WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/226
26 March 2007

(07-1261)

Dispute Settlement Body
20 February 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 February 2007

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.51)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.51)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.26)

(d) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/20)

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 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.51)

2. The Chairman drew attention to document WT/DS176/11/Add.51, 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 8 February 2007, in accordance with Article 21.6 of the DSU. As noted in the report, during the previous congressional session, the US Congress had been considering a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute. The new US Congress had now convened. The US administration would work with this Congress with respect to appropriate statutory measures to resolve this matter.

4. The representative of the European Communities said that, for many months, the EC had heard the United States to claim its commitment to the TRIPS Agreement and its duty to comply promptly with the DSB's rulings and recommendations. Regrettably, this did not fit with the reality that Members faced in this dispute. Section 211 had been condemned five years ago and the only progress the United States could report at the present meeting was that its administration would work with the US Congress to implement the DSB's ruling and recommendations. Ensuring efficient protection of intellectual property rights worldwide was a shared objective and interest of the United States and the EC. The persisting ignorance of the TRIPS obligations by the United States ran against this by undermining the authority of the TRIPS Agreement. The EC hoped that the new US Congress would realise the widespread damaging effects caused by the non-implementation of the DSB's rulings and would finally put an end to this dispute. Furthermore, the United States also sent the wrong message by refusing, on foreign policy grounds, the specific licence that would have allowed the renewal of the registration of the Havana Club. The renewal would not have granted ownership rights, but would only have preserved the status quo and let US courts decide who was the legitimate owner of that mark. Therefore, the EC invited the United States to reconsider its position, in light of its seriously damaging effects.

5. The representative of Cuba said that the DSU, the cornerstone of the multilateral trading system, stipulated in Article 21.1 that prompt compliance was essential in order to ensure effective resolution of disputes to the benefit of all Members. However, in this dispute as well as in others, the

United States seemed to ignore that provision. The United States had failed to implement the DSB's recommendations and rulings with regard to Section 211 for five years and 18 days now, while continuing to submit repetitive status reports that lacked information about the possibility of resolving this matter in the short or medium term. On the basis of the principle of prompt compliance, Members were expected to comply immediately or, if this was not possible, within a reasonable period of time which, in the dispute under consideration, had been mutually agreed by the parties to the dispute and extended on five occasions. He noted that the last deadline had expired on 30 June 2005, which demonstrated that the current situation in this dispute was totally irregular and did not conform to the letter of the DSU.

6. Section 211, which had been declared inconsistent with the TRIPS Agreement and the principles of national treatment and most-favoured-nation treatment, continued to affect not only the interests of the EC but also those of Cuba. He recalled that in the Summer 2006, the US Patent and Trademark Office had rejected a request for renewal of the registration of the Havana Club trademark, which had been submitted by the Cuban company that owned it, precisely on the basis of this absurd provision. The attitude of the United States sent very negative signals to other WTO Members and called into question the effectiveness of the dispute settlement mechanism, the credibility of the multilateral trading system and confidence in that system, at a critical time for the WTO, namely the Doha Round negotiations.

7. It was widely known that Section 211 had been orchestrated by the lawyers of the Bacardi rum company and that it was aimed at usurping ownership of the prestigious Havana Club brand in the United States from its legitimate owner, the Cuban-French joint venture, Havana Club International. It was no coincidence that Section 211 was commonly known in the US Congress and media as the "Bacardi Bill". It was not necessary for the United States to constantly repeat that none of the findings and recommendations in this dispute related to a specific trademark. Once again, Cuba called upon the United States to take prompt and effective action to implement the DSB's recommendations and rulings. In this regard, the only possible solution to this dispute was for the United States to introduce a bill in the US Congress to repeal Section 211, instead of reiterating the false assertion that it was working with the US Congress to resolve this matter, while everyone knew that in the past five years it had never made the slightest effort to do so. In the light of the United States' persistent failure to comply with its obligations under the WTO Agreements and with the decisions made by the DSB, Cuba reserved its right to raise its legitimate concerns either in this forum or by whatever means it deemed appropriate.

8. The representative of the Bolivarian Republic of Venezuela said that his country wished to thank Cuba for its statement, which it fully endorsed. Venezuela considered Cuba's complaint to be legitimate, as had been demonstrated when the DSB had found that Section 211 of the Omnibus Appropriations Act of 1998 was inconsistent with the WTO Agreements and fundamental principles of the WTO. He also noted the status report submitted by the US delegation which, once again, demonstrated the US lack of interest in complying with the Panel's recommendations. In its reports, the United States had insisted that no other country was so strongly protective of intellectual property rights. His delegation, however, found it difficult to reconcile the US statement with the present situation. A commitment was one thing – living up to that commitment was another. For almost five years, the United States had not made any serious efforts to implement the DSB's rulings and recommendations, which had condemned Section 211 for not respecting the obligations of national treatment and most-favoured-nation treatment. This month again, the United States could do no better than submit a status report which, but for the date of circulation, was absolutely identical to the report submitted last month and, in fact, to all the reports that had been submitted for almost two years.

9. Failure to respect these core principles of the TRIPS Agreement several years after the WTO's condemnation, sent the message that the disciplines of the TRIPS Agreement could be ignored. This was inevitably damaging, especially since it came from one of the main promoters of that Agreement. To make matters worse, the recent decision of the US Administration to refuse the specific licence

that would have allowed the renewal of the registration of the Havana Club mark, had once again sent the wrong message. The renewal would not have given away or granted rights. It would have only preserved the status quo and would have allowed the US courts to decide, in pending proceedings, who was the legitimate owner of that mark. Even more worrying was the US explanation that this decision had been made on foreign policy grounds. Ownership of intellectual property rights should be decided by the courts on the basis of the law, without the interference of political considerations. If this US policy were to be followed by other countries, it would seriously undermine the efforts to promote rules-based protection of intellectual property rights worldwide. His country, therefore, invited the United States to reconsider its position in the light of its seriously damaging effects, and urged the United States, the only WTO Member that systematically failed to comply with the DSB's rulings under the TRIPS Agreement, to bring itself into compliance with its WTO obligations.

10. The representative of Brazil said that, in view of its systemic interest, Brazil had been expressing its concerns about the continuation of a non-compliance situation in respect of this case. Prompt and full implementation of the DSB's rulings and recommendations was one of the major means to keep the rules-based multilateral trading system credible and effective. If long periods of non-implementation, with an apparent lack of progress, were to become normal or were tolerated, the strength of the system would be negatively affected. In light of these considerations, Brazil urged, once again, the United States to take the necessary and urgent measures to bring itself into conformity with the relevant DSB's rulings and recommendations.

11. The representative of China said that, due to its systemic interest, China once again wished to express its systemic concerns with the protracted implementation process in this dispute. First, China thanked the Unites States for its status report and the statement made at the present meeting. China also thanked the EC and Cuba for their respective statements, which it fully supported. China appreciated the efforts made by the United States during the past five years aimed at implementing the DSB's rulings. However, unfortunately there was no indication when the matter would be resolved to the satisfaction of the parties to the dispute and other Members. As China had stated at previous DSB meetings, the prompt and full implementation of the DSB's rulings and recommendations was one of the major cornerstones of the WTO dispute settlement system. In the meantime, the prompt implementation in this dispute was not only beneficial to other Members, but also to the United States, who was an active advocate of intellectual property rights in all forums. Therefore, China again urged the United States to fully implement, as soon as possible, the decision of the DSB pertaining this dispute.

12. The representative of India said that his country wished to thank the United States for its situation report and the statement. However, India noted that there was no substantive change in its situation reports over the past several months. India, therefore, felt compelled yet again to stress that the principle of prompt compliance with rulings and recommendations of the DSB appeared to be missing in this dispute. This was a matter of great systemic concern, since more than five years had now elapsed since the adoption of the recommendations and rulings of the DSB in this case. India again urged the parties to this dispute to inform the DSB as to how they intended to fulfil the objective of prompt settlement.

13. The representative of Bolivia said that, once again, his country had seen the status report provided by the United States regarding Section 211, which did not contain any changes that might lead to a solution. As Bolivia had stated in the past, the failure to implement the rulings and decisions of the DSB was harmful to the trade regime particularly in respect of the TRIPS Agreement which had been underway for more than five years. Bolivia would, once again, urge the United States to take the necessary efforts to comply with the decisions of the DSB so that it could be possible to find a solution that would be satisfactory to all affected countries.

14. The representative of the United States said that the comments made by the EC about the US commitment to intellectual property rights and to compliance with the recommendations and rulings

of the DSB were as unwarranted and unfounded now as they had been at previous DSB meetings. For further details, the United States referred the EC, its member States, and other delegations to the statement made by the United States on 26 October 2006. Regarding the comment made concerning a particular trademark registration, none of the DSB's recommendations or rulings in this proceeding related to the renewal of specific trademarks. That comment, therefore, did not relate to "the issue of implementation of DSB recommendations and rulings" in this matter.

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

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.51)

16. The Chairman drew attention to document WT/DS184/15/Add.51, 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 his country had provided a status report in this dispute on 8 February 2007, 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 new Congress which had convened in January 2007 with respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities by 23 November 2002.

18. The representative of Japan said that his country noted the statement by the United States along with its latest status report. Japan was encouraged that the US administration would work with the new US Congress to pass specific legislative amendments that would implement the DSB's recommendations and rulings. However, the implementation in this case had been under surveillance for years and it was Japan's strong hope that the US administration and the new US Congress would make tangible progress. As Japan had repeatedly stated before the DSB, a full and prompt implementation of the recommendations and rulings of the DSB was essential for maintaining the credibility of the WTO dispute settlement system. Japan urged the United States to accelerate its work to resolve this dispute once and for all.

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

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.26)

20. The Chairman drew attention to document WT/DS160/24/Add.26, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

21. The representative of the United States said that his country had provided a status report in this dispute on 8 February 2007, in accordance with Article 21.6 of the DSU. The US administration would work closely with the new US Congress and continued to confer with the EC in order to reach a mutually satisfactory resolution of this matter.

22. The representative of the European Communities said that he wished to make a short statement because the United States had not informed Members of any new developments. The EC's position regarding this dispute was well known, the EC wished to see the law to be made conform to the WTO obligations of the United States. The EC remained prepared to work with the United States

to seek a mutually satisfactory solution to this dispute and hoped that a solution could be found in the near future.

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

(d) United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing"): Status report by the United States (WT/DS294/20)

24. The Chairman drew attention to document WT/DS294/20, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

25. The representative of the United States said that his country had provided a status report in this dispute on 8 February 2007, in accordance with Article 21.6 of the DSU. The United States also noted that the issue of zeroing was the subject of two other items on the agenda of the present meeting. As noted in the report, on 6 March 2006, the US Department of Commerce had published a notice requesting comments on its intention to no longer perform average-to-average comparisons in anti-dumping investigations without offsets. On 26 January 2007, the Department had published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. The United States intended to continue to work to implement the DSB's recommendations in this dispute.

26. The representative of Japan said that the zeroing methodology in average-to-average comparison in the original investigations had been found to be inconsistent with the WTO Agreement not only in the case brought by the EC, but also in the dispute to which Japan was the party. Therefore, Japan considered that such zeroing methodology should to be abandoned as swiftly as possible. Japan would closely monitor the situation to see that the United States put an end to this methodology on 22 February, as had been publicly announced by the US Department of Commerce on 27 December 2006.

27. The representative of the European Communities said that on 27 December 2006, the United States had published a notice announcing that it would stop using zeroing in original investigations when calculating the dumping margin on a weighted-average-to-weighted-average basis. The EC welcomed the announced change in methodology, but wished to express its concerns that the implementation of this modification had already been postponed twice, from 16 January to 23 January and again to 22 February 2007. The EC was concerned that this might affect the US ability to fully comply with the DSB's ruling by the 9 April deadline. In this regard, the EC wished to ask the United States for a detailed time-table of its proposed implementation of the 31 "as applied" cases. The EC also wished to know why the United States had not yet started its implementation of the 16 "as applied" periodic reviews, given that the United States did not apparently intend to change the methodology prior to recalculating the dumping margins in those cases.

28. The representative of the United States said that the date after which the US Department of Commerce would no longer perform comparisons without offsets had been established in order to allow input from all stakeholders and from the US Congress. As the EC was aware, there was a substantial amount of work involved in responding to the DSB's recommendations and rulings. The United States was working hard to try to conclude the work by 9 April 2007.

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

2. United States – Measures relating to zeroing and sunset reviews

(a) Implementation of the recommendations of the DSB

30. 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 23 January 2007, the DSB had adopted the Appellate Body Report pertaining to the dispute: "United States – Measures Relating to Zeroing and Sunset Reviews" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

31. The representative of the United States said that his country recognized that anti-dumping was a complicated area and that the issue of "zeroing" was also complex. There was nothing in the WTO Agreements that mentioned or addressed "zeroing." And as the Appellate Body had made clear in the past, the best indicator of the intent of the negotiators was the text itself. However, in this dispute the Appellate Body had appeared to be trying to infer the intent of Members with respect to the issue of "zeroing" without the benefit of a textual basis. It was no surprise then that an interpretive approach, based not on agreed text but on inference, should raise a number of problems, both legal and practical.

32. The United States had provided for the convenience of Members a written explanation of its objections to the Appellate Body report.[1] For the reasons discussed at the 23 January 2007 DSB meeting and in the communication distributed at the present meeting, the United States considered that the Appellate Body's findings relating to zeroing outside the context of average-to-average comparisons in investigations were devoid of legal merit. And with regard to findings on that limited context, the United States referred Members to its past statements indicating that those findings were not beyond serious criticism.

33. Wholly apart from their legal shortcomings, the Appellate Body's findings suggested forms of implementation that simply made no sense from a policy perspective. For example, the Appellate Body had found that dumping duties might not be calculated and assessed on an import-specific basis, but must instead be calculated for all the merchandise of an exporter or producer. These findings suggested that importers of higher-priced merchandise not responsible for dumping must be penalized, either by seeing anti-dumping duties reduced for their competitors who imported the lower priced merchandise responsible for the dumping, or by themselves paying anti-dumping duties because of their competitors' conduct.

34. It was difficult to conclude that Members agreed upon such an illogical outcome. The text did not support such a conclusion, nor did the actions of the Members following the completion of the text. As was well known, all the major users of the anti-dumping instrument continued to zero following the implementation of the Anti-Dumping Agreement. Even after the Appellate Body reports on zeroing in the average-to-average context, eight of nine impartial anti-dumping experts agreed that the text did not prohibit zeroing beyond that context. Were this a municipal court result, such an illogical outcome would be a prime candidate for reconsideration by the legislative branch. That was no less the case here, and the United States submitted that Members take up this issue, which affected the anti-dumping systems of a number of Members, in the Rules negotiations. Having said that, the United States wished to state that it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so. The United States would need a reasonable period of time.

[1] Subsequently circulated in document WT/DS322/16.

35. The representative of Japan said that his country welcomed the statement of intention made by the United States that it would bring into conformity with the WTO Agreement its zeroing procedures, and was prepared to enter into consultation with the United States on the reasonable period of time, if needed, for the United States to implement the recommendations of the DSB. Japan wished to stress that, in this dispute, the Appellate Body had decided that zeroing was prohibited in all circumstances whenever calculating the "margins of dumping". The Appellate Body had reached the conclusions that the zeroing procedures were as such WTO-inconsistent: (i) in original investigations in the context of transaction-to-transaction comparison method; (ii) in periodic reviews, and (iii) in new shipper reviews. The Appellate Body had further found that, in addition to specific periodic reviews, by relying on the margin of dumping calculated using zeroing, the sunset reviews at issue were also WTO-inconsistent. Thus, the measures to be taken by the United States for compliance must have coverage wide enough to bring all these measures into conformity, going beyond the mere abolishment of zeroing procedures in average-to-average comparison in the original investigation, as it currently planned to effectuate in the coming days.

36. The DSU provided that the adopted Appellate Body Report "shall be [ ] unconditionally accepted by the parties to the dispute" (Article 17.14). The DSU further stated that "[p]rompt compliance with [DSB recommendations] was essential in order to ensure effective resolution of disputes" (Article 21.1) and directed Members to "comply immediately with the recommendations and rulings," (Article 21.3). Japan also recalled that the DSU recognized that the "all Members will engage in [the dispute settlement] procedures in good faith in an effort to resolve the dispute" (Article 3.10).

37. The United States continued applying zeroing in a variety of anti-dumping proceedings including periodic reviews, which had practical, commercial consequences in the real world of international trade. As the Appellate Body had taken a decision, the United States was expected to take action by bringing all of the challenged measures into compliance. Japan strongly urged the United States to take measures immediately to resolve this dispute once and for all. Japan was ready to start consultations with the United States regarding specific implementing measures both in terms of the "as applied" claims and the "as such" claims. Japan believed that the reasonable period of time for implementation should be limited to the shortest possible extent to allow the United States to take necessary measures from the viewpoint of the requirements under the DSU, as previously mentioned. Japan recalled that, as a matter of urgency, the anti-dumping duties subject to Japan's "as applied" claims in this dispute were being liquidated one by one, which practically prevented the United States' implementation of the recommendation concerning these claims. As stated above, the United States was obliged to promptly comply with the recommendations, and Japan, therefore, strongly urged the United States to take all steps available in order to prevent further liquidation and ensure the full implementation of the recommendation.

38. The representative of India said that his country thanked the United States for its statement and written comments on the Appellate Body report in this case. While India would examine these comments, it welcomed the US stated intention to implement the DSB's recommendations. Since his delegation had been unable to make a statement on this subject at the past DSB meeting, it wished to make a brief statement at the present meeting. India welcomed the Appellate Body Report in the matter on: "United States – Measures Relating to Zeroing and Sunset Reviews" and noted especially that the Appellate Body had clearly held that the US "zeroing procedures" constituted a measure that could be challenged as such. The Appellate Body had also clearly held that the United States acted inconsistently with Articles 2.4, 2.4.2, 9.3, 9.5 and 11 of the Anti-Dumping Agreement by adopting/maintaining zeroing procedures in original and various review investigations. He recalled that the issue of clarifying and improving disciplines in respect of zeroing had also been a major negotiating issue in the current round of WTO negotiations on Rules. Several Members, including India, had expressed the view that there should be express provision in the Agreement prohibiting zeroing in any form, including all investigations so that such disputes could be avoided in the future. India had a systemic interest in this issue and, therefore, had been actively supporting these proposals.

India had also been a third party in several disputes on this issue in recent years. India believed that the findings of the Appellate Body in the matter referred to above had settled most of the issues relating to the practice and procedures of zeroing in the fair comparison methodology in anti-dumping investigations and should now pave the way for an early conclusion of negotiations on this issue in the Negotiating Group on Rules.

39. The representative of the European Communities said that the issue of zeroing had been subject to numerous litigations since the first case had been brought against the EC in 1998. Since then, 12 disputes had been brought against the use of zeroing by the United States whether as the unique subject of the dispute or as part of a wider dispute. The United States might be upset by the outcome of these disputes. But, the fact was that all issues of law had now been extensively pleaded and analysed. All points of criticism raised by the United States had already been answered and proved unfounded. There was no doubt left that zeroing ran foul of fundamental obligations of the Anti-Dumping Agreement which were to establish dumping in respect of an exporter and a certain product and to conduct a fair comparison between the export prices and normal value.

40. The representative of Canada said that his country welcomed the statement made by the United States that it would comply with the rulings and recommendations of the DSB. In this respect, Canada noted the substantive written and oral comments of the United States. As a matter of principle, the DSB was the proper place for Members to address dispute settlement issues that were of concern to them, including questions of legal interpretation in panel and Appellate Body reports; indeed the DSU specifically provided for this. However, to enable a fuller discussion, Members might wish to distribute their written comments well in advance of the meeting at which a subject was to be discussed. In this way, Members could have the opportunity to discuss these matters with capitals and to come to the DSB with well-considered views. This was all the more important when one was dealing with such highly technical matters. He said that he would transmit the written comments back to Ottawa, and reserved Canada's right to return to this matter with a more comprehensive analysis and response at a future date.

41. The representative of Mexico said that his country had not been aware of the fact that the United States would submit written comments regarding this matter. On the basis of the discussion taking place at the present meeting, it seemed that the issue of zeroing was quite far from being resolved. Mexico was currently participating in discussions with the United States regarding this methodology. Unfortunately, the statement made by the United States at the present meeting did not encourage Mexico to believe that this would be the end of the dispute. Mexico urged the United States to take into account that enormous resources were being invested by countries in order to resolve disputes. Mexico was not the only country subject to this methodology and, given the current situation, one could well predict that more resources would have to be invested by other countries in order to have the method of zeroing declared incompatible with the DSU provisions.

42. 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.

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

(a) Statements by Honduras, Nicaragua and Panama

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

[2] WT/DS27.

44. The representative of Honduras said that his country wished to refer to its prior statements on this matter and would only make a brief statement at the present meeting. As previously noted, Honduras in its capacity as an original complainant in the Bananas III dispute, had concluded its 60-day Article 21.5 consultation period on 30 January 2006. Since the consultations, and all efforts since then, had failed to resolve the matter, there continued to be a clear disagreement between Honduras and the EC over the WTO-consistency of the compliance measures taken by the EC. The commercial circumstances that originally had given rise to the Article 21.5 consultation request by Honduras, continued to make this disagreement a matter of urgent priority for Honduras. The full-year EC data showed that ACP banana shipments to the EC grew by 142,000 mt in 2006 and were expected to grow an additional 190,000 mt in 2007. By comparison, Honduras' banana industry in 2006 had one of the poorest market shares and import-value performances of all Latin American banana suppliers to the EC market. Honduras' market share had declined by 16 per cent and its import value was down by 37 per cent. Because other large MFN banana suppliers transferred displaced EC volumes to the US market, Honduras' 2006 shipments to the United States suffered as well, declining by 8 per cent over 2005 levels. With ACP market gains expected to multiply in 2007, Honduras was projected to sustain even larger EC and US market losses this coming year. The EC prices, which for large periods of 2006 had already been beneath Honduras' FOB costs plus freight, were also expected to decline further in 2007, meaning Honduran producer returns were likely to decline as well. With the need for relief still so imperative, Honduras welcomed the fact that a growing number of Members were calling for prompt redress. Honduras looked forward to working in coordination with the affected suppliers on the additional steps now required to deliver substantial, near-term access improvements. As those efforts progressed, he wished again to make clear that Honduras, as an original Bananas III complainant, retained its full-party Article 21.5 rights to protect its important producing interests.

45. The representative of Nicaragua said that at the end of January, her country had circulated a communication to all Members, which focussed on three main points: (i) that it was necessary to achieve a full and prompt settlement of this dispute; (ii) that Nicaragua would work to ensure that any effort to deal with this matter involved direct participation by Nicaragua and that, in the short term, it generated benefits for Nicaraguan producers; and (iii) that if a prompt and full settlement was not achieved, Nicaragua would need to take whatever further steps were necessary to protect its substantial trade interest. Nicaragua had issued this communication after participating in year-long DSB meetings and after holding consultations and informal exchanges in which the EC had repeatedly made it clear that there would be no access reforms in the short term. Over the past 12 months, the EC had only stated that it needed more time to examine the statistics and to evaluate the different options that would be available to it once there was clarity regarding the future of the Doha Round. It had shown no sign of being prepared to reduce its restrictions on access in the short term, still less had it demonstrated a readiness to provide specific details. Although it had hinted that it would be prepared to bind the tariff at a future date, once the outcome of the Doha Round had been defined, a binding at around the level of €176/mt or above would only legitimize a prohibitive tariff for Nicaraguan producers. In the absence of prompt substantial improvements, the Nicaraguan banana industry, which provided thousands of jobs for the country's large rural population: (i) would continue to be excluded from the EC market; and (ii) would continue to lose market share in the United States, because of the volumes that have been illegally displaced from the EC market. In order to prevent its rural producers and its labour force from continuing to suffer injustices, Nicaragua urged the EC to find a prompt solution to this case, one which took account of the interests of all suppliers.

46. The representative of Panama said that in recent months, Members had heard the EC express its commitment to "maintaining MFN access to the EC market". When Panama had asked how this statement could be supported, given that the increased ACP preferences were generating enormous gains at the expense of MFN market share, the EC simply said that the changes favouring the ACP countries were not relevant with regard to "equivalent market access". Panama did not understand how, either legally or statistically, the EC could make these assertions. From the legal standpoint:

(i) the EC's banana waiver had already expired, which meant that its differentiated tariff and ACP quota were clearly illegal; (ii) The EC would no doubt recall that the 2005 arbitration award had determined that "equivalent market access" for Latin American suppliers could only be measured in terms of the relative gains by ACP over MFN suppliers under the new arrangement; (iii) full-year data for 2006 provided clear evidence that the ACP suppliers had used more than double their new preference, surpassing MFN suppliers by a wide margin; (iv) while ACP suppliers had gained considerable EC market share, the MFN suppliers, including Panama, had lost their market share; (v) while practically all the ACP suppliers had increased their shipments to the EC, with record growth rates, a good number of traditional major Latin American suppliers had lost volume and some had now been completely squeezed out of the market; (vi) while EC imports from Latin America had fallen in value by more than US$700 million, there was no decline whatsoever in the corresponding ACP figures (leaving aside climate conditions in Cameroon); (vii) these circumstances could hardly be described as pertaining to a non-discriminatory "equivalent" market; and (viii) Panama, for its part, considered that the current access arrangements were discriminatory, regressive and unacceptable. Panama was, therefore, prepared to defend its substantial production interests in this area.

47. The representative of Brazil said that her country wished to thank Honduras, Nicaragua and Panama for bringing, once again, this issue to the attention of the DSB. Regrettably, more than 14 years had gone by since the bananas dispute had first appeared on the GATT/WTO agenda and it had been more than a year since this item appeared on the DSB agenda. In January 2006 the EC had put an end to the regime for the importation of bananas found illegal by successive DSB decisions. At that time, the EC had taken the first action towards consistency with its WTO obligations. It had replaced the condemned tariff-quota regime with a tariff-only system. Notwithstanding the EC efforts to comply with the multilateral rules, there were still other steps to be taken. The present system had been applied on a provisional basis, since no definitive tariff regime for MFN bananas had been established. More than one year after the commencement of such regime, there could not be any reasonable explanation by the EC for not rebinding the applied tariff. This situation, as all knew, engendered uncertainty for the MFN suppliers, who were entitled as any other WTO Member to a minimum degree of predictability as regards market access conditions to the EC. Therefore, with a view to affording those suppliers their legitimate rights, Brazil urged the EC to take the necessary measures to rebind a definitive tariff-only regime for MFN bananas.

48. The representative of the European Communities said that the EC remained open to addressing the concerns of Latin American suppliers in relation to its import regime in the appropriate fora. The EC was well aware of the importance of the banana industry for Latin American countries, as well as ACP countries, and had always taken these interests into consideration. The EC had always been and remained committed to maintaining access to the EC market by all banana supplying countries. According to the data on overall MFN imports available to date, the EC had succeeded in this. The data gave no reason to believe that such access was not maintained. The new EC tariff had thus far resulted in the increase in imports from both MFN and ACP suppliers as compared to previous years. The EC commitments did not include a commitment to "guarantee specific market shares and prices" but only equivalent market access. The EC continued to think that there remained sufficient political will to work towards a definitive negotiated solution to this long-standing dispute in 2007. The EC was committed to work in this direction with all interested Members. The EC would not repeat its prior statements explaining as to why this matter was not an "implementation issue" covered by Article 21 of the DSU.

49. The representative of the United States said that, as Members were well aware, at Doha the EC had committed itself to shift to a tariff-only regime by 1 January 2006. As one of the original complaining parties in the dispute that had led to the DSB's recommendations and rulings in the Bananas dispute, the United States had looked forward to this long-running dispute finally being resolved at the start of 2006. That year had now come and gone, and no resolution was in sight. The United States continued to hear reports that under the new regime market conditions for some MFN

suppliers were worsening. The United States continued to urge the EC to work with all interested Members to resolve this years-long dispute.

50. The DSB took note of the statements.

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

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

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

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

53. The representative of Japan said that the latest CDSOA disbursements reported as such by the US Customs and Border Protection in November 2006 made clear that the CDSOA still remained fully operative and illegal disbursements under the CDSOA would continue for years to come. This meant that, contrary to what the United States had stated in the previous DSB meetings, the DSB's recommendations and rulings had not yet been fully implemented by the United States. The United States must stop any future disbursements regardless of the sources of duties collected, and must comply fully with the DSB's recommendations and ruling without further delay. Japan also reiterated that the United States was under the obligation to provide the DSB with a status report, pursuant to Article 21.6 of the DSU. Japan reserved all its rights under the DSU until the United States fully complied with its obligations.

54. The representative of the European Communities said that the Continued Dumping and Subsidy Offset Act had been condemned by the DSB more than four years ago, and the transfers of the anti-dumping and countervailing duties should have stopped more than three years ago. Instead, in November 2006, the United States had distributed the highest amount thus far under the CDSOA, despite the fact that anti-dumping and countervailing duties collected on goods from Canada and Mexico were not distributed any longer. The United States was hiding behind the repeal of the CDSOA to claim compliance with the DSB's rulings and conveniently ignored that a transition period would maintain the WTO illegal distributions until at least the fiscal year 2010 according to an estimate of the US Congressional Budget Office. The truth was that, as long as the redistribution of collected duties continued, the United States would be in breach of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement and full implementation would still have to be delivered. The EC, therefore, asked again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The EC also renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports on implementation in this dispute.

55. The representative of Brazil said that his country thanked Canada, the EC and Japan for keeping this matter on the DSB agenda. While Brazil reaffirmed its appreciation for the repeal of the Byrd Amendment, it was convinced that the approach taken by the United States impaired the proper functioning of the WTO dispute settlement system. Not to mention the United States' delay to actually

repeal the illegal measure, the United States had decided to create a mechanism by which it could, in the US view, claim to have fully complied with the DSB's recommendations while the very same violations would still be in place for a long period of time. As a matter of fact, disbursements under the Byrd Amendment had reached a record amount in 2006 fiscal year, after the claimed repeal of the illegal measure. Members dissatisfied with such situation should, again in the US view, resort to dispute settlement procedures, as though the original recommendations had not existed. If this approach were to be endorsed by the DSB, what would prevent a responding party from revoking a WTO-inconsistent measure in five, ten, 15 or more years time after the law repealing the said measure is published? What if, instead of a one-time prospective repeal, a responding party decided to renew and postpone the actual effect of the repeal every time the previous deadline approached? Did that mean full compliance with the DSB's recommendations? His delegation could only offer Brazil's answer to this question, which could only be a definitive and unequivocal "no". Brazil invited other delegations to reflect upon this, taking into consideration that the major players bore a greater responsibility in preserving the credibility of the system.

56. The representative of China said that his country thanked and supported Canada, the EC and Japan for raising this item at the present meeting. China appreciated the efforts of the United States to implement the DSB's rulings and recommendations in this dispute and welcomed the repeal of the CDSOA. However, China shared the same view expressed by previous speakers that the implementation issue had not been resolved in this dispute within the framework of Article 21 of the DSU. It was the obligation of a Member to fully and promptly implement the DSB's rulings and recommendations, which was critically important to the credibility and efficiency of the dispute settlement system. Therefore, China wished to join previous speakers in urging the United States to comply fully and promptly with the DSB's rulings.

57. The representative of Thailand said that first his country thanked Canada, the EC, and Japan for once again bringing this matter before the DSB. Thailand remained disappointed at the United States' continued illegal disbursement of funds under the CDSOA. Likewise, Thailand remained disappointed at the Unites States' continued refusal to submit any status report on its outstanding implementation in this dispute. Therefore, Thailand repeated its call for the United States to cease these WTO-inconsistent 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.

58. The representative of India said that his country wished to thank Canada, the EC and Japan for raising this issue in the DSB yet again. Unfortunately, India was still to get a response from the United States to its long-standing question as to how it squared up its compliance obligations with continued disbursement of collected anti-dumping and countervailing duties to its industry, almost fours years after these should have stopped. The latest data available in the CDSOA Annual Report of the US Customs and Border Protection for the fiscal year 2006 only proved India's point that the United States was not in compliance with its obligations. In spite of this, all the United States had done was to reiterate its indefensible position. Such unilateral action was indeed regrettable as it undermined the WTO dispute settlement system. India, therefore, again urged the United States to inform the DSB of the steps it proposed to take to ensure full compliance, and reiterates its request that the United States resume submitting status reports in this dispute.

59. 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. With respect to comments regarding further status reports in this matter, as the United States had already explained, the United States had taken all steps necessary to implement the DSB's recommendations and rulings in these disputes. Those Members who had inscribed this item on the agenda of the present meeting were, of course, free to do so, but

the United States failed to see what purpose would be served by the further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

60. The DSB took note of the statements.

5. United States – Subsidies on upland cotton

(a) Statement by Brazil concerning untimely filings of submissions

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

62. The representative of Brazil said that, as indicated on the agenda of the present meeting, his country wished to address systemic concerns arising from the untimely filing of a series of US documents in the Cotton dispute. The decision to bring this issue to the DSB was the result of a thorough examination by Brazil of its systemic relevance for all Members. As the body empowered to administer the rules and procedures set forth in the DSU, the DSB was an appropriate forum for the discussion of this serious matter. In raising this issue, Brazil did not expect the DSB to interfere with the Cotton implementation panel or any other panels' work as to their authority or ability to take action against procedural misbehaviour by the parties to disputes. As Members would find, for instance, in the report of the original Panel in the Cotton dispute, Brazil had expressed its concerns about untimely filings of a series of US documents throughout these proceedings[3], and Brazil would continue to do so as untimely filings recurred. However, and because Brazil considered that procedural fairness and balance were among the foundations of a credible dispute settlement system, Brazil believed that all Members should be aware of the situation Brazil had been facing since the early stages of the Cotton dispute as a result of US behaviour in respect of the service of documents. Brazil's resources and time could be better invested in addressing substantive issues related to this dispute, particularly in view of the upcoming meeting with the compliance Panel, but, regardless of the costs, Brazil felt it should not wish to wait for the next missed deadline.

63. At the risk of undercounting, Brazil recalled that the United States had missed nine deadlines in the Cotton dispute, two of them during the compliance Panel stage. No justification or explanation had been given by the United States for untimely filings before or upon late transmittal of documents. Subsequent US communications tried to blame Brazil for US delays, but did not show any good cause for them. Moreover, most of the deadlines had not been respected by the United States after the Panels had already granted it extensions of time to submit its documents. Even more seriously, most of those deadlines had been missed after the Panels had further underscored the precise date and the hour of those deadlines. These were serious breaches of due process requirements. Deadlines could not be taken lightly. Panels would not be required, under Article 12.5 of the DSU, to set *precise* deadlines, if Members were allowed to approach them on a "best efforts" basis. The United States had essentially claimed for itself the right to decide when to file submissions in dispute settlement proceedings, in flagrant and unacceptable defiance of the Panel's authority, and in disregard of the rules and procedures of the DSU.

64. Brazil – a developing country with serious budgetary and human resources constraints – had been faced with extremely short deadlines in this dispute. Nonetheless, Brazil had been meeting the deadlines established, and would continue to do so. In addition, Brazil had shown maximum flexibility to accommodate US requests for additional time, in light of Brazil's interest in having a high quality final report. As an illustration, Brazil – conscious of the complexity of the dispute – had recognized right from the start the difficulty for the Panel to abide by the 90-day time period set out in

[3] Panel Report (WT/DS267/R), paras. 7.43-7.46. See also Brazil's letters of 14 July 2003, 14 August 2003, 28 August 2003, 2 October 2003, and 23 December 2003, recorded in Annex K to the Panel Report.

Article 21.5 of the DSU. Under the current time-table, the final report was expected to be circulated to all Members in July, ten months after the establishment of the compliance Panel. Brazil had not opposed this time-frame – a time-frame that Members would normally accept for original panel proceedings, rather than compliance panel proceedings. There was not, therefore, any convincing reason for the United States to justify its conduct and the consequent impairment of Brazil's right to due process and fair procedures. In inviting the Membership to undertake a careful examination of this issue, Brazil wished that the DSB take note of its concerns and reserved the right to revert to this matter, as appropriate.

65. The representative of the United States said that regrettably this agenda item continued a pattern of behaviour that his country had seen with Brazil in the Cotton dispute. Brazil had sought press attention on this dispute numerous times – including to discuss panel proceedings that Brazil had itself insisted be treated as confidential – and Brazil had complained about the conduct of this dispute at the DSB. In this latest instance, Brazil once again was taking up the time and resources of the DSB Members on issues that were not properly raised in this forum. At the October 2006 DSB meeting, Brazil had breached the confidentiality of the panel composition process to complain that the WTO Director General had acted contrary to the DSU by recognizing US rights in appointing the Article 21.5 "compliance" panel in the Cotton dispute. At the present meeting, Brazil complained to the DSB that the United States had not made its submissions by 5:30 p.m. on the due date. The United States was surprised that Brazil considered this an issue worthy of consideration by the DSB. Brazil had already raised this issue with the Cotton compliance panel and had received their response. The United States had full confidence in the Panel's ability to handle these types of procedural issues. And the United States did not see anything to be added by also complaining to the DSB. The fact that practical difficulties might sometimes render it impossible to provide submissions by 5.30 p.m. did not reflect a lack of effort or good will on the part of the submitting party. Moreover, the interests at stake in a particular dispute were advanced when all parties were able to present their views to the most complete extent. But Brazil's approach was to deny the Panel access on the due date to the submission in its entirety and had instead forced the panel to listen to the entire submission read as an oral statement at the panel meeting.

66. This made no sense for the dispute settlement system nor was it in Brazil's own interest. Members were aware that deadlines in WTO proceedings were extremely tight. And all WTO Members, including the United States, worked very hard to provide timely submissions. But this was not always possible, as any Member participating in dispute settlement proceedings knew well. In fact, in the same week of the US rebuttal submission in the Cotton compliance proceeding, the United States had received two other Members' submissions in two other disputes many hours after 5:30 p.m. One of those late filings had been submitted in a dispute involving the same counsel as that of Brazil in the Cotton dispute. And, in another ongoing dispute in which the United States was involved, a Member had provided a submission not merely a few hours after 5.30, but three days later. These were just a few recent examples. Should every one of these instances have become a DSB agenda item? In the Cotton compliance proceeding, Brazil had had many months to prepare and submit over 250 pages of argumentation and close to 2,500 pages in exhibits in its first submission. It had then submitted 220 pages of argumentation and over 1,000 pages of exhibits in its rebuttal submission. The United States had undertaken extraordinary efforts to respond to these submissions within the short deadlines applicable in compliance proceedings. While the United States had ultimately been able to submit a response by the due date, it had simply been unable – despite its best efforts – to do so by 5:30 p.m.

67. The representative of the European Communities said that the EC thanked Brazil for bringing this matter to the DSB's attention. The EC had had its own experience with WTO disputes in which the other party had filed its submissions well after the deadline set by the panel. This problem was also well documented in dispute settlement reports, for instance in the panel report in "US – Upland Cotton". The EC recalled that Article 12.5 of the DSU stipulated that "Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines." This

"should" did not mean that the parties merely had to "try to" meet the deadlines, or were asked to do so if they wanted. In the legally binding text of the DSU, this "should" mean that a party was required to meet the deadline unless there were valid reasons for not doing so. It was important to take deadlines in dispute settlement seriously. It was a crucial aspect of showing respect for the panels and the Appellate Body which set them. These deadlines were also important in that they embodied the principle of procedural fairness by ensuring that no party obtained an illegitimate advantage over the other party. Such illegitimate advantage would arise where one party, as a result of the delay, secured for itself more time than it had been allotted in the time-table which was drawn up with a view to guarantee procedural equality. An additional illegitimate advantage arose in those situations where both parties filed a submission by the same deadline when neither was supposed to be able to take the other party's submission into account for its own submission. Also, the late filing not only disrupted the work of all those who had been waiting for the submission in question, but also used up the time they had until their own upcoming deadline. All this was to say that the EC urged WTO Members to respect deadlines in dispute settlement. No Member could consider itself above the law, or permit to ignore deadlines at free will. Where, exceptionally a deadline could not be met, be it only by a few hours, it was the least that the party in question announced this delay before the deadline's expiry, and that it justified the delay afterwards with a valid reason.

68. The representative of Canada said that his country thanked Brazil for bringing to the attention of the DSB the importance of all Members' abiding by the rules of procedure set out by panels and the Appellate Body, including those related to the timely filing of written submissions. Canada had, in past disputes, raised similar concerns before panels and the Appellate Body and, in the context of those specific cases, Canada had proposed sanctions or other measures to be taken by a panel to address its concerns. Canada had not always been successful in its requests for sanctions to apply to Members that acted inconsistently with the rules of procedures set down by panels. In this light, Canada shared Brazil's general point concerning the importance of observing rules of procedure in dispute settlement proceedings. These rules, if they were to mean anything, must be considered as deadlines and not merely guidelines. However, while the DSB was the appropriate forum to discuss general points related to the operation of the DSU, it was not, in Canada's view, the forum in which to raise procedural concern in the context of a discrete case. Canada noted that these were issues over which panels and the Appellate Body had sole jurisdiction. Nothing in the DSU permited the DSB to act as a forum for interlocutory procedural appeals, and the DSB should not take on the role of an arbiter of procedural issues in an on-going case. Canada noted that, in the case at hand, Brazil had already raised its concerns with the Panel and that the Panel had yet to address them; for Members, gathered in a diplomatic forum, even to discuss the merits of Brazil's complaint would inappropriately undermine the independence of the Panel. Canada recognized that this was not Brazil's intention, but it should not even appear to head in that direction. Canada, therefore, encouraged Members to exercise restraint in raising before the DSB issues subject to adjudication in the context of confidential panel proceedings.

69. The DSB took note of the statements.

6. United States – Anti-dumping measure on shrimp from Ecuador

(a) Report of the Panel (WT/DS335/R)

70. The Chairman recalled that at its meeting on 19 July 2006, the DSB had established a panel to examine the complaint by Ecuador pertaining to this matter. The Report of the Panel contained in WT/DS335/R had been circulated on 30 January 2007 as an unrestricted document. The Report of the Panel was now before the DSB for adoption at the request of Ecuador. The adoption procedure was without prejudice to the right of Members to express their views on the Report.

71. The representative of Ecuador said that his country welcomed the Panel's decision, which had been circulated on 30 January 2007, on the use of "zeroing" by the US Department of Commerce

(DOC) in its anti-dumping investigation of certain frozen warmwater shrimp from Ecuador. Ecuador wished to thank the Panel and the Secretariat for their hard work in resolving this matter. Ecuador also thanked the United States for its cooperation in reaching a procedural agreement with Ecuador that had resulted in expedited proceedings before the Panel. The matter referred to the Panel was quite specific. Ecuador had asked the Panel to examine whether the DOC's practice of zeroing as applied in the original investigation, when it had used the average-to-average method in comparing export price to normal value, was consistent with Article 2.4.2 of the Anti-Dumping Agreement. The DSB was familiar with all aspects of zeroing so there was no need for an extended discussion at this time of the mechanics of zeroing or the analyses contained in prior Panel and Appellate Body decisions on the subject. Suffice it to say that the Panel had found that the use of zeroing was not consistent with the Anti-Dumping Agreement based on its independent review of the relevant provisions of the Agreement in light of an undisputed factual record. The Panel had also relied in part on the Appellate Body's decisions in "US – Softwood Lumber V" and "US – Zeroing (EC)", which the Panel had found to be "persuasive" in its analysis.

72. If, as Ecuador hoped, the DSB would adopt the Panel Report, then the United States, under its procedural agreement, would have six months in which to bring its measures into conformity with the Anti-Dumping Agreement by issuing a new decision that eliminated zeroing. The original anti-dumping order that the DOC had issued continued to have serious adverse effects on Ecuador's shrimp industry, which was one of Ecuador's largest employers. In light of the financial hardship that the order had imposed on Ecuador, his country wished to take this opportunity to urge the United States to make every effort to complete its work in less than the maximum six-month period allowed by the Agreement. In fact, Ecuador knew from published news reports that the US DOC had been working diligently for some months to revise its method of calculating dumping margins in investigations without the use of zeroing. Therefore, the required margin recalculations for Ecuador's exports should be a relatively simple and quick matter to complete. Ecuador fully expected that these recalculations would lead to a finding of no dumping. This had been Ecuador's contention since the very start of the investigation in December 2003. Unfortunately, for as long as the anti-dumping order continued in effect, an injustice was perpetuated. Ecuador hoped that the United States would act expeditiously and in good faith to eliminate that injustice.

73. The representative of the United States said that his country wished to begin by thanking the Panel and the Secretariat for their hard work. As the United States had indicated in its statements on zeroing in the past, US concerns with findings on the topic had been principally directed at those findings relating to zeroing outside the context of average-to-average comparisons in investigations. As the United States had explained previously in this meeting and in the written communication submitted at the present meeting, there simply was no basis in the Anti-Dumping Agreement for concluding that there was a broad prohibition on zeroing outside that limited context. With regard to zeroing in the context of average-to-average comparisons in investigations, as discussed under a previous agenda item, the US Department of Commerce had announced several months ago that it would discontinue zeroing in this context as a result of earlier DSB recommendations and rulings. Accordingly, in the present dispute, the United States and Ecuador had sought an efficient means of addressing Ecuador's claims with a minimal burden on the resources of the parties and the dispute settlement system. The United States believed the procedural agreement it had reached achieved that goal. The United States appreciated Ecuador's cooperation during this dispute.

74. The representative of the European Communities said that the EC had followed this dispute with some interest, both because it supported the continuing efforts of a large number of WTO Members to have the United States stop the use of zeroing in anti-dumping proceedings, but also because of the innovative nature of the procedural agreement reached by the parties. The EC was satisfied with the Panel Report. It was satisfied first, because the Panel had not simply accepted, in an unquestioning manner, the procedural agreement between the parties, but had insisted, as it was required pursuant to Article 11 of the DSU, that Ecuador put forward a prima facie case. Second, the EC was also satisfied that the Panel had, once more, confirmed that zeroing was not an acceptable

practice under the WTO Anti-Dumping Agreement. Finally, the EC would also commend the Panel for the expedited manner in which it had handled the case and respect for the deadlines in the DSU. That said, the satisfaction of the EC was not unqualified. The EC wondered why it had been necessary to have recourse to a panel procedure, when the defendant WTO Member had not contested the WTO-inconsistency of the measures in question. This required the dispute settlement bodies of the WTO, the Secretariat, and a number of WTO Members to expend precious limited resources on a dispute where there was in reality no dispute. It had delayed the US coming into conformity by a number of months.

75. The representative of Brazil said that his country thanked the Panel and the Secretariat for their intense work to produce the report to be adopted at the present meeting. A careful reading of the Report would show that, though apparently simple, the Panel's task was in reality significantly complex. Thus, Brazil also congratulated the Panel for its conclusions. First, the Panel had correctly realized that, regardless of the "lack of substantive disagreement between the parties", it had been bound by the requirements of Article 11 of the DSU to make an objective assessment of the matter before it. As Brazil and other Members had argued during these proceedings, a WTO panel was not the appropriate channel for parties to a dispute to merely homologate an agreement on the result of a controversy. Second, the Panel – after reviewing the facts and legal arguments submitted by Ecuador, and in the absence of US rebutting arguments – had found the measures challenged by Ecuador to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. In Brazil's view, this conclusion further strengthened the body of WTO decisions against the use of the "zeroing" methodology in anti-dumping proceedings. Brazil was glad to note that the Panel had matched its expectation that its decision would provide Members with a new and strong condemnation of the US "zeroing" practices. Finally, and drawing on the Panel's characterization of this dispute as "unusual"[4] and "singular"[5], Brazil wished to state that the WTO dispute settlement system would be far better served if a Member whose policies had been consistently and unequivocally found to be WTO-incompatible applied the DSB's recommendations on an *erga omnes* basis. This was undoubtedly the case of "zeroing". Valuable resources of the dispute settlement system and of Members affected by the same violations would be drained and dissipated if such Members were forced to litigate over issues in relation to which even the Member applying the illegal measure agreed that there was no credible defence. Brazil encouraged, therefore, the United States to eliminate once and for all the use of the "zeroing" methodology in the shortest period possible.

76. The representative of Thailand said that his country thanked the Panel and the Secretariat for their efforts in this dispute. Thailand had participated as a third party in this case due to its substantive and systemic interest in the use of zeroing by the United States in this dispute. Thailand firmly believed that this practice was inconsistent with the WTO Anti-Dumping Agreement and welcomed the Panel Report in this regard.

77. The representative of India said that his country welcomed the Panel Report in the case: "United States – Anti-Dumping Measure on Shrimp from Ecuador" to which it had been a third party. India congratulated the Panel and the Secretariat on the expeditious completion of their work in this case and looked forward to an early implementation by the United States of the rulings and recommendations of the Panel.

78. The representative of the United States said that one or two delegations had questioned whether this proceeding was the best use of the Secretariat resources. The United States noted that the parties had discussed how best to proceed in this situation and had determined that their procedural agreement best met the concerns of the parties in resolving their dispute.

[4] Panel Report (WT/DS335/R), para. 7.1.
[5] *Idem*. para. 7.7.

79. The DSB took note of the statements and adopted the Panel Report contained in WT/DS335/R.

7. Election of Chairperson

80. The Chairman said that, before proceeding with the election of a new Chairman, he wished to make three points. First, he wished to thank the Secretariat for the support extended to him throughout the whole year: i.e. the Council &TNC Division, the Legal Affairs Division, the Appellate Body as well as interpreters. Second, he wished to thank WTO Members for the cooperation and support extended to him. Members had been kind and had made the task of the DSB Chairman very easy and fruitful.

81. The Chairman recalled that at its meeting on the 7 February 2007, the General Council had taken note of the consensus on a slate of names for Chairpersons to a number of WTO Bodies, including the DSB. On the basis of the understanding reached by the General Council he proposed that the DSB elect by acclamation H.E. Mr. Bruce Gosper (Australia) as Chairperson of the DSB.

82. The DSB so agreed.

83. The incoming Chairman thanked the outgoing Chairman and proposed to offer Members, if they so wished, to say a few words to mark Amb Noor's year as Chairman of the DSB. For his part, he wished to say that he had greatly appreciated and admired the way in which Amb. Noor had, so wisely, calmly and efficiently chaired the DSB meetings and hoped for his continued support and guidance over the year ahead. He then invited Members to take the floor, if they so wished.

84. The representative of Canada said that first of all his country welcomed the incoming Chairman and thanked Amb. Noor for his chairmanship over the past year. He said that it had been a pleasure working with him and wished him well, both on his own behalf and on behalf of Canada.

85. The representative of the European Communities said that the EC welcomed the new Chairman. The EC thanked the outgoing Chairman for the smooth conduct of business and wished him good luck in his new capacity as the General Council Chairman.

86. The representative of the United States said that his country wished to extend a warm welcome to Amb. Gosper as he assumed his new responsibilities at the DSB. The United States very much looked forward to working with him over what promised to be a full and challenging year. The United States also wished to take advantage of this opportunity to thank Amb. Noor for his efforts over the past year. The United States was pleased to be able to continue to have an opportunity to work with him in his new capacity as the General Council Chairman.

87. The representative of Brazil wished to join other delegations who had thanked the outgoing Chairman. Brazil had worked with him not just in the DSB, but also in his capacity as the Chairman of a negotiating group in the context of the Doha Round, and had come to greatly appreciate the way in which he had conducted business with his calm demeanour and efficiency. Brazil also wished to extend its best wishes and the assurance of its support regarding the difficult task ahead of him.

88. The DSB took note of the statements.