appellate Body's confirmation of the Panel's finding that the Continued Dumping and Subsidy Offset Act (the CDSOA) constituted "a non-permissible specific action against dumping or a subsidy", and, therefore, it was inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the Subsidies Agreement. In arriving at its conclusion, the Appellate Body had reaffirmed the Panel's finding that the offset payments made under the CDSOA were inextricably linked to, and strongly correlated with a determination of dumping or a subsidy and thus constituted "specific action" related to dumping or a subsidy. The Appellate Body had also found that the CDSOA was undoubtedly an action "against" dumping or a subsidy, because the CDSOA had an adverse bearing on, and more specifically was designed and structured so that it dissuaded the practices of dumping or subsidization, and because it created an incentive to terminate such practices. In addition, the Appellate Body had concluded that the CDSOA did not correspond to any of the permissible responses as envisaged by the Anti-Dumping Agreement, the Subsidies Agreement and the GATT 1994. Hong Kong, China had participated in the Panel and the Appellate Body's proceedings as a third party because it was concerned about the systematic implications of this dispute, and because it believed that the CDSOA was inconsistent with the WTO provisions and upset the balance of rights and obligations of WTO Members. The finding of the Panel and the Appellate Body in this dispute was important in upholding the disciplines as established in the relevant Agreements and agreed by WTO Members. Hong Kong, China urged the United States to bring the CDSOA promptly into conformity with the relevant Agreements. With these observations, Hong Kong China supported the adoption of the Appellate Body and the Panel Reports.

52. The representative of Malaysia said that his country was neither a party nor a third party in this dispute. Malaysia welcomed the overall outcome of this dispute notwithstanding the concerns it shared with regard to the consistency of Article 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement, as referred to by several previous speakers such as Korea, Japan and Indonesia. Malaysia wished to see prompt and full compliance by the United States and believed that this could only be done through the repeal of the CDSOA.

53. The representative of the United States said that her country was pleased that the Appellate Body had reversed the Panel's unsupported finding that the Continued Dumping and Subsidy Offset Act or "CDSOA", was inconsistent with the standing requirements in Articles 5.4 and 11.4 of the Anti-Dumping and SCM Agreements for anti-dumping and countervailing duty investigations. The Appellate Body had correctly noted that the Panel's contradictory analysis had strayed from the text of the Agreements, which made clear that administering authorities did not need to examine producer motives when making standing determinations. The United States welcomed the Appellate Body's insistence that panels grounded their analyses in the text of the WTO Agreement. That being said, the United States was disappointed in the Appellate Body's findings that the CDSOA was inconsistent with the requirements of Articles 18.1 and 32.1 of the Anti-Dumping and the SCM Agreements. The United States did not intend to re-argue the case at the present meeting. However, it found some aspects of the reasoning in the Appellate Body's Report particularly troubling. The United States believed that other Members should be troubled as well.

54. The United States asked how many Members present in the room believed that they were prohibited from providing their own industry a subsidy in response to another Member granting its industry a subsidy. The United States noted that it had seen Members many times explain that they did not want to subsidize an industry, but that they were forced to do so in response to others' subsidies. Those Members might want to refer to paragraph 273 of the Appellate Body Report. Presumably those Members would object to the Report before the DSB at the present meeting, which would find that all those subsidies were inconsistent with the WTO.

55. She noted that the Appellate Body had found in paragraph 273 of its Report that the SCM Agreement prohibited any subsidy in response to another Member's subsidy. The Appellate Body had concluded that there were only four permissible responses to subsidization – duties, provisional measures, price undertakings and countermeasures under Articles 4 and 7 of the SCM Agreement. Notably absent from this list – and thus prohibited according to the Appellate Body – was the granting of domestic subsidies in response to another Member's subsidies. Article 3 of the SCM Agreement listed those subsidies that were to be deemed *per se* "prohibited," yet Article 3 did not prohibit subsidies in response to another Member's subsidies. The Appellate Body had created a new category of prohibited subsidies that had neither been negotiated nor agreed to by WTO Members. Nor could the Appellate Body's findings be reconciled with the provisions of the SCM Agreement itself, including item (k) of the Illustrative List of Export Subsidies in Annex 1 and the Appellate Body's prior findings in other disputes concerning that item, since under item (k) it was permitted to respond to another Member's subsidies within certain parameters. Indeed, had this new category of prohibited subsidies previously existed, years of litigation in some earlier disputes could have been avoided, since each of the parties in those disputes quite freely admitted that its subsidies were in response to the subsidy programmes of the other. Instead, the parties had devoted extensive argumentation to the requirements set forth in Article 3. Also with respect to Articles 18.1 and 32.1, the United States did not see how it was possible to reconcile the Appellate Body's findings in paragraph 255 with the finding in paragraph 258 that the conditions of competition between imported and domestic goods were irrelevant. In paragraph 255, the Appellate Body had relied on the claim that CDSOA payments could affect companies' competitive position as a basis for finding the CDSOA payments to be inconsistent with the WTO.

56. Furthermore, the Appellate Body's reliance on "a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors" as the "decisive basis" for finding that the CDSOA acted "against" dumping or subsidization was a serious factual error. Foreign producers/exporters did not pay anti-dumping and countervailing duties in the United States, importers did. Nor could foreign producers/exporters pay the duty or reimburse their importers for duties paid without the US Department of Commerce increasing the dumping margin accordingly. There was no transfer of financial resources from producers or exporters.

57. Another troubling aspect of the Report to which the United States wished to draw Members' attention was the Appellate Body's discussion of "good faith". The United States was pleased that the Appellate Body had soundly rejected the Panel's statement that the United States might be regarded as not having acted in "good faith" with respect to Articles 5.4 and 11.4. However, the United States remained troubled by the Appellate Body's suggestion in paragraph 297 that a panel might, "in an appropriate case", find that a Member had not acted in good faith. The Appellate Body appeared to say that such a finding would be over and above the question of whether a Member's measure was consistent with a WTO obligation. The US concern did not relate to whether Members were to implement their obligations in "good faith" under international law. The United States agreed that they were. However, the WTO dispute settlement system had a limited mandate, which was to determine conformity with the "covered agreements," and not international law more generally. Nowhere in Appendix 1 to the DSU, which defined the covered agreements for purposes of the DSU, was there listed an international law principle of good faith. The Appellate Body's citation to its own reports could not change this. Appellate Body reports were not "covered agreements". While they were useful in clarifying obligations under the covered agreements, they might not create obligations not found in the text that Members had agreed to. Thus, the Appellate Body's citation in paragraph 297 to its earlier statements on "good faith" could not import into the covered agreements an obligation that was not there. A finding that a Member had not acted in "good faith" would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body set forth in Articles 7, 11 and 19 of the DSU, to confine their findings to the question of conformity with the covered agreements cited in a panel request, and not to add to or diminish the rights and obligations under those agreements. Fortunately, no dispute to date had resulted in such a finding.

58. Finally, the United States was concerned with the Appellate Body's conclusion regarding Article 9.2 of the DSU. Article 9.2 was simple, clear and straightforward. The second sentence stated: "If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned." The text was unequivocal: "if a request is made, it shall be granted". Despite the mandate of this text, the Appellate Body had found that the United States' request was not made in a "timely manner" and that the United States had not shown prejudice, therefore, separate reports were not warranted. This finding was not supported by the text of Article 9.2 or the facts of this dispute. A simple review of the text confirmed that there was no deadline for such requests or a requirement to show prejudice, nor had the panel indicated any time-frame for such a request in this particular dispute.

59. The Appellate Body's endorsement of the Panel's *ex post facto* imposition of conditions on a Member's rights under Article 9.2 was quite disturbing. Nowhere had the Appellate Body or the Panel acknowledged that the United States' request in this case for a separate final panel report was made on 10 June 2002, approximately five weeks prior to the issuance of the interim report and almost eight weeks before the final report. This was contrasted with the Appellate Body's conclusion in DS184, the *Hot-Rolled Steel* dispute, that in the context of an anti-dumping investigation, a company's data had to be considered even when submitted after the pre-established and published deadline. Here there was no deadline established or communicated to the parties. The Appellate Body appeared to believe that private exporters of dumped goods should have greater rights than WTO Members. Nor had the Appellate Body explained why, if '"prejudice" were relevant, it should be the requesting party that had to show prejudice, rather than those who might have opposed the request.

60. In light of these many troubling aspects, the United States urged Members to object to this Report. Nevertheless, the United States respected its WTO obligations, and while it had concerns regarding this Report, should it be adopted at the present meeting, the United States intended to implement the DSB's recommendations and rulings in a manner that respected its WTO obligations.

61. With regard to one last point, returning to the discussion that had taken place at the beginning of the meeting concerning the manner in which these Reports had been placed on the agenda, the

United States recalled that Canada had made a separate panel request from that of the other complaining parties in this dispute. There was no question that Canada was not a party to the other panel requests. The United States knew of no reason why Canada had needed to seek adoption of the other reports in the other disputes. The United States wished to point out the unfortunate and unnecessary precedent which Canada had established by placing the Reports of other complaining Members up for adoption in this dispute. By doing so, Canada had unnecessarily created legal uncertainty as to the rights and obligations of the other parties under the Reports which might be adopted at the present meeting as regards their co-complainants. Equally unfortunately, Canada's action had raised the possibility that Members might in the future face a situation in which a non-party or a third party could force adoption of a report at a time neither party desired. The time for reaching a mutually satisfactory solution did not end when a report was issued, and it would be unfortunate if their efforts in this regard were cut short because of the actions of a non-party in placing a report up for adoption. Yet, Members were now presented with this spectre.

62. The representative of the European Communities said that he had to take the floor for the second time because of the last point raised by the United States concerning the adoption of the Panel the Appellate Body Reports with regard to which the EC wished to clarify its position. It was true that the Reports had been placed on the agenda at the request by Canada, which had acted more rapidly than the other co-complainants. Therefore, the EC considered that it was not necessary to second Canada's request for inclusion of the item on the agenda. He recalled that the request for the inclusion of an item on the agenda was not made pursuant to the DSU provisions, but pursuant to Chapter II and Rule 3 of the Rules of Procedure for meetings of the General Council. He also recalled that the inscription of the Reports on the agenda had happened in the past at the request of the defendant. He drew attention to the fact that in the case on "United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany", the inclusion of the Reports on the agenda had been requested by both parties. In other words, the defending party and the complaining party had requested the inclusion of the item on the agenda. What Canada had done was to inscribe the item on the agenda and the agenda had been approved by all Members at the outset of the present meeting. Accordingly, the Reports would have to be adopted. In other words, all Members present in the room by not opposing the adoption of the agenda had accepted that the Reports would be adopted. In addition, as stated by the Chairman, the adoption of the Reports was mandatory unless there was a consensus not to adopt the Reports. He noted that the United States had just urged Members not to adopt the Reports, but no other Member had supported this point. Therefore, it was clear that the Reports would have to be adopted at the present meeting and that the adoption would create rights for all parties to the dispute. Despite of the fact that there were several complaints, the DSB had decided to establish a single panel and this single panel had produced one single report, which was subject of one single notice of appeal by the United States and one single Report had been issued by the Appellate Body. It was clear that the legal situation created by the adoption of these Reports could not be subject to any conditions or any interpretation derived from the fact that the request for inscription of the item on the proposed agenda had been made by one country. He recalled that Article 17.14 of the DSU stated that the Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute. The EC, therefore, hoped that the remarks made by the United States did not constitute a condition to the acceptance of these Report which was a single Report. Finally, the EC supported the statement made by Australia that the rights and obligations accruing from the adoption of these Reports at the present meeting extended to all parties to the dispute.

63. The representative of Canada said that his country agreed in total with the statement made by the EC on this issue. As a disputing party with important commercial and systemic interests at stake, Canada had sought adoption of the Reports at the earliest instance to expedite implementation of the DSB's rulings and to minimize the harm the measure currently presented to the US trading partners. It was Canada's understanding that all co-complainants supported the adoption of the Reports at the present meeting. The disputing parties had agreed to join their complaints pursuant to Article 9 of the DSU. Accordingly, the Panel and the Appellate Body had each issued a single Report. Canada was

fully justified in seeking the adoption of that Report – as indeed it could not have done otherwise. As pointed out by the EC, there was only one Panel Report issued, and only one Appellate Body Report issued. Canada could not have sought adoption of "its portion" of the Reports. Canada recalled that it had agreed to a single panel process for all complainants to help expedite this matter. Canada's agreement to have the complaints joined did not in any way affect Canada's rights under the DSU, as a Member of the WTO or as a disputing party, to seek the adoption of the Reports. In this respect, Article 9 of the DSU could not and did not, in any way, vitiate the rights of a disputing party under Articles 16.4 and 17.14 of the DSU to request adoption of a single panel and Appellate Body report issued in a multi-complainant case. The US position raised questions far beyond the matters immediately at issue. If the United States was correct in suggesting that a report should be placed for adoption only upon concurrence of all complainants in a multi-complainant dispute, the consequence would be that a single complainant could block adoption of a report. This had no basis in the DSU. It could hold the adoption of panel and Appellate Body reports hostage to negotiations between the responding party and only one of the complaining parties. It would, as a result, discourage co-complainants from bringing a joint case, and this development would have far-reaching consequences for the operation of the dispute settlement mechanism of the WTO. In this instance, had the complainants been deterred from joining the cases, what would have been the consequence? There was the administrative burden to the WTO; i.e. issuance of 11 panel reports and 11 Appellate Body reports, each of which would require separate translation. There was the legal uncertainty that had to necessarily result from 11 separate panels' reports examining the same issue. And there was the burden on the responding party of having to respond to eleven different submissions in eleven different proceedings. In response to the point made by the United States that Canada had created legal uncertainty as to the rights and obligations of the other parties by seeking inscription of this item on the agenda, he recalled that Article 17.14 of the DSU provided that "[A]n Appellate Body report *shall* be adopted by the DSB and *unconditionally* accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report …". "Unconditionally", did not mean "subject to approval of the agenda"; it did not mean "subject to the concurrence of co-complainants"; and it did not mean "subject to any desire for a negotiated solution raised by the responding party."

64. The US obligation stemmed from the adoption of the Reports by the DSB, and not from the placement of an item on the agenda of the DSB. Canada recalled that Article 21.3 of the DSU required that the "Member concerned", in this case the United States, had to "inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB." Article 21.3 of the DSU did not limit implementation only in respect of those co-complainants that had placed the adoption of a report on the agenda of the DSB. Nor did Article 21.5 limit recourse to dispute settlement in respect of implementation to only those complaining parties that had placed a report on the agenda of the DSB. Similarly, the right to seek arbitration or retaliation was based on the report with rights accruing to all complainants, and did not derive from the exercise of a procedural right to place an item on the DSB's agenda. This was not just a logical and inescapable consequence of the preceding point; it was unambiguously set out in Article 22.2 of the DSU. There, the right to request authorisation to suspend concessions was reserved to "any party having invoked the dispute settlement procedures". There was no mention in Article 22.2 of inscription of a report on the DSB's agenda. It was inconceivable that the rules of procedure for the meetings of the DSB could in any way vitiate the substantive rights of the parties under the DSU.

65. The representative of Chile said that Articles 16 and 17.14 of the DSU contained different language and set out different rights and obligations for Members. While one referred to unconditional acceptance, the other established a time-period for adoption of reports and provided Members with the right to make comments. This led to conclude that the meaning and scope of those Articles were different. Therefore, the question as to who was entitled to request the adoption of a report had to be analysed from that perspective, and this was not the appropriate forum. In Chile's view, only the parties to the dispute; i.e. the litigants, could request adoption of a report of a panel or the Appellate Body. This underscored the essentially bilateral nature of disputes. To argue to the

contrary would imply that any Member could intervene in a dispute, jeopardizing the possibility for a rapid and effective solution, which was the primary objective of the system. Nevertheless, to maintain that Canada was not a party to this dispute was legally groundless. It was not possible to contend that this case involved more than one dispute. Although originally there was more than one complaint, they related to the same matter – the Byrd Amendment. For that reason, pursuant to Article 9 of the DSU they had been submitted for consideration by the same Panel, resulting in a single report which had been the subject of a single process of appeal, settled by a single report by the Appellate Body. That being the case, adoption created rights for Chile as a "party to the dispute", a "party having invoked the dispute settlement procedures" and as a "complaining party", as indicated in Articles 21 and 22 of the DSU. None of those provisions referred to the party or Member which requested the adoption of a report.

66. The representative of Japan said that, in response to the US statement, he wished to join other co-complainants in making clear Japan's position. First, in Japan's view there was no legal uncertainty concerning its rights. Canada, which was a co-complainant in these proceedings, had the right to inscribe the item on the agenda. The Reports of the Panel and the Appellate Body were both respectively in one single Report. The DSB had to adopt them by negative consensus and the United States would have to unconditionally accept them pursuant to Article 17.14 of the DSU. The rights and obligations of the parties to the dispute arising from the adoption of the Reports of the Panel and the Appellate Body, in particular Articles 21 and 22 of the DSU, were accruing to all the parties. Japan failed to see any real justification for any other view.

67. The representative of Mexico said that his delegation also wished to refer to the last point made by the United States. It considered that the concern of the United States was political rather than legal. In this context, it further noted that the United States had submitted a proposal with the aim of allowing parties to the dispute to control the adoption of reports, but it believed that this discussion had to be taken up in a different forum. Mexico claimed that its right as a party to the dispute resulted from the adoption of the Report independently of the fact that Canada, another co-complainant, had requested the item to be placed in the agenda of the DSB meeting.

68. The representative of Korea said that his country also wished to respond to the last point raised by the United States regarding the adoption of the Reports. Korea shared the view expressed by Canada, the EC, Japan and Mexico and believed that Canada, as one of the co-complainants to this case, had the right to seek the adoption of the Reports. However, Korea wished to express its view that once the Reports were adopted, Korea, as one of the co-complainants, would have the same rights as Canada and other complaining parties with regard to the implementation of the DSB's recommendations and rulings in this case.

69. The representative of India said that, like previous speakers, his country did not see any provision in the DSU stating that only upon the inscription of the item on the agenda by all the co-complainants the rights and obligations would flow. India believed that the rights and obligations of the parties to the dispute would flow from the adoption of the Panel and Appellate Body Reports by the DSB. Therefore, there was no legal uncertainty in this regard.

70. The representative of Thailand said that his country wished to support the views expressed by other co-complainants with respect to the point made by the United States on the issue of the inscription of the Reports on the agenda. Thailand understood that there was no provision in the DSU which could be interpreted in such a way so as to deny Thailand's rights as a co-complainant in terms of implementation.

71. The representative of Indonesia said that his country also wished to support the statements made by the co-complainants and considered that the rights and obligations accrued to all parties from the adoption of the Reports and not from the inscription of the item on the agenda.

72. The DSB took note of the statements, and adopted the Appellate Body Report in WT/DS217/AB/R – WT/DS234/AB/R and the Panel Report in WT/DS217/R – WT/DS234/R, as modified by the Appellate Body Report.

5. Proposed amendments to the *Working Procedures for Appellate Review* (WT/AB/WP/5)

73. The Chairman said that, as announced at the DSB meeting on 19 December 2002, this matter had been placed on the agenda of today's meeting pursuant to the recently adopted procedures for consultations between the Chairperson of the DSB and WTO Members in relation to amendments to the *Working Procedures for Appellate Review* contained in document WT/DSB/31 in order to enable delegations to exchange views on the recently proposed amendments as set out in Annex A to document WT/AB/WP/5. He recalled that also on 19 December 2002 he had sent a fax to Heads of Delegations inviting Members to provide comments in writing, if they so wished, on the proposed amendments. In this regard, he informed Members that so far no written comments have been submitted on the proposed amendments. He invited delegations to provide their views on the proposed amendments.

74. The representative of Canada said that his country had reviewed carefully both the proposed amendments to the *Working Procedures for Appellate Review* with respect to third-party participation in the oral hearing, and the related communication from the Appellate Body contained in document WT/AB/WP/5 dated 19 December 2002. Canada appreciated the consideration given by the Appellate Body to the issue of due process protection in its proposed amendments. It welcomed both the Appellate Body's encouragement to third parties to file written submissions, as expressed in the proposed paragraph 3 of Rule 24, and its inclusion of an explicit reference to the requirements of due process in the proposed paragraph 3(b) of Rule 27. However, in Canada's view, the need to take into account due process requirements would arise in all circumstances where a third party sought to make an oral statement at the oral hearing of an appeal in which it had not filed a written submission. As drafted, the proposed Rule 24(2), in conjunction with Rule 27(3)(a), would allow a third party that did not file a written submission to make an oral statement simply by notifying the Secretariat in advance that it intended to appear at the oral hearing. This proposal would not require the third party to provide the parties with any notice of the issues to be addressed in its oral statement or the substance of its statement. As result, when a third party relied on these provisions, parties would have no opportunity to reflect on the expressed positions of the third party. Rules 24(4) and 27(3)(b) were intended to prevent this prejudice where the third party had neither made a written submission nor had given notice of its intention to appear. It was unclear how notice of the sort contemplated by Rule 24(2) could suffice to prevent the same prejudice. Canada, therefore, suggested that where, as under Rule 24(2), a third party did not file a written submission but wished to make an oral statement, the Appellate Body division hearing the appeal should have the same discretion to allow that participation as it had under Rule 27(3)(b).

75. The representative of the United States said that her country wished to thank the Chairmen of the DSB and the Appellate Body for providing this process for considering and commenting on additional amendments to the *Working Procedures for Appellate Review*. The United States had two comments. First, the United States suggested that new Rule 24(4) should end with the phrase "and in any event prior to the date of the oral hearing". Members should be encouraged in this way to state their intentions before the hearing itself, so as to avoid unnecessary use of scarce hearing time debating the question of third-party participation, especially since there could be numerous such requests to sort through at the same time. The United States did not believe it would be burdensome to at least raise this issue by at least the day before the hearing. The United States would also appreciate further clarification of the effective date of the amendments. It was the US understanding that the last amendments were effective with respect to appeals in which third participants' written submissions were due after 27 September 2002. The United States wished to know if the new amendments would similarly apply to appeals in which the deadline for the filing of third participants' written submissions fell after 15 February 2003.

76. The representative of India said that his country wished to thank the Appellate Body for its explanation on proposed modifications to its working procedures. India was not able to understand the distinction made between "party" and "participant" as well as between "third party" and "third participant" in the proposed *Working Procedures for Appellate Review*. There was no such distinction in the DSU. It was the Appellate Body's working procedures, which made such distinction. This, as pointed out by the Appellate Body in its explanatory note, had created "rigidity ... with respect to rules relating to third party participation in the (AB's) oral hearing ...". India would have appreciated had the Appellate Body done away with such artificial distinction. However, India noted the Appellate Body's recognition about possibility of undertaking comprehensive review and revision of its working procedures in future, perhaps, upon completion of the ongoing DSU negotiations. India hoped that then this artificial and rigid distinction would go away.

77. The representative of Ecuador said that his country had noted document WT/AB/WP/5 and was grateful for this opportunity to make comments. Ecuador had also noted the application of the guidelines approved by the DSB in December 2002 regarding holding consultations between the Appellate Body and the Chairman of the DSB on amendments to the *Working Procedures for Appellate Review*. These guidelines had given an appropriate and adequate opportunity, in a transparent environment, for Members to comment on proposed amendments. Ecuador was pleased to see that the Appellate Body at this time had made an effort to give due information to Members regarding the proposed amendments. The information provided by the Appellate Body also contained the reasons for the proposed amendments, which reflected the comments that some Members, including Ecuador, had made regarding the practice which in the past had been adopted by the Appellate Body with regard to the participation of third parties in the Appellate Body's hearings. The proposed amendments, to a certain extent, harmonized the treatment given to third parties in the panel and the Appellate Body phases. In Ecuador's view, this was as a positive development as it recognized the rights of third parties to follow their interests in all phases of the process. This, in turn would strengthen the system by enabling interested third parties to contribute to each stage in the dispute settlement process.

78. The representative of Japan said that her country welcomed the initiative taken by the Appellate Body to consult with the DSB prior to amending the Working Procedures, and expressed its gratitude to the Chairman of the DSB for inviting comments from delegations. Japan would submit written comments and at the present meeting it wished to highlight some points in this regard. Her delegation would appreciate if the Chairman could forward these written comments to the Appellate Body and inform delegations of further communications from the Appellate Body. Japan noted the reference by the Appellate Body to a meeting with the DSB Chairman and others, and reiterated its strong interest to participate in such a meeting. With regard to the proposed Rule 1, the meaning of the word "participate" was not clear in the definition of a third participant. If "participate" meant more than just to appear at the oral hearing, a third party might not know, until after the oral hearing where the discretion under proposed Rule 27(3)(b) was exercised, if it had indeed become a "third participant". An important legal question still existed on the relationship between Article 17.4 of the DSU and proposed Rule 27(3)(b). Article 17.4 of the DSU explicitly stipulated third-party right to be heard by the division. However, proposed Rule 27(3)(b) left uncertainty as to whether the right to be heard would be conferred or not, since it provided that the division had the discretion to decide whether a third party might "appear", "make an oral statement", and "respond to questions". With regard to Rules 27(3)(a) and 27(3)(b), it was not clear which provision applied to a third party that notified only an intention to appear at the oral hearing pursuant to Rule 24(2) and subsequently requested to make an oral statement pursuant to 24(4). Rule 27(3)(b) gave the Appellate Body the discretion to allow a third party to respond to questions, although a third party could not specify in the notification pursuant to Rule 24(4) if it wished to respond to questions or not. Japan would appreciate explanations from the Appellate Body as to why this was the case. With regard to Rules 16(1), 18(5) and 19, Japan would like to confirm its understanding that the proposed changes would enhance the applicability of these provisions to cover parties that were not participants and third parties that were not third participants. If this was the case, Japan welcomed these changes. At the same time, Japan

sought clarifications as to why Rules 28(1) and 28(2) were not amended as well. In this connection, some Rules specifically listed four categories of Members: i.e. parties to the dispute, participants, third parties and third participants [Rules 16(2), 18(2), 18(3) 18(4) and 27(2)]. Others listed only two categories, namely, parties to the dispute and third parties [Rules 21(1), 22(1), 25(2) and 26(4)]. Japan wished to know if this was due to substantive differences, and if so, what they were and why they existed. If there were no differences, Japan sought indication from the Appellate Body if it intended to unify the texts at this juncture.

79. The representative of the European Communities said that the EC supported the Appellate Body's proposal on further amendments to Rules 1, 24(4), and 27 as well as on additional consequential amendments to Rules 16(1), 18(5), 19, 28 and to Annex 1. The proposed rules had appropriately put an end to the undesirable practice of the "passive observers" and reflected a correct interpretation of the DSU provisions on third-party rights, notably Article 10. The EC also wished to thank the Appellate Body for the additional explanations on how it would exercise its discretion in applying these new regulations.

80. The Chairman said that, in accordance with the DSB's decision adopted on 19 December 2002, it was his intention to transmit to the Appellate Body the views expressed by Members on the proposed amendments at the present meeting. He would then request the Appellate Body to take these views into account. He noted that Japan had requested more time in order to submit comments in writing and possibly other delegations who had not taken the floor at the present meeting might wish to avail themselves of some additional time for this purpose. He, therefore, proposed that Members' comments on the proposed amendments would be sent to the Appellate Body by the end of this month; i.e. on 31 January 2003. Those delegations, like Japan, wishing to provide additional comments in writing would have until that time to do so. With regard to the clarification requested by the United States regarding the effective date of the application of these amendments, it was his intention when he would transmit Members' comments on the proposed amendments to the Appellate Body to ask the Chairman of the Appellate Body to confirm the effective date of the amendments. He would also ask that the effective date be communicated to all Members. He reiterated that he would give additional time to delegations to submit any written comments that might have on the proposed amendments. Subsequently, in accordance with the agreed procedures (WT/DSB/31), he would convey these comments to the Appellate Body and request the Appellate Body to take them into account. At the same time, he would request confirmation of the effective date for application of these amendments and ask the Appellate Body to communicate this information to all Members.

81. The DSB took note of the statements and agreed to the course of action proposed by the Chairman with regard to Members' comments on the proposed amendments to the *Working Procedures for Appellate Review*.