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## MINUTES OF MEETING

Held in the Centre William Rappard  
on 19 March 2004

*Chairperson: Ms Amina Mohamed (Kenya)*

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

- (a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.24 – WT/DS162/17/Add.24)
- (b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.17)
- (c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.17)
- (d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.5)
- (e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.2 – WT/DS234/24/Add.2)

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

- (a) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.24 – WT/DS162/17/Add.24)

2. The Chairperson drew attention to document WT/DS136/14/Add.24 – WT/DS162/17/Add.24 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

3. The representative of the United States said that before addressing US implementation in specific disputes, he wished to note that in his appearances this month before Congressional trade committees, Ambassador Zoellick had reiterated the importance of implementing all DSB recommendations and rulings in WTO disputes, and had urged Congress to work on necessary legislation to bring the United States into compliance with its obligations. The US administration would continue to work with Congress to achieve further progress in resolving all disputes. With respect to 1916 Act implementation, as noted in the US status report, dated 8 March 2004, legislation repealing the 1916 Act was pending in both the US Senate and US House of Representatives. On 29 January 2004, HR 1073, which would repeal the 1916 Act, had been reported favourably out of the Committee on the Judiciary of the US House of Representatives.

4. The representative of the European Communities said that one year ago a repealing bill had been introduced in the House of Representatives. One month ago, this bill had been eventually voted out of the House Committee for consideration by the whole House. The EC expected that the next steps would be undertaken in a more expedite manner and without further delay. The WTO Arbitrators had recognized the EC's right to suspend concessions to the United States under the GATT 1994 and the Anti-Dumping Agreement. The EC strongly hoped that prompt full implementation would make it unnecessary to use such right.

5. The representative of Japan said that his country was extremely concerned that the United States had missed another month, yet again, to implement the DSB's recommendations and rulings in this proceeding. Such a lengthy period of non-compliance made a mockery of the WTO dispute

settlement system and cast doubt on the commitment of the United States. Under the WTO-inconsistent 1916 Act, Japanese companies were still being forced to incur substantial damages including significant legal costs. In this regard, Japan had taken note of the US status report and reiterated its position that any repealing legislation of the 1916 Act must have retroactive effect so that the pending cases would also be terminated properly. Japan urged the US administration to endeavour to secure the passage of bills repealing the 1916 Act with proper retroactive effect at the earliest juncture during the second session of the 108th Congress. Japan had not yet made a final decision on the reactivation of the DSU Article 22 arbitration. Nevertheless, Japan would like to remind the United States of its right to suspend concessions or other obligations.

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

(b) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.17)

7. The Chairperson drew attention to document WT/DS176/11/Add.17 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

8. The representative of the United States said that his country had provided a status report in this dispute on 8 March 2004, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

9. The representative of the European Communities said that the two bills pending in the House of Representatives and in the Senate would ensure an effective protection of intellectual property rights both in Cuba and in the United States and, in this context, they would repeal Section 211. The "US-Cuba Trademark Protection Act" would resolve this dispute to the benefit of all and in a way consistent with the US commitment to effective and non-discriminatory protection of intellectual property rights. The EC expected that the US administration would support these bills as an appropriate solution to this dispute.

10. The representative of Cuba said that her delegation, once again, deplored the lack of progress by the United States in implementing the recommendations and rulings of the DSB in respect of Section 211 of the Omnibus Appropriations Act of 1998. Cuba repeated that it stood by the statements it had made during previous DSB meetings, especially during the most recent ones on 23 January and 17 February 2004. Cuba insisted that Section 211 of the Omnibus Appropriations Act of 1998 should be repealed since it violated basic principles of the WTO such as national treatment and most-favoured-nation treatment, as confirmed by the Appellate Body in its examination of the matter. The adoption of Section 211 had led to an extension of the international blockade and an intensification of the aggressive policies targeting Cuba in the area of intellectual property. Since the DSB had concluded that the United States must comply with the DSB's rulings and findings, the United States had requested repeated extensions to the deadlines set for bringing its legislation into conformity, giving the most incredible excuses, all of which were both unconvincing and inconsistent. Her delegation noted with concern that the progress reports submitted by the United States were becoming repetitive in the sense that they reiterated that the Government was still working with Congress with a view to complying with the DSB's recommendations, when in fact, there had been no results in the two years since the decision was adopted. Cuba, once again, condemned the total indifference and lack of willingness with which the United States reacted to the DSB's rulings. Cuba drew attention to the concept of the "reasonable period of time" and observed that the three extensions granted to the United States by the EC meant that the initial reasonable period of six months had been prolonged to two years. Cuba noted that promptness in implementing rulings was one of the objectives of the

dispute settlement process, especially when the appropriate balance between rights and obligations was affected. Moreover, the systematic failure of the United States to comply with the DSB's rulings cast doubt not only on the country's true political will to move forward in the negotiations and honour its WTO commitments, but also on the credibility of the institution itself. Finally, her delegation wished to emphasize that it maintained its conviction that Section 211 should be repealed, since the Appellate Body's review demonstrated that it was inconsistent with commitments undertaken by the United States in the area of intellectual property. Finally, she requested that the statement made by Cuba at the present meeting be circulated as an official WTO document.<sup>1</sup>

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

(c) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.17)

12. The Chairperson drew attention to document WT/DS184/15/Add.17 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

13. The representative of the United States said that his country had provided a status report in this dispute on 8 March 2004, in accordance with Article 21.6 of the DSU. The US administration continued to work with the US Congress to address the recommendations and rulings of the DSB that had not been addressed by 23 November 2002.

14. The representative of Japan recalled that, in December 2003, the reasonable period of time for implementation in this proceeding had been extended for the second time until 31 July 2004. He noted that before the first session of the 108th Congress ended in December 2003, to Japan's great regret, no "specific legislative amendments" had been introduced to the Congress. Since then to this date, again, no positive move forward has been reported by the United States. Japan urged the United States to secure the introduction and passage of the necessary bills during the second session of the 108th Congress and thereby promptly implement the DSB's recommendations and rulings.

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

(d) Chile – Price band system and safeguard measures relating to certain agricultural products: Status report by Chile (WT/DS207/15/Add.5)

16. The Chairperson drew attention to document WT/DS207/15/Add.5, which contained the status report by Chile on progress in the implementation of the DSB's recommendations in the case concerning price band system and safeguard measures relating to certain agricultural products.

17. The representative of Chile said that, given that his country had adopted the measures which it deemed to be consistent with the DSB's recommendations and rulings in this dispute, there was no progress to report within the meaning of Article 21.6 of the DSU.

18. The representative of Argentina said that, as his country had previously indicated, the disagreement within the meaning of Article 21.5 of the DSU between the two countries continued to exist since the measures adopted and put into effect by Chile at the end of 2003 did not comply with the DSB's recommendations and rulings. Accordingly, Argentina would, in due course, request consultations with Chile within the framework of the Understanding of 24 December 2003 regarding

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<sup>1</sup> The statement was subsequently circulated in document WT/DSB/COM/6.

procedures under Articles 21 and 22 of the DSU(WT/DS207/16). In view of the foregoing, Argentina was looking into all procedural options set forth in the Understanding, with a view to resolving the disagreement.

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

(e) United States – Continued Dumping and Subsidy Offset Act of 2000: Status report by the United States (WT/DS217/16/Add.2 – WT/DS234/24/Add.2)

20. The Chairperson drew attention to document WT/DS217/16/Add.2 – WT/DS234/24/Add.2 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Continued Dumping and Subsidy Offset Act of 2000.

21. The representative of the United States said that his country had provided a status report in these disputes on 8 March 2004, in accordance with Article 21.6 of the DSU. As noted in the report, on 19 June 2003, legislation to bring the Continued Dumping and Subsidy Offset Act (the CDSOA) into conformity with the WTO obligations of the United States had been introduced in the US Senate (S. 1299). In addition, on 2 February 2004, the US administration had, once again, proposed repeal of this Act, in its budget proposal for fiscal year 2005. After the US status report had been submitted, on 10 March 2004, legislation repealing the CDSOA was introduced in the US House of Representatives (H.R. 3933). The US administration was continuing to work with Congress to achieve further progress in resolving these disputes.

22. The representative of the European Communities said that after the United States had reported on implementation prior to the present meeting, the EC had learned that a bill had been introduced in the House of Representatives to repeal the Byrd Amendment. The EC hoped that this showed a renewed determination of Congress to comply with the DSB's recommendations. Up to now, there had not been convincing signs that Congress was eagerly working or even considering implementation. Since June 2003 and the introduction of the Senate bill mentioned in the US status report, nothing had happened. This was all the more disturbing that the EC had heard repeated statements that there would be no need to implement or that negotiations should be conducted to modify WTO rules. The EC hoped that reason would now prevail and urged the US administration to actively work with Congressional leaders to ensure prompt implementation of the DSB's recommendations.

23. The representative of Chile thanked the United States for its written and oral report, but regretted that three months after the expiration of the reasonable period, there was still no sign of progress in compliance. Chile had taken note of the recent bill introduced in the House of Representatives proposing the repeal of the CDSOA. This proposal was a reaction to the recent Congressional Budget Office report, which had found the Byrd Amendment to be affecting the US economy adversely. More specifically, it increased costs which, in terms of reduced overall economic performance and lower economic well-being of the population, generated anti-dumping and countervailing measures. Chile hoped that the administration would work with Congress to ensure that the bill was passed at the earliest possible date, thus obviating the need for Chile to implement the measures of last resort for which it had sought authorization from the DSB.

24. The representative of Canada said that his country noted the US status report and continued to be disappointed that the United States had not made progress to comply with the DSB's rulings and recommendations. Nonetheless, Canada was encouraged with the findings contained in a recently published report by the Congressional Budget Office. This report had found that the distributions mandated by the Byrd Amendment encouraged the filing of more trade remedy cases; subsidized the firms receiving the payments; increased the cost of operating the trade laws and discouraged the

settlement of cases by US firms. In the past week, the US Trade Representative had stated that the law amounted to a "double hit" on foreign producers and that the United States must comply with the WTO rulings. Canada hoped these pronouncements would serve as added impetus to repeal the Byrd Amendment.

25. The representative of Japan said that his country had taken note of the status report and the statement made by the United States at the present meeting, which added little to the status report submitted by the United States at the 17 February DSB meeting. Japan sincerely hoped that this was not a sign of inertia and outright disregard of the dispute settlement system on the part of the United States. While the issue was pending before arbitration under Article 22.6 of the DSU, Japan strongly urged that the United States secure the implementation of the DSB's recommendations and rulings, by promptly repealing the CDSOA.

26. The representative of Korea said that his country wished to express thanks to the United States for its status report, but the fact remained that compliance had not occurred and now, as Members were aware, the arbitration process on Article 22.6 of the DSB was on its way. Korea hoped that swift implementation by the US Congress would make eventual suspension of concessions or other obligations unnecessary.

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

**2. United States – Final countervailing duty determination with respect to certain softwood lumber from Canada**

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

28. The Chairperson said that this item was on the agenda of the present meeting at the request of Canada and invited the representative of Canada to make a statement.

29. The representative of Canada said that at its meeting on 17 February 2004, the DSB had adopted the Panel and Appellate Body Reports in the case on "United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada". The DSB had held that the United States had not fulfilled its WTO obligations in relation to the alleged "pass-through" of subsidies and had recommended that the United States bring its measures into conformity with its obligations under the SCM Agreement. Pursuant to the DSU, the United States was required to state its intentions in respect of implementing the DSB's rulings and recommendations within 30 days from the adoption of the Reports. He said that in order to avoid holding a special DSB meeting, Canada and the United States had agreed that the United States could state its intentions in writing. The United States had notified its intentions in a letter, dated 5 March 2004 (WT/DS257/12), in which it expressed willingness to discuss implementation procedures with Canada. His country looked forward to these discussions with a view to agreeing on a reasonable period of time.

30. The representative of the United States said that as his country had stated at the 17 February DSB meeting, the United States was pleased by the results of this dispute. The Panel and the Appellate Body Reports had rejected, in all major respects, Canada's claims that the United States had acted inconsistently with the Subsidies Agreement and the GATT 1994 in finding that Canada had provided countervailable subsidies to its softwood lumber industry. The United States did acknowledge the finding that the United States should have investigated whether the subsidies had been passed from one company to another through the sell of logs and it was currently examining approaches to implement this finding. In that regard, on 5 March 2004, the United States had informed the DSB by letter that it intended to implement the DSB's recommendations and rulings in

this dispute in a manner that respected the WTO obligations of the United States, and that it had begun to evaluate options for doing so. The United States had also informed the DSB that it would require a reasonable period of time to implement these recommendations and rulings. The United States looked forward to meeting with Canada in the near future in order to reach agreement on a reasonable period of time.

31. The DSB took note of the statements.

**3. United States – Laws, regulations and methodology for calculating dumping margins ("zeroing")**

(a) Request for the establishment of a panel by the European Communities (WT/DS294/7/Rev.1)

32. The Chairperson recalled that the DSB had considered this matter at its meeting on 17 February 2004 and had agreed to revert to it. She drew attention to the communication from the European Communities containing its revised panel request, which had been circulated in document WT/DS294/7/Rev.1.

33. The representative of the European Communities said that in the panel request initially sent by the EC, the numbering of paragraphs had been inadvertently deleted. The United States considered that this made the request unclear. The EC regretted this, but understood with satisfaction that the United States would accept the establishment of a panel at the present meeting. The EC had sent a corrected version of the request on 16 February 2004. For the reasons detailed in its request, the EC was requesting that a panel be established to examine the WTO-compatibility of the US legislation, methodologies and specific determinations in a number of original investigations and administrative reviews as result of the use of zeroing when establishing the dumping margin.

34. The representative of the United States said that with respect to the substance of the EC's panel request, the United States would not repeat the points it made at the 17 February DSB meeting, other than to say that it disagreed with the notion that the Anti-Dumping Agreement required that authorities offset calculated dumping margins with so-called "negative margins". With respect to the procedural issues raised by the EC's filing of a second panel request, the United States appreciated the fact that the EC in this request had corrected minor deficiencies contained in its initial request. Therefore, notwithstanding that the DSB was considering this new panel request for the first time, the United States did not oppose the establishment of a panel at the present meeting.

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 Argentina, Brazil, China, India, Japan, Korea, Mexico, Norway and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

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

(a) Request for the establishment of a panel by Korea (WT/DS301/3)

37. The Chairperson recalled that the DSB had considered this matter at its meeting on 17 February 2004 and had agreed to revert to it. She drew attention to the communication from Korea contained in document WT/DS301/3.

38. The representative of Korea said that his country had requested, on 5 February 2004, in document WT/DS301/3 the establishment of a panel with respect to the EC's Temporary Defense Mechanism (TDM), which was based on the EC Regulation 1177/2002, dated 27 June 2002, as well

as the member State measures implementing it. This issue had been discussed at the 17 February DSB meeting. As pointed out at that meeting, in Korea's view, these measures raised systemic concern as they were, *inter alia*, in violation of the basic principle of the WTO dispute settlement system, that was the prohibition of unilateral action. Korea continued to believe that the EC measures specified in Korea's panel request constituted a clear violation of its obligation under the WTO regime by the EC and its member States. Korea was requesting that a panel be established at the present meeting with standard terms of reference.

39. The representative of the European Communities said that at the 17 February DSB meeting the EC had expressed its disapproval of this procedural manoeuvring by Korea, which involved the request for a panel on some of the issues covered by the consultations, and the continuation of the consultations under a different DS number (DS307). This dichotomy of the consultation process was difficult to understand considering that the same measure (Council Regulation 1177/2002) seemed to be at the centre of the present request and the future consultations. In that respect, the EC had already signalled its willingness to enter into consultations on the issues specified by Korea in the request under DS/307; it would, therefore, seem more logical first to complete the discussion of these measures before considering further steps. Nevertheless, if Korea insisted on this double approach, the EC would, in any event, vigorously defend its measures in the course of a panel procedure.

40. 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.

41. The representatives of China, Japan and the United States reserved their third-party rights to participate in the Panel's proceedings.

## **5. United States – Anti-Dumping Act of 1916**

(a) Statement by the United States regarding the Arbitrator's award

42. The representative of the United States, speaking under "Other Business", said that the United States was pleased that the Arbitrator in "United States – Anti-Dumping Act of 1916"<sup>2</sup> had correctly concluded that the EC had no current right to suspend concessions against the United States. He also wished to make clear that the US administration remained committed to full compliance with the WTO obligations of the United States in this dispute. Having said that, the recent award of the Arbitrator in the Article 22.6 proceeding on the 1916 Act raised a number of significant issues concerning the operation of Articles 22.6 and 22.7 of the DSU which merited serious reflection. The United States appreciated that the Arbitrator strove for a balanced result in this award. However, Article 22.7 of the DSU did not mandate a balanced result, but a balance between the level of suspension proposed and the level of nullification or impairment. And when the latter level was zero, the correct result was that the award must also equal zero. Arbitrators must apply the rules. Unfortunately, while correctly articulating a number of rules and principles governing Article 22.6 proceedings, the Arbitrator in some instances had applied those principles only up to a point. For example, the Arbitrator had correctly enunciated the important principle that, in determining the level of nullification or impairment, it was necessary to rely on "credible, factual, and verifiable information". Claims that were "too remote", "too speculative", or "not meaningfully quantified" were to be rejected. Nevertheless, the Arbitrator had then gone on to conclude that final judgments under the 1916 Act "clearly nullify or impair" EC benefits, without analysis beyond the fact that the dollar figures were final, public and verifiable. Likewise, it had concluded that public settlements could be used to measure nullification or impairment for the same reason. It was true that the Arbitrator's analysis ensured that an examination of nullification or impairment began from credible figures. Unfortunately, the Arbitrator's analysis ended where it began. There was no reason to

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<sup>2</sup> WT/DS136/ARB.



assume, to speculate, that a 1916 Act judgement or settlement in itself nullified or impaired any benefits. For example, what if the parent companies of both the plaintiff and the defendant were EC companies, or if both the plaintiff and defendant produced goods only in EC member States? How could the transfer of funds between these two companies be said to affect the trade of, or harm the economic interests of, the EC? The Arbitrator's approach left these questions unaddressed, and simply assumed that the amount of judgements and settlements would equal the amount of nullification or impairment. There was no legal basis for making such a prediction, nor had the Arbitrator offered any economic or other evidence that would justify such an assumption. The Arbitrator had also disregarded the fact that no specific judgements or settlements under the 1916 Act – not past, current, or certainly future – were within the terms of reference of the original dispute, nor were they the subject of DSB rulings. The Arbitrator's task was to determine the level of nullification or impairment attributable to the breaches found with respect to the existence of the 1916 Act, not its applications.

43. Another way in which the Arbitrator had correctly enunciated a principle then failed to apply it related to limits on the level of nullification or impairment. The Arbitrator had correctly concluded that the EC's proposed suspension measure would in no way have limited the level of suspension, and was, therefore, not equivalent to the level of nullification or impairment. Nevertheless, the Arbitrator had then defined the level of nullification or impairment as a formula to be applied by the complaining party based on future events – in other words, it set no limit. Here, the Arbitrator had explicitly abdicated its responsibility to determine a fixed level of nullification or impairment, as every previous arbitrator understood the DSU to require. It was no excuse to argue that this level would vary from year to year, and therefore that the level of nullification or impairment should be expressed as a formula. That could be said of every previous arbitration, and every future arbitration. Of course, the Arbitrator might have been led to this result because of its reluctance to conclude that, with no current judgements, public settlements or pending cases against EC companies, the level of nullification or impairment could only be zero. Here, the Arbitrator had applied very questionable logic, with very uncertain consequences for future disputes. It referred to the standard finding of the panel directed by Article 3.8 of the DSU, that the WTO breach was considered *prima facie* to constitute a case of nullification or impairment. From that alone, the Arbitrator had concluded that the level "must be something greater than zero". The Arbitrator stated that it was a contradiction to suggest otherwise. However, in drawing this conclusion, the Arbitrator itself had contradicted the Arbitrator in the Bananas dispute. The Arbitrator in Bananas concluded that, with respect to trade in goods, the nullification or impairment of US benefits in that dispute was equal to zero. And the 1916 Act Arbitrator itself had recognized, together with the Arbitrator in the Bananas dispute that there was no more than a presumption that a breach constituted nullification or impairment. That presumption could be rebutted, and in this case had been rebutted. Even by the Arbitrator's own measurement, i.e., current judgements and public settlements, it had found the current level of nullification or impairment to be zero.

44. The Arbitrator's finding on the significance of the standard report language on nullification or impairment could have unfortunate consequences, if it were read to suggest that one could only rebut the presumption of nullification or impairment during panel proceedings, and not in an Article 22.6 arbitration. The DSU drew no such limitation. Indeed, it had been well-understood that the purpose of panel proceedings was to establish whether there was an inconsistency with a WTO obligation. Only when there was an inconsistency was there a possible need to reach Article 22 of the DSU, and a central purpose of Article 22.6 proceedings was to determine the level of nullification or impairment – even if that level was zero. Only one set of rules could govern Article 22.6 proceedings. The United States believed that Article 22 required arbitrators to award a fixed, multilaterally determined level of nullification or impairment that was based on an analysis of the trade or economic effects of a measure. Every previous Arbitrator had agreed that Article 22 required this. Yet the 1916 Act Arbitrator had not agreed, concluding that a complaining party might decide, and change, the level of nullification or impairment well after completion of the arbitration, based upon its own evaluation of

the criteria established by the Arbitrator. This prospective, unpredictable approach to determining nullification or impairment was not going to contribute to the security and predictability of the trading system. It would create rather than resolve disputes – indeed, the Arbitrator recognized this when it indicated several times in the award that the United States could initiate further dispute settlement proceedings should it disagree with the EC's applied levels of retaliation in the future. Moreover, it was important to recognize that if the Arbitrator's reasoning was correct, every past arbitration was wrong, and every future arbitration should apply that reasoning. There was no basis for applying different standards in different disputes. Members should reflect on this fact. The United States hoped they would conclude that the approach of the 1916 Act Arbitrator should not be repeated. The United States would be happy to discuss further with Members these serious, systemic concerns.

45. The representative of the European Communities said that, in light of the US intervention, the EC would like to highlight particularly three points. First, the award was a welcome reaffirmation that a Member might not violate its obligations with impunity. The non-implementation of the DSB's recommendations necessarily led to nullification or impairment and created the right to suspend obligations or concessions at an equivalent level. Second, the Arbitrators had confirmed that the benefits accruing under the GATT and the multilateral agreements on trade were, in no way, limited to trade benefits. Third, the decision had recognized that a level of suspension of concessions or obligations might be variable in order to reflect the variability of the nullification or impairment that a Member might cause by failing to implement the DSB's recommendations. The three particular findings were extremely valuable for the effectiveness of the dispute settlement mechanism and the EC commended the work of the Arbitrators. However, the EC also wished to signal its disagreement with the failure of the Arbitrators to include "litigation costs" in the calculation of nullification or impairment. EC companies had incurred major costs as a result of the need to defend their interests in connection with a WTO-incompatible legislation. Such costs represented, in the EC's view, a clear instance of nullification or impairment of WTO benefits, regardless of whether or not a settlement had been concluded or a final award had been issued. Finally, the EC would correct the US assertion that the EC had no current right to suspend its obligations under the GATT and the Anti-Dumping Agreement. In truth, EC companies had paid to settle claims and these amounts created the right to a corresponding level of suspension. The EC also wondered what was the purpose of making such a statement and recalled that the United States had the responsibility to ensure compliance with the DSB's rulings and recommendations.

46. The representative of Canada said that his delegation had had a chance to review the US statement this morning, and had listened carefully to the critique of the award of the Arbitrator in the 1916 Act case. Frankly, the critique was at once puzzling, wrong and dangerous. It was puzzling because was it not clear how the violation of a treaty obligation in international law could be said to result in "zero" nullification and impairment. To the extent that a treaty obligation meant anything, it implied the conferring of benefits to the rest of Members. When an obligation was violated, the corresponding benefits were nullified or impaired. The US critique was also wrong in the scheme of the WTO Agreement. One should not forget that when the DSB had adopted the Reports of the Panel and the Appellate Body, it had also found that benefits accruing to complaining parties had been nullified or impaired. As the Arbitrator found in the 1916 Act award, where there was a finding of nullification or impairment by the DSB, it was absurd to suggest that the level of such nullification or impairment could be zero. But above all, by this statement the United States had launched a frontal assault on the edifice of dispute settlement in the WTO. It was not enough, the United States had suggested, to challenge a measure *as such*. Rather, to have effective redress, a complaining Member might only challenge a measure as applied. One should reflect on this. The United States proposed, for example, that where an import ban had been found to violate the WTO Agreement, the complaining party must also challenge each and every application of that measure to be able to obtain appropriate retaliation rights. Each and every application, after the fact. After the damage had been done. The United States proposed that in the WTO, "the barn doors might be closed only after the horses had flown". It was difficult – it would beggar the imagination – to over-estimate the gravity of

the challenge the US position posed, if it were to prevail, to WTO dispute settlement. Canada was confident that, were the United States to raise these arguments in the context of a future arbitration, they would be seen for what they were and rejected forthwith. Above all, Canada noted that the United States could easily avoid all these concerns, if it were to comply promptly and in good faith with the DSB's rulings and recommendations.

47. The representative of India said that he did not have the award with him at the present meeting and that he had received the US statement on this subject only a while ago. The statement of the United States made certain assertions. For example, it stated that that EC had no current right to suspend concessions and that the Arbitrator had striven for a balanced result, but Article 22.7 of the DSU mandated a balance between the level of suspension proposed and the level of nullification or impairment. Without having the award, commenting on it through the prism of the US interpretation would be unjust not only to India's right of adequate opportunity to respond, but also to the Arbitrator. He also failed to recognize anything in the DSU meriting the US comment that the level of nullification or impairment was, in this case, zero, or indeed could be zero, when the DSB had already decided that there had been nullification or impairment due to a violation complaint. To adequately respond to the US statement made like this under "Other Business" was further complicated by the fact that the United States had entered into intricate legal analysis of the award. For instance, it again used the US prism to comment on the Arbitrator's conclusion that the final judgements under the 1916 Act "clearly nullify or impair" EC benefits, and then had gone on to circumscribe, again through the US prism, the mandate of the arbitrator. It had ignored the fact that by using the term "clearly", the Arbitrator in fact envisioned many other actions as nullifying or impairing EC benefits, while the final judgements clearly doing so. There were other comments made, like clubbing the Banana Arbitrator's determination of the nullification and impairment of US benefits as zero in respect to a particular claim with the mandate under Article 3.8 of the DSU, and comments on whether the level, in certain circumstances, could change from year to year. India did not agree with these comments. It was not possible to comment on a statement like this in the given time. Finally, he underlined that Members should focus on meeting their obligations under the WTO Agreements.

48. The representative of Japan said that, as his delegation had stated at the present meeting under agenda item 1(a), Japan had no yet made a final decision on the reactivation of the DSU Article 22 arbitration and firmly retained its right to suspend concessions or other obligations on this issue. In light of this, Japan's authorities in Tokyo would scrutinize all the points raised by the United States at the present meeting. Japan would not be able to go along with some of the points made and noted the comments made by Canada, the EC and India.

49. The DSB took note of the statements.

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