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MINUTES OF MEETING

Held in the Centre William Rappard
on 24 June 2008

Chairman: Mr. Mario Matus (Chile)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.67)

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(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.42)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.5 – WT/DS292/31/Add.5 – WT/DS293/31/Add.5)

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". The Chairman proposed that the four 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.67)

2. The Chairman drew attention to document WT/DS176/11/Add.67, 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 12 June 2008, in accordance with Article 21.6 of the DSU. As noted in that status report, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current Congress, in both the US Senate and the US House of Representatives. The US administration continued to work with the Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, once again, the EC could not but stress that the United States had not made any progress in the implementation of the DSB's ruling despite the fact that more than six years had elapsed since the United States had been found in breach of the TRIPS Agreement. The EC hoped that the bipartisan bills introduced to repeal Section 211 would finally progress and put the United States into compliance with its TRIPS obligations.

5. The representative of Cuba said that the DSB had before it the status report submitted by the United States. However, Cuba did not consider that this document, submitted each month by the United States, could be called a status report. Under Article 21.6 of the DSU, the report should reflect the progress made in the implementation of the DSB's recommendations and rulings. However, the text under consideration made no mention of any such progress. The report, the content of which had never changed, just as there had never been any change in terms of the US Government's lack of political will to resolve this and other cases, showed that the dispute settlement system, in some instances at least, had not managed to resolve disputes or reduce existing imbalances. Within the framework of the Doha Round, a number of Members had expressed concern regarding the WTO credibility. However, they should be more concerned about, and deal with, the real reasons for the eroding role and effectiveness of the WTO. Cases, such as the Section 211 dispute, concerning the

non-implementation of the DSB's recommendations and rulings for an indefinite period of time, which affected not only the complaining party, but all Members, demonstrated that the system did not fulfil the role and objectives that it should. The legal obligations of "prompt compliance" under the DSU, and of national and most-favoured-nation treatment under the WTO Agreements, were dead letters when it came to the intentions and violations of the major trading powers.

6. Intellectual property issues were currently, in economic and political terms, more important than ever before. It had been included on the agenda of the G8 Summits, and new agreements to combat counterfeiting had been negotiated in closed session between the most powerful figures in world trade, and the debate had extended to other organizations such as the WHO and the WCO. The developed countries showed a growing concern about this matter; there were demands for new penalties for offenders, and the international community was being called upon to take urgent measures to curb piracy and counterfeiting. In a context such as this, and as noted by the Appellate Body over six years ago, it was inconceivable that the United States should maintain in effect measures that did not respect issues "fundamental to the TRIPS Agreement". Cuba, which was not a complaining party in this dispute, and therefore could not resort to the suspension of obligations, could have opted to take unilateral measures affecting the rights of US holders that had registered their trademarks in Cuba. This was not, however, the route Cuba had chosen in response to the flagrant violations committed by the United States in the field of intellectual property. Thanks to its geography and traditions, Cuba produced goods of high reputation, which were not sold on the US market due to the economic, commercial and financial embargo imposed on the country. This had encouraged the trend of marketing products and services in the United States using the indication "Havana", which contravened domestic and international regulations. To make matters worse, the US courts often failed to acknowledge misappropriation, false indications of origin and consumer deception.

7. The United States not only labeled its products and services with the name "Havana", but had gone on to register it as a trademark. This year, for instance, the US Patent and Trademark Office had granted the trademarks "Havana Collection" and "Old Havana" to companies domiciled in New Jersey and Nevada, respectively. Section 211, as an expression of this phenomenon, had gone even further, affecting the payment for the legitimate renewal by a Cuban company of a trademark lawfully registered in 1976. It was no secret, and indeed it had been clear from the outset, that the objective was to benefit, for political reasons, the Bacardi company, which was determined to usurp Cuba's famous rum trademark with the approval of the US Government and the support of US laws. The idea that all Members had the same obligations and rights under the WTO system was only valid for a student's manual. Those who were here on a daily basis knew that only a few voices were listened to and that these same voices were the ones that decided when to settle a dispute. Some might think that this complaint was futile, that nothing could be done in this case, that no conclusion would be reached when the Member doing its utmost to demand immediate action, namely the implementation of the WTO Agreements and the DSB's rulings, was a small developing country, such as Cuba. Despite the foregoing, Cuba believed that it was vital to proceed with the complaint. Cuba could not settle for indifference and would continue to insist upon the application of law and justice, as it did in other international fora.

8. The representative of Viet Nam said that his country, once again, called on the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

9. The representative of the Bolivarian Republic of Venezuela said that her country wished to thank the United States for its status report and the statement made at the present meeting. Her country also thanked Cuba for its statement. Venezuela wished to renew its systemic concerns about the protracted situation of non-compliance in this dispute. Venezuela urged the United States to take immediate action to ensure the implementation of the DSB's recommendations. This would permit the resolution of the complainant's legitimate claim and would reinforce the importance of the dispute

settlement mechanism, which guaranteed Members' rights under the multilateral trading system. Finally, she said that US compliance in this dispute would have a positive effect on the overall effectiveness of the WTO dispute settlement system.

10. The representative of India said that her country thanked the United States for the status report and the statement made at the present meeting. India appreciated the steps taken by the United States thus far to repeal Section 211 as a step in the positive direction. However, as mentioned on several occasions, there was no substantive change in the situation, and India felt compelled again to stress that the principle of prompt compliance was missing in this dispute. India, therefore, wished to renew its systemic concerns about this situation of non-compliance. This continuous non-compliance situation by the WTO Members clearly undermined the credibility and confidence that Members reposed in the system.

11. The representative of Thailand said that his country wished to thank the United States for its status report and the statement made at the present meeting. Like previous speakers, Thailand wished to express its concern over the systemic implications of this dispute. Non-implementation of the DSB's rulings and recommendations undermined the rules-based multilateral trading system. Thailand, therefore, called on the United States to take the necessary and urgent steps to comply with its obligations under the TRIPS Agreement.

12. The representative of Brazil said that his country thanked the United States for the status report and, once again, expressed its systemic concerns about the continuous non-compliance situation in this dispute. Brazil urged the United States to comply with the DSB's recommendations and rulings and thus to actively contribute to the strengthening of the WTO dispute settlement system.

13. The representative of China said that his country wished to thank the United States for its status report and, once again, wished to reiterate its systemic concerns with the delayed process of implementation in this dispute. China hoped that the present US Congress would realize that it was in the interest of not only other Members, but also in the interest of the United States to put an end to this situation, which was damaging the authority of the TRIPS Agreement and the creditability of the WTO dispute settlement system. Therefore, China urged the United States to make an extra effort to bring itself promptly into conformity with the decision of the DSB.

14. The representative of United States said that with respect to the systemic concerns concerning non-compliance, as the United States had pointed out previously, the record was clear: the United States had come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances where US efforts to do so had not yet been entirely successful, the United States continued to work actively towards compliance.

15. The representative of Cuba said that his delegation wished to make an additional comment. He said that despite oral and written statements by the United States, the US Government had made no effort to comply with the DSB's rulings. It had never advanced any legislation towards repealing Section 211. In fact, it had done the opposite. It had worked with various members of the Republican Party in order to undermine any efforts aimed at bringing the legislation in question into compliance with the DSB's rulings and the TRIPS Agreement.

16. 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.67)

17. The Chairman drew attention to document WT/DS184/15/Add.67, 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.

18. The representative of the United States said that his country had provided a status report in this dispute on 12 June 2008, in accordance with Article 21.6 of the DSU. As of 23 November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. The US administration would work with the US Congress with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

19. The representative of Japan said that his country thanked the United States for its statement and the latest status report. Japan acknowledged that in November 2002 the United States had taken certain measures to implement part of the DSB's recommendations, as reported by the United States. The fact remained, however, that the remaining part of the recommendations had not yet been implemented and the issue of implementation in this case was still on the DSB's Agenda. Japan strongly hoped that the United States would soon be in a position to report to the DSB on more tangible progress in this long-standing dispute. A full and prompt implementation of the DSB's recommendations and rulings was essential for maintaining the credibility of the WTO dispute settlement system. Japan wished to urge the United States to come into full compliance without further delay.

20. 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.42)

21. The Chairman drew attention to document WT/DS160/24/Add.42, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

22. The representative of the United States said that his country had provided a status report in this dispute on 12 June 2008, in accordance with Article 21.6 of the DSU. The US administration would work closely with the US Congress and would continue to confer with the EC, in order to reach a mutually satisfactory resolution of this matter. In this regard, the United States shared the EC's goal of discussing how a mutually satisfactory solution to this dispute could be achieved.

23. The representative of the European Communities said that there was nothing much to say, because nothing much had been happening in the past years. The EC was still waiting for compliance.

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

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Communities (WT/DS291/37/Add.5 – WT/DS292/31/Add.5 – WT/DS293/31/Add.5)

25. The Chairman drew attention to document WT/DS291/37/Add.5 – WT/DS292/31/Add.5 – WT/DS293/31/Add.5, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's measures affecting the approval and marketing of biotech products.

26. The representative of the European Communities said that the EC was happy to report, once more, that good faith cooperation between the complainants and the EC continued. The EC kept a regular dialogue with the three complainants and held regular technical meetings, which were aimed at addressing all relevant biotech-related issues of their concern. On 18 and 19 June, the EC and the United States had held the sixth technical meeting on biotechnology issues. Progress in the processing of pending applications continued. Sixteen authorizations had been granted since the establishment of the WTO panel, seven in 2007 only. One draft authorization decision on oilseed rape T-45 had been discussed on 16 June 2008 and would be voted at the relevant Council Committee on 14 July. Two more draft authorization decisions would be voted in the Council next month. The EC was also pleased to report further progress in relation to the national safeguard measures covered by the Panel Report. On 27 May, Austria had adopted a decision lifting its bans on imports and processing of GM maize MON810 and T-25. The EC believed that given the inevitably sensitive nature of biotech issues, dialogue was the appropriate way forward and remained open to continue discussions with the three complainants.

27. The representative of Canada said that her country thanked the EC for its status report. With respect to DS292, Canada agreed with the EC that progress continued to be made on this file. It was due to this progress that Canada had decided that it was worthwhile to extend the reasonable period of time for implementation until the end of July 2008. Canada would continue to watch this progress carefully.

28. The representative of Argentina said that his country wished to thank the EC for its status report. The new facts presented by the EC at the present meeting demonstrated that steps had been taken in the right direction to ensure that progress was being made towards implementation in this dispute. Argentina and the EC had decided to extend the reasonable period of time for implementation until 12 August 2008, as had already been indicated by the EC.

29. The representative of the United States said that his country thanked the EC for its written status report and for its statement made at the present meeting. The United States had filed its consultation request in this matter over five years ago, yet the issues remained unresolved. The recent rise in world food prices reinforced the importance of the EC implementing its WTO commitments to adopt timely, science-based decisions on agricultural products developed using modern biotechnology. The United States continued to have serious concerns with the operation of the EC's approval system for biotech products. The EC had not made a single decision on a pending biotech application since March 2008. As a result, the EC had made no progress in clearing the backlog of pending applications. Indeed, the backlog had grown worse. The EC now had 50 biotech product applications backed up in its approval system.

30. The United States recalled that the DSB had not only found undue delays in the EC's biotech approval process, but had also found that bans adopted by six EC member States on products approved at the Community level were in breach of obligations under the SPS Agreement. In its status report, the EC stated that the DSB had found that bans imposed by Austria on the "import and processing" of two varieties of maize were "WTO-incompatible," and that Austria had now removed those bans. The United States had not yet had the opportunity to review the recent Austrian actions

described in the EC's status report. The United States noted, however, that the bans found by the DSB to be WTO-inconsistent covered all uses of these maize varieties. Yet the EC's status report and its statement made at the present meeting only mentioned the removal of those aspects of the Austrian ban covering "import and processing". Thus, based on the EC's status report and its statement, it appeared that Austria might have left in place a ban on other uses of these maize varieties, including the planting of these varieties within Austria. In other words, it appeared that Austria had left in place an important part of the measure that the DSB had found to be in violation of the SPS Agreement. A failure to remove all aspects of the Austrian ban would be of serious concern to the United States. As noted, the United States continued to have serious concerns with the actions of the EC and its member States. Accordingly, the United States urged the EC to take prompt steps to address those concerns, so that there would be no need for the United States to pursue further proceedings under the DSU.

31. The representative of the European Communities said that the EC had acted upon all the various national measures covered by the WTO Panel's ruling. All those measures had become obsolete, with the only exception being the Austrian measures on GM maize MON810 and T-25. Concerning the Austrian measures, Austria had lifted the bans on import and processing of GM maize MON810 and T25 (decisions of 27 May, published on 30 May). As regards the cultivation issue, the EFSA had been requested to issue an opinion on the scientific information provided by Austria on cultivation of those GMO events by 31 July 2008.

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

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

(a) Statements by the European Communities and Japan

33. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Communities and Japan. He invited the respective representatives to speak.

34. The representative of Japan said that, on 4 June 2008, the US Customs and Border Protection had published preliminary CDSOA distribution amounts available for the fiscal year of 2008[1], thus publicly initiating processes for a new round of distributions under the CDSOA. This latest action demonstrated that the CDSOA remained operational. Japan urged the United States to immediately terminate the illegal distributions and to repeal the CDSOA not just in form, but in substance, so as to resolve this dispute once and for all. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute "until the issue is resolved". Japan reserved all its rights under the DSU until the United States came into full compliance.

35. The representative of the European Communities said that the United States had recently taken the first step in the preparation of the next round of distribution under the Byrd Amendment that would take place in the Autumn. The EC wished to ask the United States how this continuing distribution of anti-dumping and countervailing duties in violation of the WTO rules reconciled with the US assertion of having taken all steps required to bring itself into compliance with its obligations under the WTO. The EC would also like to ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties to its industry. 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 implementation reports in this dispute.

[1] See US Customs and Border Protection's website at:
http://www.cbp.gov/linkhandler/trade/priority_trade/add_cvd/cont_dump/prelim_report08.ctt/prelim_report08.pdf

36. The representative of China said that his country thanked the EC and Japan for, once again, raising this item at the DSB meeting. China shared the views expressed by previous speakers and wished to join them in urging the United States to comply fully with the DSB's rulings.

37. The representative of India said that her country thanked the EC and Japan for maintaining this issue before the DSB once again. India noted with appreciation the positive steps taken by the United States and was pleased that duty deposits collected by the United States after 30 September would no longer be subjected to the Byrd Amendment. While this was a significant step forward, duties collected before 1 October 2007 would, nevertheless, continue to be subject to the Byrd Amendment. This had a trade-distorting effect on foreign producers and exporters. India, therefore, urged the United States to cease its WTO-inconsistent disbursements. India supported the view that continued surveillance by the DSB was needed.

38. The representative of Thailand said that, at the outset, his country thanked the EC and Japan for bringing this item before the DSB once more. On 30 May 2008, the US Customs and Border Protection had announced its intention to distribute AD/CVD duties under the Byrd Amendment for fiscal year 2008. Unfortunately, this announcement was no surprise: it was well known that such duties collected on goods that entered the United States before October 2007 would continue to be disbursed to the domestic industry. Nevertheless, Thailand wished to express its continued disappointment at the US persistent maintenance of those WTO-inconsistent disbursements. Thailand, therefore, urged the United States to cease those disbursements, to repeal the Byrd Amendment with immediate practical effect, and to resume providing status reports until such actions were taken and this matter had been fully resolved.

39. The representative of Canada said that her country thanked the EC and Japan for continuing to put this matter on the DSB's Agenda. Canada agreed with the EC and Japan that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

40. The representative of Brazil said that anti-dumping and countervailing duties collected in the United States before 1 October 2007 were still being distributed to domestic firms under the Byrd Amendment, and apparently they would continue to be distributed over the next fiscal year. This was in contradiction with the DSB's recommendations and rulings, and was affecting the rights of other WTO Members. Brazil understood that urgent action must be taken in order to make sure that no more disbursements were made under the CDSOA. In thanking the EC and Japan for bringing this issue to the attention of the DSB, once again, Brazil reiterated the need for full compliance in all disputes and by all Members.

41. 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. The United States recalled, furthermore, that Members, including the EC and Japan, had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. The United States, therefore, did not understand the purpose for which the EC and Japan had inscribed this item on the Agenda of the present meeting.

42. With respect to the comments regarding further status reports on this matter, as his delegation had already explained, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. In this light, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

43. The United States would also like to comment on Members' statements that this legislation – though repealed – continued to cause trade distortions. The United States did not understand the basis for this statement. The United States recalled, as it had done in previous meetings, that with one exception, none of the complaining parties in this dispute had claimed that the CDSOA caused trade-distorting effects under the SCM Agreement. Furthermore, though one Member had claimed that the CDSOA caused trade-distorting effects under the SCM Agreement, those adverse effects claims had been rejected. Members' comments alleging any trade-distorting effects were thus not based on any DSB recommendations and rulings. The United States, therefore, failed to understand the basis for Members' statements that their trade with the United States was being distorted by virtue of the now-repealed CDSOA.

44. Finally, the United States wished to comment on one statement made by the EC at the present meeting. The United States would note that in a dispute for which the panel report had recently been circulated, the EC strongly advocated the position that a Member could not state at a DSB meeting that a measure taken to comply by another Member was not consistent with that Member's WTO obligations, unless the Member had had recourse to dispute settlement proceedings with respect to that measure. The United States understood the EC's statement made at the present meeting – and the many similar statements that the EC had made at recent meetings – as a reversal of the EC's position, and looked forward to seeing that reversal reflected in the ongoing appeal.

45. The representative of the European Communities said that the EC considered as good news the underlying shift in the US position, and welcomed the United States among the group of WTO Members who rejected unilateral determinations. The fact, however, was that the EC had made no such determination, the situations in both disputes had nothing in common. In the Byrd Amendment dispute, the entry into force of the implementing act had been postponed by several years. The EC only took at face value the US legislation. The EC did not see how the United States could seriously claim that the EC had made a unilateral determination of non-implementation when the implementing act itself stated that it would produce effects only at some undetermined date in the future. A measure taken to comply that produced legal effects simply did not yet exist, and the United States could not claim in good faith that such a measure existed. Furthermore, the EC's sanctions were revised every year on the basis of the latest distribution under the Byrd Amendment. They would, therefore, automatically disappear at the same rhythm as the implementing act effectively came into effect.

46. The DSB took note of the statements.

3. European Communities – Regime for the importation, sale and distribution of bananas: Recourse to Article 21.5 of the DSU by the United States

(a) Joint request by the United States and the European Communities (WT/DS27/88)

47. The Chairman drew attention to the communication from the United States and the European Communities contained in document WT/DS27/88 and invited the representative of the United States to speak.

48. The representative of the United States said that his country joined the EC in asking that the DSB agree to provide additional time for adoption of the compliance Panel Report in this proceeding by adopting the draft decision set forth in document WT/DS27/88. The draft decision would provide for DSB adoption by negative consensus by no later than 29 August 2008. Such additional time would provide an opportunity for ongoing discussions related to this dispute to continue. The United States also recalled that the DSB, at its 2 June 2008 meeting, had adopted a similar decision proposed by Ecuador and the EC. The United States appreciated the DSB's support in this regard.

49. The representative of the European Communities said that the request by the EC and the United States was deemed to facilitate the constructive negotiations currently on-going between the EC and banana suppliers on a final settlement to this long-standing dispute. The new deadline proposed; i.e. 29 August 2008, aligned with the new deadline approved at the DSB meeting held on 2 June in the case of Ecuador, and provided the parties with a large margin to conclude the negotiations. The EC believed that the negotiation of an agreement, rather than further pursuing with litigation, was the only way towards a solution. An agreement was also essential in the context of the on-going DDA negotiations.

50. The DSB took note of the statements.

51. The Chairman proposed that: "The DSB agree that, upon a request by the United States or the European Communities, the DSB shall no later than 29 August 2008, adopt the Report of the Panel in the proceeding: *European Communities – Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5 of the DSU by the United States*, contained in document WT/DS27/RW/USA, unless (i) the DSB decides by consensus not to do so or (ii) the United States or the European Communities notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU".

52. The DSB so agreed.

4. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/380)

53. The Chairman drew attention to document WT/DSB/W/380, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he proposed that the DSB approve the name contained in document WT/DSB/W/380.

54. The DSB so agreed.