WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/215
25 July 2006

(06-3539)

Dispute Settlement Body
19 June 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 June 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

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1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.43)

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(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.18)

(d) European Communities – Export subsidies on sugar: Status report by the European Communities (WT/DS265/35/Add.1 – WT/DS266/35/Add.1 – WT/DS283/16/Add.1)

(e) European Communities – Customs classification of frozen boneless chicken cuts: Status report by the European Communities (WT/DS269/15 – WT/DS286/17)

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 then proposed that the five 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.43)

2. The Chairman drew attention to document WT/DS176/11/Add.43, 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 June 2006, in accordance with Article 21.6 of the DSU. As noted in the report, several legislative proposals relating to Section 211 that would implement the DSB's recommendations and rulings in this dispute had been introduced in the current US Congress, both in the US Senate and the US House of Representatives. The US administration was working with the US Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Communities said that, once again, the United States could not report on any progress in the implementation of the DSB's ruling and recommendations in the case under consideration. He noted that the same would be true in respect of item 1(c) on the agenda of the present meeting, namely, the implementation – or rather non-implementation – of the DSB's ruling and recommendations in the Section 110 dispute. The EC fully shared the US objective

to ensure and promote effective and non-discriminatory protection of intellectual property rights worldwide. The TRIPS Agreement was a keystone in the achievement of that objective. The United States, by its persistent ignorance of other Members' rights under the TRIPS Agreement, risked undermining the authority of that Agreement and compromised the interests of its industry at large to preserve legislation that benefited the limited interests of a very few companies. Yet, repealing bills were pending in the US Congress. Their adoption would bring a satisfactory solution to this dispute. As had been seen recently, the US Congress was perfectly able to work towards compliance, when it so wished.

5. The representative of Cuba said that Members had heard yet again the usual status report that the United States had been repeating for more than four years, which offered no evidence of compliance with the DSB's rulings and recommendations in the case at hand. This situation was extremely worrying for Cuba, and other Members should also be concerned about it. A serious precedent was being set for the dispute settlement mechanism, which was regarded as an achievement of the multilateral trading system and a guarantee for small and underdeveloped countries to defend their trade interests on an equal footing with major trading powers. The fact that one of the most powerful Members of this organization continued to violate rules constituted evidence that there was no guarantee that Members would comply with the WTO Agreements nor was there an efficient mechanism for settling disputes. This was to the detriment of the primary objective of WTO dispute settlement proceedings, namely, to find an effective solution to every case. One ought to review the provisions of Article 3.2 of the DSU which stated that: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." The question therefore was what was the guarantee that the United States would implement the recommendations if after four years it had not done so?

6. It was obvious that this case, as well as other similar cases brought before the DSB, had increasingly undermined the credibility of the dispute settlement mechanism and the efficiency of the multilateral trading system, and had done so at a crucial juncture in the negotiating process launched at Doha. Only one month remained before the expiry of the legitimate right of a Cuban company to renew the registration of the Havana Club trademark at the US patent office. To remove the right to this internationally known trademark was the purpose of Section 211. This was also a reason for the US delay to implement the DSB's recommendations in this case. If the United States finally repealed Section 211 after July 2006, this would amount to a fait accompli. The United States would have achieved what it had set out to do, namely, to allow arbitrary appropriation of this trademark by Bacardi. This would again highlight the serious flaws of the system based on rules that had been far from just and fair, and which favoured the most powerful Members. These Members could afford to ignore the rules, and they would even join with the complaining party in order to avoid retaliatory measures. The case in point was the Understanding of July 2005 reached between the United States and the EC, the results of which caused injury and impairment to Cuba's rights. Cuba, once again, appealed to the competent US authorities to comply at once and unconditionally, with the WTO's rulings and recommendations in this case, in the only way possible; i.e. by repealing the arbitrary and discriminatory provisions of Section 211.

7. The representative of China said that his country wished to express its continued concern regarding this dispute due to systemic interest. He recalled that, on 2 February 2002, the DSB had adopted both the Panel and the Appellate Body Reports pertaining to this case. Since then, more than four years had passed. China appreciated the efforts made by the United States during these four years aimed at implementing the DSB's rulings, but unfortunately there was no indication when the matter would be resolved to the satisfaction of the parties to the dispute and other Members. China believed that 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 the advocate of intellectual property rights in all forums. Besides, such delays

caused systemic concerns about the efficacy of the dispute settlement system. China believed that the WTO dispute settlement constituted an effective and efficient system for the resolution of trade disputes, and provided a degree of certainty and predictability in international trade to all Members. Once again, China urged the United States to implement the decision of the DSB in this dispute as soon as possible.

8. The representative of India said that his country continued to have concerns that due consideration of the principle of prompt compliance with the DSB's rulings and recommendations, essential to effective resolution of disputes to the benefit of all Members, appeared missing in this dispute. Although a solution mutually acceptable to the parties was preferred, parties should keep the DSB informed of progress towards such resolution in a meaningful manner. However, this was not apparent from the statements made by the parties at the present meeting, even four years after adoption of the rulings and recommendations in this dispute, thus ignoring the systemic concerns for WTO Members in general. India would urge the parties to this dispute to be more responsive to these systemic concerns and to shed some light on the way they intended to meet the objective of prompt settlement and the actions they proposed to take to achieve that objective.

9. The representative of Bolivia said that her delegation also wished to express its views on the status of the Section 211 dispute, and after hearing the report made at the present meeting, Bolivia wished to highlight some issues in this regard. Undoubtedly, a failure to comply with the DSB's recommendations and rulings in any dispute undermined the credibility and stability of the WTO legal system, which provided Members – developed, developing or least-developed – with rights and obligations. In light of the ongoing negotiations aimed at addressing concerns of developing countries and at providing greater opportunities for them, at the time when everybody was expecting the proper functioning of the multilateral legal system, the continued delay in implementation of the DSB's ruling in this dispute, which had lasted for over four years, was deplorable. It was also a matter of concern to her delegation that a failure to comply with the DSB's recommendations and findings undermined the predictability of the TRIPS Agreement as a legal instrument, which protected the intellectual property rights of all WTO Members. Her delegation wished to join Cuba in urging the United States to comply with the DSB's decision in this dispute as soon as possible.

10. The representative of the Bolivarian Republic of Venezuela said that her delegation wished to thank the United States for its report on implementation of recommendations adopted by the DSB in connection with Section 211 Omnibus Appropriations Act of 1998 and the report presented in June 2006. As stated previously, her country was very concerned about the lack of certainty regarding decisions adopted by the DSB. This had systemic implications. Her country wished to be fully associated with the statement made by Cuba, and urged the United States to undertake all possible efforts in order to modify as soon as possible its legislation so as to be able to comply with the DSU provisions.

11. The representative of Brazil said that his country thanked the United States for its status report and the statement made at the present meeting. Brazil regretted, however, the lack of any positive developments regarding the implementation of the DSB's recommendations in this dispute. Compliance with the DSB's recommendations, together with mutually agreed solutions, was the most faithful measure of the effectiveness of the dispute settlement system. The fuller and faster a Member brought its measure into conformity with its obligations, the more effective and, consequently, the more credible the system would be. Conversely, the complete absence of meaningful developments towards compliance severely impaired the functioning of the system, and altered the balance of rights and obligations, which had been negotiated by Members. All Members bore that responsibility, but the behaviour of major players had a much more significant impact and they bore a correspondingly greater individual responsibility. Brazil, therefore, urged the United States to step up the efforts to fully implement the relevant DSB's recommendations in the shortest period of time possible.

12. The representative of Argentina said that, like previous speakers, his country wished to express systemic concern with regard to the delays in implementing the DSB's recommendations and rulings. Prompt compliance with the DSB's recommendations and rulings was a critical element of the WTO dispute settlement system. Long delays in implementation and the apparent lack of progress four years after the reasonable period of time had elapsed, as in the Section 211 dispute, created a negative precedent for the credibility of the system. Argentina, therefore, insisted that the United States redouble its efforts to ensure immediate compliance with the DSB's recommendations and rulings in this dispute.

13. The representative of the United States said that his delegation wished to thank those Members who had expressed appreciation for US efforts to comply with the DSB's recommendations and rulings in this dispute. With respect to the question posed by one Member to both parties to this dispute about US future efforts to resolve this dispute, the United States reiterated again that it would continue to work with the other party to this dispute in seeking to resolve it in accordance with the rules of this Body.

14. 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.43)

15. The Chairman drew attention to document WT/DS184/15/Add.43, 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.

16. The representative of the United States said that his country had provided a status report in this dispute on 8 June 2006, 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 continued to support legislative amendments that would implement the DSB's recommendations and rulings with respect to the US anti-dumping duty statute, and was working with the US Congress to pass such amendments.

17. The representative of Japan said that his country noted the statement made by the United States along with its latest status report. While Japan was encouraged that the US administration was prepared to work with the US Congress to enact the legislation H.R. 2473, it wished to reiterate its disappointment that no progress had been made more than one year since that legislation had been introduced in the US Congress. In order to take into account Japan's interest as well as to preserve the credibility of the WTO dispute settlement system, Japan wished to renew its strong hope that the United States would make further efforts to implement the DSB's recommendations and rulings as soon as possible.

18. 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.18)

19. The Chairman drew attention to document WT/DS160/24/Add.18, 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.

20. The representative of the United States said that his country had provided a status report in this dispute on 8 June 2006, in accordance with Article 21.6 of the DSU. As noted in the report, the US administration was working closely with the US Congress, and conferring with the EC, to reach a mutually satisfactory resolution of this matter.

21. The representative of the European Communities said that, as his delegation had indicated at the previous DSB meeting, the EC regretted the lack of progress in solving this long-standing dispute. He noted that the Panel Report pertaining to this dispute had been adopted in July 2001. Now it was June 2006, but the United States had failed to take any steps to amend a piece of legislation that violated intellectual property rights and hurt the interests of music creators. For several years now, in its status reports, the United States had stated that the US administration was actively discussing with the US Congress possible solutions to this dispute, but the United States had not substantiated that assertion before the DSB in spite of repeated calls from the EC in this regard. Once again, the EC urged the United States to provide information on the specific steps that it had taken or intended to take to solve this dispute. This situation of non-compliance had already lasted for too long. Finally, the EC wished to recall that it had reserved its right to reactivate, at any point in time, the arbitration proceedings on the level of retaliation.

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

(d) European Communities – Export subsidies on sugar: Status report by the European Communities (WT/DS265/35/Add.1 – WT/DS266/35/Add.1 – WT/DS283/16/Add.1)

23. The Chairman drew attention to document WT/DS265/35/Add.1 – WT/DS266/35/Add.1 – WT/DS283/16/Add.1, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning export subsidies on sugar.

24. The representative of the European Communities recalled that on 19 May 2005, the DSB had adopted the recommendations and rulings in the "EC – Sugar" dispute brought by Australia, Brazil and Thailand by adopting the Appellate Body and the Panel Reports. On 28 October 2005, the Arbitrator acting under Article 21.3(c) of the DSU had determined that the reasonable period of time for the EC to implement the DSB's recommendations and rulings would be 12 months and three days. That time-period had expired on 22 May 2006. As the EC had reported already in its first status report, on 20 February 2006 the EC Council had adopted Regulation (EC) No 318/2006 on the common organization of the markets in the sugar sector. As interested Members were aware, the adoption of this Act had been preceded by intense debate, both internally and internationally on how to dramatically reform the EC sugar sector, something which had not been done in 40 years. The result, Regulation No 318/2006, set out the framework for a comprehensive and very painful reform of the EC sugar sector. This reform addressed the root causes for the exportation in excess of scheduled limits of what the Appellate Body had considered to be "subsidised" sugar. The reform was expected to bring down the EC support price by 36 per cent, EC production by 8 million tons and exports by more than 5 million tons. Any subsidized exports would respect the scheduled subsidy commitments on the basis of export licences issued for the relevant marketing years. The new regulation no longer required C sugar – now termed "out-of-quota sugar" – to be exported, nor was the future issuance of licences for the exportation of out-of-quota sugar foreseen at the moment.

25. He noted that one of the main consequences would be to turn the EC from a net exporter into a net importer of sugar. He added that this reform would not only be painful for EC farmers, but also for the ACP countries. Regulation No 318/2006 had also given the necessary powers to the European Commission to adopt the implementing measures required to fully achieve compliance by 22 May 2006. A first such measure was Commission Regulation No 493/2006 of 27 March 2006. Following the elimination of the obligation to export C sugar, this regulation allowed this sugar to be

carried forward to the 2006/2007 marketing year and be considered as non-quota sugar under the terms of Regulation 318/2006. It also provided for the reduction of eligible production under quota in respect of the 2006/2007 marketing year so as not to create new stocks of sugar. Various options had been created to make sure that this sugar remained in the EC and was not exported.

26. He said that since the previous status report, Commission Regulation No 769/2006 of 19 May 2006 had been adopted and had entered into force. That Regulation allowed for the return of export licences for C sugar issued but not used by 22 May 2006 and suspended the further issuance of export licences for C sugar from 23 May 2006. On the basis of the above legal acts and their application, the EC was now in a position to maintain its subsidized exports of sugar within its commitments as from the marketing year 2006/2007, as well as applied on a *pro rata* basis for the remainder of the marketing year 2005/2006. The EC had thus fully complied with the DSB's rulings and recommendations in this dispute within the reasonable period of time specified for that purpose. To announce this, the EC had submitted its second status report right after the expiry of that deadline. This status report contained attachments with the three mentioned Regulations, and the EC thanked the Secretariat for processing and circulation of this large volume of documents.

27. The representative of Australia said that her country thanked the EC for its second written status report and for the information provided at the present meeting. Australia welcomed the opportunity to consult on progress in the EC's implementation of reforms to its sugar sector. In its second written status report, the EC had claimed that it had fully complied with the DSB's recommendations and rulings by the date of expiry of the reasonable period of time; i.e. 22 May 2006. At the same time, the information provided in the second written status report of the EC provided clear evidence that 26 WTO Members – the EC and its member States – had not given effect to their undertakings not to provide export subsidies otherwise than in accordance with the Agreement on Agriculture and with the commitments as specified in those Members' schedules. The status report also confirmed that those WTO Members had not ensured the conformity of their laws, regulations and administrative procedures with their WTO obligations.

28. In the status report, the EC stated that, as from 24 May 2006, it had been in a position to maintain its subsidized exports of sugar within its commitments as from the marketing year 2006/2007. The status report provided no assurance that the EC would maintain its subsidized exports and export subsidies within its WTO commitment limits. The delegation of legal capacity to a regulatory authority to maintain subsidized exports and budgetary outlays on export subsidies within the WTO-scheduled limits might contribute towards WTO conformity. However, it was another matter when that same regulatory authority introduced and applied measures providing for subsidized exports and export subsidies in excess of those limits – that was, measures which were prohibited under the terms of the Agreement on Agriculture. It would be a matter of concern for all WTO Members, if the provisions of the DSU were to be interpreted as affording a right to an implementing Member to suspend its WTO obligations under a WTO covered agreement, both during and beyond the reasonable period of time. If such interpretation were accepted, the DSU would cease to preserve rights and obligations under the WTO covered agreements; rather, it could serve to nullify the rights of other WTO Members.

29. Throughout the reasonable period of time for implementation of the DSB's recommendations and rulings, the EC had introduced and applied measures which were prohibited under the Agreement on Agriculture. The status report confirmed that the EC would continue to do so, at least until 30 September 2006. During the course of the implementation period, the relevant regulatory authority – the European Commission, acting through the procedures of the Sugar Management Committee – had introduced a measure declassifying quota sugar to C sugar. That measure had been introduced after the commencement of the 2005/2006 marketing year. It was applied with the intent and effect of increasing subsidized exports to levels significantly in excess of the WTO quantity limit in the 2005/2006 period. The declassification mechanism was carried through to the new sugar regime.

30. Also during the course of the implementation period, that same regulatory authority had introduced and applied WTO-prohibited measures – and according to the status report – would continue to introduce and apply WTO-prohibited measures after 22 May. The combination of measures was forecast to result in subsidized exports some 7 million tonnes in excess of the EC's quantity commitment limits for the 2005/2006 marketing year. It had taken comparable action in regard to measures introduced and applied in excess of the EC's scheduled export subsidy budgetary outlays limits for the 2005/2006 marketing year, expiring on 30 June 2006. Those actions, which represented almost the total of the EC's WTO scheduled commitments over seven WTO marketing years, had come at great cost to the Australian sugar industry, conservatively estimated at around $A 200 million in 2006 alone.

31. The status report referred to the action taken to suspend C sugar export licences as a measure of implementation. In so doing, the report did not inform the WTO Membership that, in the lengthy lead up to the date of effect of licence suspension – 23 May – no limits had been placed on the quantities of C sugar eligible for export licensing up to that date. Nor had the status report referred to the regulatory authority's failure to exercise its legal capacity – available before, during and after the implementation period – to regulate quota sugar export quantities and export subsidies through export licensing and the fortnightly or monthly decisions of the Sugar Management Committee. The status report referred to the elimination of the legal requirement to export C sugar as a measure of implementation. The report did not inform the WTO Members of the legal fact, that C sugar – or any other sugar declared surplus to domestic consumption – would attract a penalty if not exported. The new regime preserved those penalty provisions. It also preserved the provisions restricting retention of out-of-quota sugar on the internal market to a very limited category of industrial sugar usage, as well as the restrictions on carryover to the next year's quota. The status report did not claim that there would be expanded opportunities for disposal of any surplus to quota sugar on the internal market. In this context, Australia would be interested in an explanation of the intent and effect of the most recent draft Commission Implementing Regulation on out-of-quota sugar which provided, *inter alia*, that in regard to stocks and exports of out of quota sugar, the arrangements were largely based on the existing rules for C sugar.

32. The status report also referred to forecasts that the sugar reforms could serve to reduce exports by more than 5 million tonnes, as a consequence of expected reductions in support prices and production. The status report contained no indication of the time-frames for any such forecast outcomes. For the immediate future, it was relevant that the quotas of the major surplus producing member States – which were also the major exporting member States – would be increased by 1 million tonnes. In any event, forecasts of expected outcomes could not be claimed as measures taken to comply within the reasonable period of time.

33. In conclusion, the facts demonstrated that the EC had failed to comply with the DSB's recommendations and rulings within the reasonable period of time. The facts also demonstrated that the EC would continue to apply WTO-inconsistent measures well beyond the expiry of the reasonable period of time. Australia, therefore, reserved its WTO rights. She noted that Australia's consent to a procedural agreement with the EC had been given for the sole purpose of preservation of those rights, including rights under the DSU and the rights under the WTO Annex 1 Agreements. The procedural agreement could not, in any way, be interpreted to signify that Australia had foregone those rights. Finally, Australia requested that the DSB take note of this statement.

34. The representative of Brazil said that his country wished to thank the EC for its status report and its statement made at the present meeting. Brazil acknowledged the importance of the reform approved by the EC to its sugar regime. It also looked forward to seeing the promises that the EC sugar production and exports were to be drastically reduced would become an actual fact very soon. Based on market conditions, the EC should have never become a sugar exporter, let alone one of the major exporters. Furthermore, under the Agreement on Agriculture, the EC was, at least, more than

10 years late in limiting its sugar exports. Brazil was carefully examining the complex rules that would govern the new sugar regime in order to assess its impacts on Brazilian rights and interests. With regard to this point, Brazil wished to express its appreciation for the constructive approach taken by the EC in offering explanations and clarifications about the sugar regime which would enter into operation on 1 July.

35. Nonetheless, Brazil did not agree that the EC had complied with the DSB's recommendations in the sugar dispute within the reasonable period of time, which had expired on 22 May 2006. The implementation obligation for the EC was to limit – during the reasonable period of time – its subsidized sugar exports to 1.2 million tonnes per year and the amount of sugar export subsidies to €499 million per year. The EC could not deny that sugar exports in marketing year 2005/2006 had already – and significantly – exceeded those limits. In view of this fact, the assertion by the EC that it had fully implemented the DSB's recommendations within the reasonable period of time was but an assertion. Even of greater concern for Brazil was the allegation by the EC that, despite having exported much more than what it was allowed under the Agreement on Agriculture and its schedule in marketing year 2005/6, the EC was still entitled to export beyond those limits for the remaining of the current marketing year on a "pro-rata basis". Brazil could not conceive of any sound legal argument that could justify the position advocated by the EC. For the credibility of the dispute settlement system, the EC must give a detailed explanation of its "pro-rata basis" proposition. In light of all these considerations, Brazil would continue to follow attentively the evolution of the figures concerning the EC's sugar exports and, also, the actual implementation of the new sugar regime. At the same time, Brazil would consider all options available to preserve and promote its rights to obtain the full implementation of the DSB's recommendations in this dispute.

36. Finally, with regard to the impact of the changes in the EC sugar regime on the ACP countries, he reiterated that there was nothing in this dispute that would force the EC to reduce in any way preferential market access or benefits for the ACPs. The proportion of funds allocated for compensation of EC and ACP farmers, respectively, had not been determined by the DSB and it, therefore, showed how concerned the EC was about the ACP countries, and how much it cared about protection of its own sugar farmers which, by the way, were not the poorest in Europe.

37. The representative of Thailand said that his country wished to join previous speakers in thanking the EC for its statement and its updated status report, including its production and export projections for the new sugar regime. Much like its predecessor, the new regime and its governing regulations were complex, and Thailand would continue to carefully examine these in light of the EC's obligations under the WTO Agreements. Despite the inception of the EC's new regime, and despite the expiration of the reasonable period of time on 22 May 2006, troubling aspects of the old regime remained in force. This included, the EC's decision to allow continued illegal exportation of C sugar for at least three months after the expiry of a reasonable period of time. Thailand had previously voiced this concern during the DSB meeting on 17 May 2006, and had urged the EC to bring all aspects of its sugar regime into compliance as soon as possible. Unfortunately, the updated status report by the EC did not provide Thailand with any comfort. The status report simply stated that the EC had suspended further issuance of such export licenses, but had failed to negate that these licenses remained valid for at least another three months after the expiration of a reasonable period of time.

38. Troubling also was the justification given by the EC in its status report for its continuation of these illegal exports. The EC stated that it "is now in a position to maintain its subsidized exports of sugar within its commitments as from the marketing year 2006/2007, as well as applied on a *pro rata* basis for the remainder of the marketing year 2005/2006." Thailand failed to see how the EC could claim a right to continue exporting subsidized sugar when it had long since exceeded its quantity and budgetary outlay commitments on sugar exports for the 2005/2006 marketing year. For Thailand, these actions did not fall within the definition of "compliance" by any interpretation. For Thailand,

compliance meant, at a minimum, that the EC would have stopped exporting illegally subsidized sugar as of 23 May 2006. Because Thailand remained to be convinced that the EC had brought itself into compliance with the DSB's recommendations and rulings within the reasonable period of time, Thailand had preserved its rights in a procedural agreement with the EC set forth under agenda item 7(c). Thailand would continue to examine all its options in this regard. Finally, he noted that it was said that "old habits die hard". Thailand hoped that the EC's exportation of illegally subsidized sugar was not one of them.

39. The representative of the European Communities said that it was evident that there was a disagreement between the parties. As he had already stated, the EC considered that it had brought about compliance with its export subsidy commitments by the end of the reasonable period of time. Regarding C sugar, there was no longer a requirement to export. Operators were provided a choice of the use to be given to such sugar, and licences that had been granted under the previous regime could be returned so that that choice was fully effective. In any event, no licences for the export of C sugar had been granted since 23 May 2006. Therefore, the EC was convinced that it had ensured compliance. Once again, he wished to state that the reasonable period of time was a period foreseen for bringing about compliance, it was not a period during which compliance must already exist. The reasonable period of time was precisely a period granted to permit the losing Member to undertake the necessary legislative or administrative changes allowing it to conform to its obligations for the future. While the complainants had argued in the arbitration proceedings, pursuant to Article 21.3 of the DSU, that the EC could have done this sooner, the Arbitrator had not rejected the EC's position that a Council regulation was an appropriate means to ensure compliance.[1] The EC, like any other WTO Member, could not at the same time be taking steps to amend its legislation to come into conformity and be in conformity. In this case, the EC had taken the required steps to export subsidised sugar only within the WTO limits as from 23 May 2006. Requiring that limit to be respected already before that date – for the purposes of assessing compliance in the period after the expiry of the reasonable period of time – would amount to denying the EC's right to that reasonable period of time, and raised fundamental systemic issues for the functioning of the WTO's dispute settlement system. As he had stated previously, the EC had taken the required steps to export subsidised sugar only within the WTO limits as from 23 May 2006. As the complainants knew, the EC's annual limit was not zero. For the application of this limit in the period from 23 May 2006 to 30 September 2006, which was not a full marketing year, the EC would, therefore, respect the limit that corresponded to that period. He stressed that the EC sugar reform would ensure that future exports of sugar would fully comply with the EC's obligations, as interpreted by the Panel and the Appellate Body.

40. The DSB took note of the statements.

(e) European Communities – Customs classification of frozen boneless chicken cuts: Status report by the European Communities (WT/DS269/15 – WT/DS286/17)

41. The Chairman drew attention to document WT/DS269/15 – WT/DS286/17, which contained the status report by the European Communities on progress in the implementation of the DSB's recommendations in the case concerning the EC's customs classification of frozen boneless chicken cuts.

42. The representative of the European Communities said that, under Article 21.6 of the DSU, the EC had to submit a status report regarding this case starting from 20 August 2006. However, in a spirit of transparency and good faith, the EC had submitted this report much earlier, while preserving its rights. There was no need to repeat the whole status report which had been submitted to the DSB. The EC was pleased to report that draft legislation under the form of a Commission Regulation that would fully implement the relevant DSB's findings and recommendations had been submitted and was

[1] Arbitrator's Report, para. 73.

now in the process of being adopted. In fact, the European Commission wished to inform the DSB that the draft regulation had gone through the Customs Code Committee recently, which was the step necessary before an adoption by the College of Commissioners. The Commission had worked hard to ensure that this legislation was enacted, and entered into force at the latest by the expiry of the reasonable period of time for implementation as fixed through binding arbitration. The EC intended to present a more detailed report as soon as such legislation was adopted and entered into force.

43. The representative of Brazil said that his country noted the statement made by the EC at the present meeting, but regretted the scarcity of information contained in the status report provided by the EC. Considering the EC's substantive and procedural obligations under Article 21.3 and 21.6 of the DSU, and bearing in mind that only eight days remained until the end of the reasonable period of time, Brazil expected that the EC would inform with precision and in detail the steps it had taken in order to comply with the DSB's recommendations and rulings. Unfortunately, this had not happened. The EC had merely affirmed that "a Commission Regulation amending Annex 1 to Council Regulation (EEC) No. 2658/87 […] that would fully implement the DSB recommendations and rulings [...] is now on the process of being adopted".

44. Brazil was, notwithstanding, pleased to note that the EC intended to implement these recommendations in a period shorter than the one initially proposed by the EC during the arbitration proceedings under Article 21.3(c) of the DSU. At those proceedings, the EC had alleged that it would need 18 months to ask for confirmation at the World Customs Organization of the Appellate Body's findings. The EC had also argued that an additional eight-month period would be necessary for enacting a Commission Regulation to comply with the DSB's rulings. At the present meeting, by affirming that it would implement those rulings "at the latest by the expiry of the RPT"; i.e. within the nine-month period as recommended by the arbitrator, and in only four months since the circulation of the arbitral award, the EC confirmed that (i) recourse to the WCO was not necessary to implement the DSB decisions[2] and that (ii) the eight months purportedly needed to pass a Commission Regulation did not constitute the shortest period of time[3] under the EC law when passing such legislation. Finally, he said that Brazil was following closely the EC's implementation actions and expected that by the expiry of the reasonable period of time, on the 27 June, the EC would fully comply with its obligations under the DSU.

45. The representative of Thailand said that his country also noted the status report submitted by the EC at the present meeting. Under Article 21.6 of the DSU, the EC was obliged to submit its first status report as from 20 August 2006. However, the EC had stated that in the "spirit of full transparency", it was submitting this status report much earlier than it was due. Thailand understood and appreciated the EC's intention to be transparent; however, in Thailand's view, the status report was not very clear. Thailand had two concerns with the information contained in the EC's status report. First, given the fact that the reasonable period of time for implementation would expire in eight days, namely on 27 June, the EC report was rather vague about the precise stage it was at in its implementation process. It only stated that the European Commission was working with the relevant Committees to enact this legislation. Given the imminent expiry of the reasonable period of time in eight days, Thailand expected that the EC would be more advanced in its legislative process than at the Committee stage.

46. Second, in its report the EC had stated that it intended to present a more detailed status report "as soon as such legislation is adopted and enters into force." Thailand noted that this raised the possibility that the EC could adopt the required legislation on the last day of the reasonable period of time; i.e. 27 June 2006, but that the legislation would not enter into force until 20 or 30 days after the expiry of the reasonable period of time. As Members were aware, this gap between the enactment of

[2]"EC – Chicken Cuts", Arbitrator's Award in Article 21.3 Proceedings, para. 64.
[3] *Idem*, paras. 79-80.

the legislation and the actual implementation of that legislation was an issue under another agenda item. The EC had in the past expressed strong disappointment with such a gap. Thailand trusted that there would be no inconsistency between the EC's words and its own deeds in that respect and that, therefore, its implementing legislation in this dispute would enter into force by the expiry of the reasonable period of time, as stated by the EC at the present meeting. Thailand would continue to actively monitor the EC's implementation process. It looked forward to the more detailed status report by the EC indicating that it had brought its measures into full conformity with its WTO obligations by 27 June 2006.

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

2. Implementation by the European Communities of the recommendations and rulings of the DSB in relation to "European Communities – Regime for the Importation, Sale and Distribution of Bananas"[4] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

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

49. The representative of Honduras said that at previous DSB meetings his country and other Members had repeatedly expressed their concern at the undue tariff discrimination, the undue quota and absence of a bound MFN tariff by the EC. With regard to tariff and quota discrimination, the EC had generally disregarded Honduras' concerns without giving any explanation. It had been unable to explain in what way its discriminatory tariff complied with Article I of the GATT 1994 or how its discriminatory quota complied with Article XIII of the GATT 1994. It had simply insisted that it had "rectified the matter". As far as the absence of a bound MFN tariff was concerned, the EC had said that it had not rebound the tariff because it wanted to "verify the real impact of the new MFN tariff on the market". Thus, in the EC's view, the level of the bound tariff should be determined by the market impact of its new applied tariff of 176€/mt. The EC had also stated that – despite all the economic analyses showing the contrary – its applied tariff had been set "at the correct level" and would not have any negative impact on the market. The EC had assured the DSB that its "monitoring process" would reaffirm the EC's statement in this regard. Honduras had now been told – informally – that the EC's bound tariff would be well above the applied tariff and much higher than the bound tariff of 187€/mt, previously proposed by the EC, but rejected after the WTO arbitration. If this information was correct, in Honduras' view, the rebinding of this new tariff, at a higher level, would be contrary to the EC's statements made at previous DSB meetings. He then raised some questions. How could the matter be "rectified" by imposing a bound tariff, which had been rejected by the WTO? How was it possible for a bound tariff, which would be much higher than the applied tariff – in fact unacceptably high – be determined by the "market impact" when, to a large extent, Honduras had lost the EC's market since the ACP suppliers used the disproportionately larger increases under the current arrangement? How could the EC's "monitoring process" constructively help to settle this dispute if it was used to make the new tariff even more WTO-inconsistent? These new questions and the possibility of being penalized with a higher new bound tariff confirmed that the situation was deteriorating without any hope of improvement and that, at the present time, the EC did not have the slightest intention of respecting Latin America's trade rights in respect of bananas. Accordingly, together with other Members, Honduras must pursue the corrective options it had and, once again, urged the DSB to give Honduras the support that would facilitate a prompt solution.

[4] WT/DS27.

50. The representative of Panama said that his country had also heard reports that the EC might rebind its banana tariff at a level higher than the 176 €/mt applied rate, perhaps even as high as 230 €/mt. Panama hoped that this would not be the case. A new, even higher bound rate would only add to the DSB's implementation concerns and would suggest a new level of the EC's reluctance to honour its WTO banana commitments. As Members were aware, the EC's unwillingness to honour its commitments had already commanded the attention of a number of WTO Bodies. In the DSB, Panama had discussed at length the EC's non-compliance with Articles I and XIII of the GATT 1994. In the General Council, Panama had further discussed the EC's Article XIII violation. In the Council on Trade in Goods, Panama had repeatedly addressed the EC's unwillingness to fulfil its GATT Articles XXIV:6 and XXVIII obligations. Now, as the Doha Round reached a crucial phase, attention was again being given to bananas. If the EC were to introduce a new, improperly inflated bound rate at the time when Members moved to finalize negotiating modalities, it would be hard to interpret that the EC's action as anything other than an effort to escape its core market access commitments on bananas. Under any plausible Doha scenario, a bound rate set at a new level up to 30 per cent higher than the already punitive applied rate of 176 €/mt would prevent a reduction in the 176 €/mt applied rate for several years. This would not represent a "substantial improvement in market access" for bananas, nor would it represent the "fullest liberalization of trade in tropical products". By the time any market access improvement occurred, Panama and other Latin American countries would already have suffered irreparable harm. Whether this issue was addressed in the DSB, the General Council, the CTG, or the Doha Round, the overriding objective must be prompt and meaningful relief for developing economies. Since substantial economic harm had already begun for many developing countries, a delay in relief would ultimately be no different to a denial of relief. Panama urged Members to work with it in the DSB, and in all other relevant WTO foras, to promote prompt and meaningful relief on this matter.

51. The representative of Nicaragua said that his country too wished to ask the EC to clarify whether it intended to bind its MFN banana tariff at a rate above the one currently applied, which was unacceptably high and inconsistent with the WTO. If a high bound tariff were to be included in the Schedules, this would mean a further very serious harm to Latin American banana suppliers in both economic and legal terms. As regards the economic aspect, Nicaragua again pointed out the following: (i) until 1 January 2006, all bananas imported into the EC had been subject to a tariff of €75/mt, i.e. US$1.75/box; (ii) since 1 January 2006, Latin American bananas had been subject to a tariff of €176/mt or US $4.10/box. This tariff was approximately two and half times higher than the one applied previously to bananas – a product originating entirely from developing countries; (iii) if the bound tariff was now to be set at €230/mt, as some stated it would, this would amount to US $5.37/box. In that case, the tariff listed for Nicaragua would be more than three times higher than the bound tariff of €74/mt that applied from 1995 to 2005; (iv) nobody could suggest that a tariff more than twice as high – let alone three times as high – as the previous one was "trade neutral".

52. With regard to the legal aspect, Nicaragua again pointed out that in August 2005, in the Bananas III arbitration proceedings, the arbitrators had expressly prohibited a bound rate of €230/mt. In October 2005, the arbitrators had expressly prohibited a tariff rate of €187/mt. In both proceedings, it had been made quite clear that the MFN rate of the single tariff should be bound at €75/mt or thereabouts. The EC should have no doubt about the legal and economic realities of the matter. In a press release of November 2005, the EC had informed the public that the WTO had rejected its bound rate of €230/mt and €187/mt. The EC knew well that it could never defend itself with the argument that these tariff rates were "trade neutral". Indeed, in formal consultations, the EC had already conceded to some Latin American suppliers that there were legal impediments to imposing a bound rate of €187/mt or higher. Consequently, if the EC were now to opt for a higher bound rate, it would be reaffirming with painful clarity that it had no intention of meeting its obligations in this matter. It would also be confirmation that Nicaragua should hold out no hope of protection for its fragile developing country interests unless it had the DSB's support. On behalf of its banana industry and other sectors in Nicaragua that were following this case with interest, his country wished to make the

following appeal: the DSB must ask the EC to comply faithfully with its WTO obligations and to give Nicaragua a fair opportunity to compete in the EC's banana market.

53. The representative of the European Communities said that the EC had, once more, listened carefully to the statements made by WTO Members on this matter. He referred to the EC's prior statements regarding its objection to categorisation of this matter as an "implementation issue" relevant to Article 21 of the DSU. The EC had remained open to addressing the concerns of Latin American suppliers in relation to the new 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. A solution was currently being pursued in the context of the monitoring and review mechanism under the good offices of the Norwegian Minister Støre. The EC regretted that Honduras, Panama and Nicaragua had opted for the litigation route rather than engaging in this process. The EC also noted that it was in contact with partners on the rebinding of the tariff. The position of the EC remained the same. The EC had always aimed at making a neutral move from a TRQ system to the tariff-only system now in place. In order to ensure this, the EC had agreed to closely monitor the impact of the new MFN tariff and exchange data with Latin American banana suppliers willing to participate in the Støre process in good faith. The EC had not proceeded with the rebinding in order to verify the real impact of the new MFN tariff in the market and in the hope that an agreement could be reached with all suppliers. The EC was pleased to report that discussions to this end were well under way in the context of the monitoring and review process.

54. The representative of the United States said that his country understood that there had been little progress in addressing the concerns that interested Members had been raising about the EC's new banana regime. The United States was continuing informal consultations with Members about these concerns. The United States urged the EC, once again, to work with interested Members to resolve this dispute as quickly as possible.

55. The DSB took note of the statements.

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

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

56. 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.

57. The representative of the European Communities said that on 1 June 2006, the US Customs and Border Protection administration had published a notice of intent to distribute offset payments for fiscal year 2006 under the CDSOA. The US Customs had also posted on its website a provisional estimate of the amounts available for distribution as from 1 October 2006. These were the first steps in the process that would result in a new distribution starting on 1 October 2006 and would add to the nullification and impairment already caused not only to the co-complainants in this dispute, but actually to the whole Membership. The first indication was that the next CDSOA distribution and the consequent impairment and nullification would increase. The preliminary amount of duties collected up to 30 April 2006 was substantially higher than the amount already collected on the same date in the past year. As far as the EC was concerned, the preliminary amount collected on its exports had already exceeded the definitive amount collected in the whole of the previous fiscal year. Those transfers of collected anti-dumping and countervailing duties were WTO-incompatible and should have been stopped by 27 December 2003. And yet, the United States had asserted that it had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute. This meant

that the United States had granted itself unilaterally the right to comply with the DSB's ruling at some undetermined date in the future regardless of Members' duty to comply promptly with the DSB's rulings. In the absence of a status report, the EC wished to ask again the United States if and what steps it intended to take to stop the transfer of anti-dumping and countervailing duties without further delay. The US Congress could revisit the delayed termination of the Byrd Amendment if political will was there as shown by the FSC dispute where it had put an end to WTO-illegal transition periods. 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.

58. The representative of Japan said that his country was disappointed that the United States had not submitted a status report this month once again in spite of the statements made at previous DSB meetings. Although Japan welcomed the enactment of the Deficit Reduction Act of 2005, it believed that the full implementation of the DSB's recommendations and rulings in this dispute meant that the CDSOA should be completely repealed and the illegal distribution under the CDSOA terminated. Japan urged the United States to take steps to comply fully with the DSB's recommendations and rulings without further delay and to provide its status report. Japan also wished to renew its request for providing information on how actual disbursements would work under the transitional clause of the CDSOA. Japan reserved all the rights under the DSU until full implementation by the United States.

59. The representative of Canada said that as his delegation had stated at previous DSB meetings, Canada welcomed the adoption of the prospective repeal of the Byrd Amendment. Starting from 1 October 2007, anti-dumping and countervailing duties would be deposited in the US Treasury, rather than being disbursed to US producers. However, this method of repeal raised important commercial and systemic concerns that had not yet been addressed by the United States. In this context, the US claim that by implementing this prospective repeal it "has taken the actions necessary to implement the rulings and recommendations" would only be accurate when disbursements were terminated. Given that disbursements would continue to occur for several years to come, Canada saw no justification for the discontinuation by the United States of submitting to the DSB status reports on developments relating to the implementation of the rulings in this dispute. Canada called on the United States to resume the submission of status reports and to implement full repeal of the Byrd Amendment.

60. The representative of Brazil said that his country thanked Canada, the EC and Japan for bringing this matter to the attention of the DSB. This was the fourth time that these Members and others, like Brazil, had searched for an explanation from the United States regarding the grounds for the claim that, by the sole adoption of the prospective repeal of the Byrd Amendment, it had fully complied with the DSB's recommendations in this case. On the three previous occasions (DSB meetings on 17 March 2006, 21 April 2006 and 17 May 2006), the United States had presented no reason whatsoever to convince Members that the matter at issue had been solved. Systemic reasons alone should suffice to stimulate the United States to spell out its position. If that were not enough, reasoned explanations by the United States were also necessary in view of the recent information by the US customs authorities that the preliminary amounts – up to 30 April – to be distributed under the CDSOA next October exceeded US$170 million. Such information had given concrete and serious indications regarding the questions the complainants had been posing to the United States on how next disbursements could be reconciled with recommendations according to which every such disbursement was WTO-inconsistent. In light of these facts, Brazil renewed its request that the United States explain in detail the rationale underlying the US statement that it had implemented the DSB's recommendations.

61. The representative of Chile said that his country, once again, wished to make a statement on this agenda item because the United States was still not complying with the DSB's recommendations. The Byrd Amendment was still in force and, according to indications, would remain so until

1 October 2007. However, the situation regarding this protracted compliance was not clear because recently the US Department of Commerce had announced that, even after that date, there could be disbursements. The injury suffered by the Chilean industry would, therefore, continue indefinitely because, in addition to the foregoing Chile understood that the duties available for distribution in past years which had not been distributed for various reasons could be distributed after 1 October 2007. Chile, once again, called on the United States to terminate the Byrd Amendment both in the letter and as far as disbursements were concerned and thus comply with the DSB's recommendations and findings.

62. The representative of Thailand said that first of all his country wished to thank Canada, the EC, and Japan for bringing this matter before the DSB. Thailand joined previous speakers in expressing disappointment that the United States continued to illegally disburse funds under the CDSOA, and that it had not submitted a status report on its outstanding implementation in the "US – Continued Dumping and Subsidy Offset Act of 2000" dispute for the present meeting. Thailand, therefore, reaffirmed its previous views expressed during DSB meetings since February 2006, and urged the United States to continue providing status reports until it brought its actions into full conformity with the DSB's rulings and recommendations in this dispute, and until this matter had been fully resolved.

63. The representative of Korea said that, as previous speakers had mentioned, his country noted that, on 1 June 2006, the US Customs and Border Protection administration had published a notice of intent to distribute offset payments for fiscal year 2006 under the CDSOA. It was disappointing that, despite its repeated statements that it had taken all actions necessary to implement the DSB's rulings and recommendations, the United States was preparing another illegal payment to its domestic industries. Korea believed that this additional disbursement would seriously undermine the WTO dispute settlement system for which prompt and unconditional implementation was essential. It would, of course, also worsen nullification and impairment which the complaining Members had already suffered. Therefore, Korea called on the United States to take all the necessary actions to stop additional distributions and to promptly resolve this dispute.

64. The representative of India said that his country, once again, wished to thank Canada, the EC and Japan for bringing up this matter before the DSB at the present meeting. India joined the previous speakers in expressing its disappointment about the lack of any progress report by the United States even though it had not yet fully complied with its obligations based on the DSB's recommendations and rulings in this dispute. As stated by the EC and others, the preliminary amounts available for disbursement in 2006 had now been published on the CPB website. India had not escaped this WTO-inconsistent action by the United States. Amounts of about US$1.545 million were being made available for disbursements to US domestic industry on duties collected from imports from India on products ranging from iron metal castings, to carbon steel and stainless steel items, PET films, pigments and mushrooms. There was no response from the United States to the question put by India at the previous DSB meeting as to how continued disbursements of duties collected on imports entering the United States squared up with its compliance obligations. The United States needed to do more than re-iterate a clearly indefensible position on compliance in the face of this new administration action based on the very CDSOA that it admitted had been found inconsistent with WTO rules and asserted that it had bee n withdrawn. Such unilateral action undermined the WTO dispute settlement system. India urged the United States again to inform the DSB of the steps it proposed to take to ensure full compliance. India also again requested, at the present meeting, that the United States resume submitting status reports in this dispute, and, of course, India reserved all its rights under the DSU.

65. The representative of the United States said that as his country had already explained at previous DSB meetings, the 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 recommendations and rulings in these disputes. In light of the fact that the United States had taken all actions necessary to implement the recommendations and rulings in these disputes, the United States failed to see what purpose would be served by the submission of status reports repeating the progress the United States had made in implementation.

66. The DSB took note of the statements.

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

(a) Statement by the European Communities

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

68. The representative of the European Communities said that the EC wished to express its deep disappointment over the final determinations issued at the end of May by the US Department of Commerce, which confirmed the preliminary findings. The EC had hoped that the Department of Commerce would consider seriously the overwhelming evidence in favour of the repeal of these two CVD measures, but that had proved not to be the case. Once again, the United States had failed to comply with the recommendations and rulings adopted by the DSB in this old dispute, by ignoring or twisting the relevant evidence. The final determinations demonstrated beyond any doubt the results-oriented nature of the Department's analysis, reasoning and conclusions. Indeed, the final findings and conclusions were unsupported by the record, totally unjustified and groundless. Essentially, the Department of Commerce had determined that the privatisations of Aceralia and the British Steel had not taken place on market terms, but that was not supported either by facts or by law. Once more, it should be recalled that the purpose of this second Section 129 determination was to implement the findings of the 21.5 Article panel in the case at issue.

69. First, the decision found essentially that the privatisation of British Steel was not for fair market value. However, in both previous WTO proceedings (particularly in DS138, Lead and Bismuth Steel from the UK in 1999) as well as in national proceedings that had taken place in the United States in 1995 concerning the same privatisation, the United States had accepted unequivocally that British Steel had been privatised for fair market value. This did not change by merely arguing, as the Department of Commerce had done that the previous findings and admissions were not relevant anymore due to the change of the privatisation analysis methodology. This did not hold water. The Department of Commerce had analysed the same facts as in the past under basically the same criteria – arm's length and fair market – which had remained the same and still had reached different conclusions. This was simply unjustified and impermissible. A privatization, dating from 1988, that had been found to be at fair market value in 1995 and 1999 had not suddenly ceased to be so in 2006.

70. Second, in its final determinations, the Department of Commerce reached the specific findings by repeating, among others, its claims regarding the alleged deliberate withholding of pertinent information by the Government of the United Kingdom. Both the Commission and the UK Government had, however, provided reasonable explanations of why the 20-year old valuation study requested was not available. In spite of that and in spite of ample evidence on the record proving that the privatisation of British Steel had taken place on market terms, the Department of Commerce had chosen to draw adverse inferences which were without basis and contrary to law. The information on the record did not support the finding that the information requested was deliberately withheld. Indeed, officials from the UK Department Trade and Industry and employees of Corus had both signed affidavits stating that they had searched extensively for the document but had not found it.

Presumably, the United States did not believe them. Further, the remaining record evidence, including previous admissions from the US administration regarding this matter, should have provided the evidence that the privatisation of British Steel was on market terms.

71. Third, the final determinations again refered to certain alleged subsidy programs which had not been terminated. Although no sufficient details had been given, the Department of Commerce had referred to regional development aid either through UK national programs or the European Regional and Development Fund. As explained in the Commission's comments, these allegations did not hold water. The EC had provided detailed and solid evidence to rebut the Department of Commerce allegations beyond any reasonable doubt. The alleged programs had been terminated a long time ago and nothing on the record demonstrated that British Steel had continued to receive regional development grants that benefited the subject merchandise.

72. In view of this, and in the complete absence of any breach of the applicable Community rules at the time of the sunset review in question, namely the 1996 EC steel aid code, with regard to British Steel's steel production, the Department should have concluded that no CVD orders were justified on this ground either. The EC had explained many times to the United States that under the 1996 steel aid code, regional aid was no longer allowed in the steel sector, and had backed this up with documentary evidence showing that the regional measure in favour of British Steel was purely for the social purpose of assisting with the creation of SME's in a regional affected by steel closures. Instead, the Department of Commerce had preferred to ignore the relevant evidence by erroneously arguing that it was unsupported and untimely, simply because that suited the formulation of the pre-ordained result. Admittedly, this practice was against all notions of good faith and due process.

73. On the basis of the above and the evidence on the record, it was clear that the final findings in this case were totally unjustified. It served no purpose to try against all compelling evidence to twist the facts in order to reach different conclusions. When the record evidence was considered, the only defensible conclusion was that all subsidy benefits had been terminated or were *de minimis*. The proven facts simply did not support a finding that subsidization was likely to continue or recur. In light of the above, the EC would take the appropriate measures to defend its interests.

74. The representative of the United States said that on 26 May 2006, the US Department of Commerce had issued its final revised determinations in the sunset reviews involving certain steel products from Spain and the United Kingdom. In both cases, the Department of Commerce had determined that revocation of the countervailing duty order would likely lead to continuation or recurrence of a countervailable subsidy. In each case, the Department of Commerce had examined the privatization of the firm in question. Specifically, the Department of Commerce had applied the method for examining changes in ownership of a firm that it had developed following the DSB's adoption of the Panel and the Appellate Body Reports in the original proceeding.

75. With respect to the privatizations of the firm Arcelia in the Spanish case, and the firm British Steel plc in the UK case, the Department of Commerce had found that a portion of each privatization had not been conducted on an arm's-length basis. In addition, the Department of Commerce had identified evidence suggesting that these privatizations had not been for fair market value. However, due to the failure in each case of the respondent government to supply certain critical information that the Department of Commerce had requested, the Department of Commerce had been unable to complete the analyses. In sum, the Department of Commerce had been unable to determine that the privatizations in question were for fair market value. However, in the UK case, the Department of Commerce had determined that the change of ownership with respect to the firm Glynwed was at arm's length and for fair market value, thereby eliminating any prior non-recurring, allocable subsidies. With these actions, the United States had implemented the recommendations and rulings of the DSB in this dispute. With respect to the string of assertions that the EC had made in its statement, the United States did not intend to engage in this forum in a substantive debate regarding the

determinations in question. Suffice it to say that in the US view, the Department of Commerce had engaged in a thorough analysis of the evidence, and had responded to the arguments raised by the parties. The Department of Commerce determinations were public, and would be available on the Department of Commerce's website.

76. The DSB took note of the statements.

5. Japan – Countervailing duties on dynamic random access memories from Korea

(a) Request for the establishment of a panel by Korea (WT/DS336/5)

77. The Chairman recalled that the DSB considered this matter at its meeting on 30 May 2006 and had agreed to revert to it. At the present meeting, he drew attention to the communication from Korea contained in document WT/DS336/5, and invited the representative of Korea to speak.

78. The representative of Korea said that, as mentioned at the special DSB meeting on 30 May 2006, Korea had grave concerns over the countervailing measures taken by Japan against dynamic random access memories ("DRAMS") produced by Hynix in Korea. Japan's imposition of a countervailing duty on imports of the DRAMS was inconsistent with Japan's obligations under the relevant provisions of the GATT 1994 and the SCM Agreement. Among other things, Japan had failed to demonstrate the existence of a financial contribution by the Government of Korea with respect to the transactions at issue in the subsidy investigation. Japan had also failed to demonstrate that a benefit had been conferred on the Korean manufacturer, given available market benchmarks and the circumstances of financial restructuring. For these reasons, Korea again requested that the DSB establish a panel pursuant to Article 6 of the DSU, with standard terms of reference, to examine the matters described in Korea's panel request, which had been circulated to Members on 19 May 2006. Finally he said that it was regrettable that it had not been possible to solve this matter amicably between Japan and Korea.

79. The representative of Japan said that his country regretted that Korea had chosen to pursue this matter further by making its second request for the establishment of a panel. As Japan had pointed out at the DSB meeting held on 30 May 2006, when Korea had made its first request for the establishment of a panel in this case, Korea's request did not sufficiently indicate the legal basis of its complaint to present the problems it alleged clearly. There were several claims in Korea's request for the establishment of a panel which were ambiguously written, and did not specify which of the multitude of obligations Japan had allegedly violated. Specifically, claims 9, 10 and 15 of Korea's request did not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly within the meaning of Article 6.2 of the DSU. Japan reserved the right to object to any claims Korea would make that had not been sufficiently presented in its request for the establishment of a panel, and which would be inconsistent with the WTO Agreements, including the points just raised. In any event, Japan was certain that the panel would find that the countervailing measures against the subsidies regarding DRAMS from Korea comply with the WTO Agreements.

80. 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.

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

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

(a) Request for the establishment of a panel by Ecuador (WT/DS335/6)

82. The Chairman drew attention to the communication from Ecuador contained in document WT/DS335/6 and invited the representative of Ecuador to speak.

83. The representative of Ecuador said that on 8 June 2005, Ecuador had submitted to the DSB its request for the establishment of a panel to resolve its dispute with the United States regarding the US Department of Commerce's policy that applied the so-called "zeroing" of negative anti-dumping margins in its original investigations. The United States applied this "zeroing" policy in its investigation of certain frozen warm-water shrimp from Ecuador. Had the United States not applied this policy, the Department of Commerce would not have issued an anti-dumping order in February 2005 because it would not have found dumping by any Ecuadorian shrimp exporter. The anti-dumping order had an extremely negative impact on Ecuador's shrimp industry, which was its third largest export industry and generated significant employment opportunities in many impoverished areas of Ecuador where few employment alternatives were available. Accordingly, Ecuador requested the DSB to establish a panel at the present meeting because it strongly believed that the practice of "zeroing" was inconsistent with the Anti-Dumping Agreement. On two previous occasions, the Appellate Body had found that "zeroing" was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The first finding related to a complaint by Canada on softwood lumber and the second was a case brought by the EC on a variety of steel products. Ecuador was, therefore, quite confident that its position was correct and that it would be vindicated by the Panel. Ecuador had held several consultations with the United States over the past few months and these had been fruitful in narrowing their differences. Nevertheless, the parties had not yet been able to reach a mutually satisfactory solution so that was why Ecuador was proceeding at the present meeting with its request for a panel.

84. The representative of the United States noted that Ecuador's statement had alluded to discussions between the United States and Ecuador, and indeed, for quite some time, the United States had been working with Ecuador in an effort to resolve this matter. In light of this ongoing effort, the United States believed that this panel request was premature. As a result, the United States was not in a position to agree to the establishment of a panel at this time.

85. The representative of India said that his country wished to support the request by Ecuador for the establishment of a panel in this dispute. He noted that the use of "zeroing" in final margin determination by the United States had been repeatedly declared WTO-inconsistent by the various panels and the Appellate Body, two of which had been mentioned in the panel request. In this light, it was unfortunate that the Unites States had not used the opportunity available during the consultation period, which was more than three times the minimum required under the DSU in this dispute, to resolve the dispute to the mutual satisfaction of the parties, by taking measures consistent with the WTO.

86. The DSB took note of the statements and agreed to revert to this matter.

7. European Communities – Export subsidies on sugar

(a) Joint request by Australia and the European Communities (WT/DS265/36)

(b) Joint request by Brazil and the European Communities (WT/DS266/36)

(c) Joint request by Thailand and the European Communities (WT/DS/283/17)

87. The Chairman proposed that the three sub-items to which he had just referred be considered together since they pertained to the same matter. First, he drew attention to the communication from Australia and the European Communities contained in document WT/DS265/36 and invited the representative of Australia to speak.

88. The representative of Australia said that in document WT/DS265/36 Australia and the European Communities had informed the DSB of an Understanding reached with respect to the dispute: "EC – Export Subsidies on Sugar" (WT/DS265). As set out in that document, Australia requested, jointly with the EC, that the DSB adopt the draft decision contained in WT/DS265/36. The Understanding reached between Australia and the EC and the requested DSB's decision had been designed to preserve the respective rights of both parties to the dispute at this time. Consequently, Australia requested, jointly with the EC, that the DSB take note of the Understanding reached between Australia and the EC, as set out in document WT/DS265/36 and adopt the draft decision contained in that document.

89. The Chairman drew attention to the communication from Brazil and the European Communities contained in document WT/DS266/36 and invited the representative of Brazil to speak.

90. The representative of Brazil said that on 22 May 2006, the reasonable period of time for implementation of the DSB's recommendations in this dispute had expired. The measures the EC had taken to comply, in its view, with those recommendations had been referred to in the EC's status reports submitted to the DSB on the matter at issue. It was not necessary to cite them again. Brazil considered, however, that it was necessary to reaffirm that Brazil was not satisfied that the EC had implemented the DSB's recommendations and rulings in this dispute within the reasonable period of time. He then referred Members to his previous statement made at the present meeting on the reasons sustaining Brazil's position.

91. In document WT/DS266/36, Brazil and the EC had informed the DSB of an Understanding reached with respect to the present case. The Understanding clearly identified the divergence of views between Brazil and the EC on whether compliance had been achieved in this dispute. It also provided for the order in which the procedural steps to resolve that divergence should be taken by the parties to the dispute. In addition, and without prejudice to other formats used by Members in similar situations in the past, the Understanding set out that Brazil requested, jointly with the EC, that the DSB adopt the draft decision contained therein. As Brazil considered that the full appreciation of the questions related to compliance in this dispute would take longer than the 30-day period set out in Article 22, the Understanding and the requested DSB decision were designed to preserve the respective rights of both parties at this point in time.

92. In this regard, as set out in document WT/DS266/36, Brazil respectfully requested, jointly with the EC, that at the present meeting the DSB "take note of the Understanding reached between Brazil and the European Communities and agree that, in the event that the DSB adopts recommendations and rulings that measures taken by the European Communities to comply with the prior recommendations and rulings of the DSB do not exist or are inconsistent with a covered agreement, the DSB shall grant Brazil upon its request authorization to suspend concessions or other obligations pursuant to Article 22 of the DSU unless (i) the DSB decides by consensus not to do so, or

(ii) the European Communities objects to the level of suspension proposed or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, in which case the matter shall be referred to arbitration under Article 22.6 of the DSU".

93. The Chairman drew attention to the communication from Thailand and the European Communities contained in document WT/DS283/17 and invited the representative of Thailand to speak.

94. The representative of Thailand said that his country appreciated the cooperation of the EC in concluding the Understanding and the joint request for action submitted to the DSB as document WT/DS/283/17 at the present meeting. As indicated under a previous agenda item, Thailand continued to have serious concerns about the manner in which the EC had approached the implementation of the DSB's recommendations and rulings in the Sugar dispute, and Thailand continued to consider all options in this regard. To this end, Thailand respectfully requested, jointly with the EC, that the DSB: "take note of the Understanding reached between Thailand and the European Communities and agree that, in the event that the DSB adopts recommendations and rulings that measures taken by the European Communities to comply with the prior recommendations and rulings of the DSB do not exist or are inconsistent with a covered agreement, the DSB shall grant Thailand upon its request authorization to suspend concessions or other obligations pursuant to Article 22 of the DSU unless (i) the DSB decides by consensus not to do so, or (ii) the European Communities objects to the level of suspension proposed or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, in which case the matter shall be referred to arbitration under Article 22.6 of the DSU".

95. The representative of the European Communities said that as had already been apparent at the previous DSB meeting, the parties seemed to disagree over the EC having achieved compliance in this dispute. While the EC regretted this fact, it was, of course, the legitimate right of the complainants to safeguard their rights in this respect. Similarly, the EC had a legitimate interest to protect itself against any unilateral determination of non-compliance, which would be at odds with the rules of the DSU and the dispute settlement practice of the last seven years. For this reason, the parties had concluded standard "sequencing" agreements on 8 June 2006, which had been notified to the DSB and circulated to Members. The EC was satisfied to have concluded these standard agreements, as the EC was also pleased about the constructive dialogue which was taking place between the parties on the substantive questions of implementation in this dispute. The proposed DSB decisions would endorse those agreements and provided protection against concerns that might exist due to some ambiguous deadlines in the DSU. The EC would, therefore, be pleased if the DSB would adopt the proposed decisions at the present meeting.

96. The DSB took note of the statements.

97. The Chairman proposed that: "The DSB take note of the Understanding reached between Australia and the European Communities and agree that, in the event that the DSB adopts recommendations and rulings that measures taken by the European Communities to comply with the prior recommendations and rulings of the DSB do not exist or are inconsistent with a covered agreement, the DSB shall grant Australia upon its request authorization to suspend concessions or other obligations pursuant to Article 22 of the DSU unless the DSB decides by consensus not to do so, or the European Communities objects to the level of suspension proposed or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, in which case the matter shall be referred to arbitration under Article 22.6 of the DSU."

98. The DSB so agreed.

99. The Chairman proposed that: "The DSB take note of the Understanding reached between Brazil and the European Communities and agree that, in the event that the DSB adopts recommendations and rulings that measures taken by the European Communities to comply with the prior recommendations and rulings of the DSB do not exist or are inconsistent with a covered agreement, the DSB shall grant Brazil upon its request authorization to suspend concessions or other obligations pursuant to Article 22 of the DSU unless the DSB decides by consensus not to do so, or the European Communities objects to the level of suspension proposed or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, in which case the matter shall be referred to arbitration under Article 22.6 of the DSU."

100. The DSB so agreed.

101. Finally, the Chairman proposed that: "The DSB take note of the Understanding reached between Thailand and the European Communities and agree that, in the event that the DSB adopts recommendations and rulings that measures taken by the European Communities to comply with the prior recommendations and rulings of the DSB do not exist or are inconsistent with a covered agreement, the DSB shall grant Thailand upon its request authorization to suspend concessions or other obligations pursuant to Article 22 of the DSU unless the DSB decides by consensus not to do so, or the European Communities objects to the level of suspension proposed or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, in which case the matter shall be referred to arbitration under Article 22.6 of the DSU."

102. The DSB so agreed.

8. Proposed nomination for the indicative list of governmental and non-governmental panellists (WT/DSB/W/322)

103. The Chairman drew attention to document WT/DSB/W/322, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. Unless there was any objection, he proposed that the DSB approve the name contained in document WT/DSB/W/322.

104. The DSB so agreed.