WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/225
8 March 2007

(07-0944)

Dispute Settlement Body
23 January 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 23 January 2007

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on: "United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina" was removed from the proposed agenda following the United States' decision to appeal the Report.

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.50)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.50)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.25)

(d) Mexico – Definitive anti-dumping measures on beef and rice: Complaint with respect to rice: Status report by Mexico (WT/DS295/13/Add.1)

(e) Mexico – Tax measures on soft drinks and other beverages: Status reports by Mexico (WT/DS308/16)

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 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.50)

2. The Chairman drew attention to document WT/DS176/11/Add.50, 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 11 January 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 convened earlier in January 2007. The US administration would work with that Congress with respect to appropriate statutory measures to resolve this matter.

4. The representative of the European Communities said that with the entry of the new US Congress, pending bills concerning implementation of the WTO ruling on Section 211 had now been declared moot. As a consequence, the EC was in a situation where the very first step in the

implementation process, which was the introduction of a bill in the US Congress, had not even been taken even though the deadline for implementation had expired more than four years ago. At the present meeting, the EC had heard again that the US administration would work with the US Congress to implement the DSB's ruling and recommendations. The EC hoped that this new Congress would realise the widespread damaging effects that a persisting non-compliance with the TRIPS Agreement had on the interests of the United States and on the whole trade community by undermining the authority of that agreement and the objective of ensuring efficient protection of intellectual property rights worldwide. Refusing, on foreign policy grounds, the specific licence that would have allowed the renewal of the registration of the Havana Club mark had also sent the wrong message. He noted that the renewal would not have granted ownership rights, but would have only preserved the status quo and would have 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 on 2 February 2007 five years would elapse since the adoption of the DSB's rulings and recommendations in this dispute. Incidentally, this period of time corresponded to just under half the time of the existence of the WTO. Since then the United States had proved itself to be a flagrant non-complier, trying to make Members accustomed to its detrimental practice of submitting laconic, repetitive and non-substantial status reports with no indication as to when it would comply with its WTO obligations. Cuba recalled that this dispute was one of the three longest-standing disputes on the DSB's agenda. In all three cases, settlement was dependent upon the United States, the only Member to show an irreverent reluctance towards observance of its obligations under the WTO Agreements. The US attitude sent out very negative signals to other WTO Members and called into question the effectiveness of the dispute settlement system. At the same time, it undermined the balance between the rights and obligations, the equality among the parties and the predictability of the multilateral trading system. As Cuba had reported on previous occasions, the continued application of Section 211 – which had been declared inconsistent with the TRIPS Agreement and with WTO rules and principles – had given rise to the arbitrary and illegal decision of the US Patent and Trademark Office to reject the application to renew the registration of the Havana Club trademark filed by the Cuban company that owned it, and which would merely have maintained the status quo of this trademark. However absurd it might seem, the sole purpose of this decision was to favour political and commercial interests of the Bacardi rum company, which endeavoured to usurp the Havana Club trademark, thereby putting at risk hundreds of US entrepreneurs who owned more than 4,000 trademarks registered in Cuba and the future of multilateral intellectual property agreements. Indeed, as soon as the decision of the US Patent and Trademark Office had been made public, Bacardi had announced that it would begin manufacturing rum under the Havana Club brand name. Its purpose was to deceive consumers who acquired the product on the US market by taking advantage of the recognized prestige of the Havana Club brand and its clear association with Cuba, thereby selling a product which was not of Cuban origin nor comparable in terms of quality to the rum marketed worldwide by the Cuban-French joint venture Havana Club International.

6. He said that despite unsuccessful US attempts to deny the fact, this dispute was indeed related to this trademark and all the attendant circumstances. The content of Section 211 and events subsequent to its adoption had only proved this. Its objective was to deprive Cuban right-holders and their successors, including foreign companies with interests in Cuba, of the recognition and enjoyment in the US territory of their rights regarding properly registered and protected trademarks and brand names, thus preventing the legitimate owners from defending such rights in the US courts and from renewing the registration of their trademarks in that country. Cuba, once again, called upon the United States to repeal the illegal Section 211 and to give constructive consideration to the concerns and claims expressed month after month by several DSB Members. The United States should be mindful of possible repercussions of its negligent acts.

7. The representative of the Bolivarian Republic of Venezuela said that his country thanked Cuba for its statement, which it fully endorsed. His country considered Cuba's complaint to be

legitimate. This had been demonstrated by the DSB when Section 211 had been found to be inconsistent with the WTO Agreements and the WTO fundamental principles. His country also noted the status report submitted by the United States, which once again highlighted the United States' 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 country, 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. At this point 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 in the previous month and actually to all the status reports that had been submitted over almost two years.

8. Failure to respect these core principles of the TRIPS Agreement, several years after the WTO's finding that Section 211 was WTO-inconsistent had 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 thus 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 must be decided in courts on the basis of the rule of law and free from 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 obligations.

9. The representative of Brazil said that while his country wished to thank the United States for its 50th status report and the statement made at the present meeting, it could not escape making some points of systemic nature in relation to the lack of compliance in this dispute. Brazil did not question the United States' reaffirmed intention and disposition to comply with the DSB's recommendations in this dispute. Nonetheless, it was only natural that Members were concerned about the credibility of a dispute settlement system when overly long periods of non-compliance such as in this case had no other consequences than monthly diplomatic statements. This situation was particularly serious because of the greater responsibilities the United States bore, as one of the major users of the system. Brazil therefore, invited, the United States to make an extra effort in order to bring itself promptly into conformity with the applicable multilateral rules.

10. The representative of China said that first, his country thanked the United States for its status report and its statement. However, China wished to express its systemic concerns with the protracted implementation process in this dispute. China appreciated the efforts made by the United States during the past five 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 an active advocate of intellectual property rights in all forums. Therefore, China again urged the United States to fully implement the decision of the DSB in this dispute as soon as possible.

11. The representative of India said that his country wished to thank the United States for their situation report and its statement. However, India noted that there was no substantive change in the situation report. 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 almost five years had elapsed from 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.

12. The representative of Bolivia said that his delegation had been commenting on this issue for several months and yet the position of the United States, as reflected in its status reports, had not changed in any way that might enable a settlement to be reached. This, as his delegation had stated previously, undermined the credibility of the multilateral trading system and, in particular, the DSB because of the systematic nature of the failure to comply with the decisions and rulings of the DSB. Bolivia was also concerned about the implications that this could have on the intellectual property regime under the TRIPS Agreement. This case had been ongoing for more than five years, with a clearly damaging effect on one developing country. Bolivia, once again, wished to urge the United States to comply with the DSB's rulings and strongly hoped that in the coming year it would be possible for this matter to be removed from the DSB's agenda once a satisfactory settlement had been reached for all those adversely affected Members.

13. The representative of Uruguay said that her delegation thanked United States for its status report. Uruguay shared the systemic concerns that had been expressed by previous speakers with regard to the importance that Members should promptly comply with the WTO recommendations in order to preserve the balance between the rights and obligations and to preserve the credibility of the system. That was why Uruguay hoped that the United States would take the necessary measures so as to comply with the DSB's recommendations.

14. The representative of the United States said that in response to the suggestion that the US compliance record was poor, the facts simply did not support that assertion. Indeed, the record showed that the United States had fully complied with WTO rulings in the vast majority of its disputes. As for the remaining few, the United States was actively working towards compliance. Regarding the comment made concerning a particular trademark registration, none of the recommendations or rulings of the DSB 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.50)

16. The Chairman drew attention to document WT/DS184/15/Add.50 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 11 January 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 made by the United States along with its latest status report. However, it was very regrettable that, although the legislation that the United States had stated would implement the DSB's recommendations and rulings had been introduced in the last US Congress in May 2005, it had failed to pass that legislation. 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 recalled that the United States had stated, in its most recent report, that the "Administration continues to support specific legislative amendments that would implement the DSB's recommendations and rulings". Japan wished to renew its strong hope that the US administration would accelerate its efforts to work with the US Congress and implement the DSB's recommendations and rulings as soon as possible.

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.25)

20. The Chairman drew attention to document WT/DS160/24/Add.25, 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 11 January 2007, in accordance with Article 21.6 of the DSU. The US administration would work closely with the new US Congress, which had convened this month, and would continue 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 the EC's position regarding this dispute was well known, and did not require repetition be it in bureaucratic language or poetry. The EC wished that this item be removed from the DSB agenda, but that would require action from the United States, and such action had not yet taken place. 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 identified 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) Mexico – Definitive anti-dumping measures on beef and rice: Complaint with respect to rice: Status report by Mexico (WT/DS295/13/Add.1)

24. The Chairman drew attention to document WT/DS295/13/Add.1, which contained the status report by Mexico on progress in the implementation of the DSB's recommendations in the case: "Mexico Definitive Anti-Dumping Measures on Beef and Rice: Complaint with respect to Rice".

25. The representative of Mexico said that his country had submitted a status report contained in WT/DS295/13/Add.1, which was the last report to be presented regarding this dispute. Mexico believed that it had complied with its obligations following the withdrawal of its anti-dumping measures in respect of rice. This had been notified by the Ministry of Trade. However, pursuant to the agreement between Mexico and the United States contained in WT/DS295/15, his country was open to discussions with the United States regarding this matter.

26. The representative of the United States said that his country thanked Mexico for its status report. As it had been previously stated, the United States was pleased that Mexico had revoked the anti-dumping measure on rice, which had implemented the DSB's recommendations and rulings with respect to that measure. The United States was also pleased that Mexico had amended its Foreign Trade Law to address the DSB's recommendations and rulings. As it had been stated at the 19 December DSB meeting, the United States was currently studying those amendments. The United States had some questions with respect to certain amendments, and expected to be in touch with Mexico in the near future to discuss them. Again, the United States appreciated the steps Mexico had taken, and looked forward to discussing its questions with Mexico.

27. The DSB took note of the statements.

(e) Mexico – Tax measures on soft drinks and other beverages: Status reports by Mexico (WT/DS308/16)

28. The Chairman drew attention to document WT/DS308/16, which contained the status report by Mexico on progress in the implementation of the DSB's recommendations in the case concerning Mexico's tax measures on soft drinks and other beverages.

29. The representative of Mexico said that as under the previous agenda sub-item, Mexico was presenting its first and final status report regarding this matter. Thus Mexico had complied with its obligations by withdrawing its measure that was subject to this dispute, as explained in its status report.

30. The representative of the United States said that his country wished to express its appreciation for Mexico's efforts to repeal the beverage tax and to comply with the DSB's recommendations and rulings. The United States looked forward to the benefits this might bring for sweeteners trade between the two countries.

31. The DSB took note of the statements.

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"[1] and related subsequent WTO proceedings

(a) Statements by Honduras, Nicaragua and Panama

32. 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.

33. The representative of Honduras said that his country again referred to its prior statements on this issue. As previously noted, his country, an original complainant in the Bananas III case, had already held Article 21.5 consultations regarding the EC's continuing non-compliance with the rulings in the Bananas III case. Honduras regretted that the consultations and all informal efforts since then had failed to resolve this matter. The commercial circumstances that originally had given rise to Honduras' Article 21.5 consultation request continued to be of serious concern to his country. The latest data available shown that Honduras had sustained the second-highest decline in both volumes and market share since the banana regime had first come into effect. They also showed, by comparison, that ACP shipments to the EC had been increased by 20 per cent, or 150,000 mt, over 2005 levels, with at least another 20 per cent ACP increase expected in 2007, and even larger ACP gains expected in 2008, when the EC had opened its market to unlimited duty-free ACP access.

[1] WT/DS27.

Given that trade distortions in the EC's marketplace were escalating so rapidly, and relief remained so imperative, Honduras had taken positive note that a growing number of Members now shared its commercial and legal concerns in this dispute, and was seeking prompt relief. Honduras looked forward to working in conjunction with affected suppliers on additional steps now required to deliver substantial, near-term access improvements. As those efforts progressed, his delegation wished again to make clear that Honduras reserved all its rights in the Article 21.5 proceedings.

34. The representative of Nicaragua said that her country, once again, referred to its previous statements on this matter and, at the present meeting, wished to make a brief statement. Her country followed with special interest the ongoing consultations requested by Ecuador under Article 21.5 of the DSU. Having already participated in the Article 21.5 consultations on the EC's banana regime, Nicaragua's substantial trade interest in this dispute was firmly established. Those earlier consultations, together with various informal discussions that had been held since that time, had failed to resolve the dispute. The absence of a settlement to this dispute meant that Nicaragua's banana industry, which provided thousands of jobs for the country's rural population, continued to be denied any prospect of entering the EC's banana market. Consequently, in the event that further efforts should be made to resolve this issue during the time that remained under Ecuador's consultations, Nicaragua reiterated that it maintained its substantial trade interest in this dispute and any such efforts should include Nicaragua as well all other Members who had participated in previous Article 21.5 consultations. If the concerns which Nicaragua and others had raised in the past with regard to the EC's compliance were not addressed promptly and fully, Nicaragua would join other Members in reserving all its rights under Article 21.5 of the DSU to protect its substantial trade interest regarding this matter.

35. The representative of Panama said that, month after month, the EC had continued to claim that MFN access had not been adversely affected by the US$4.30/box tariff advantage given to ACP bananas over bananas from Panama and other Latin American countries. New information from the EC continued to prove otherwise. The share of ACP countries was increasing more rapidly than expected. In November 2006, ACP shipments to Europe had been up 50 per cent compared with November 2005. Figures for 2006 were expected to show an ACP growth rate of at least 20 per cent, which had exceeded traditional MFN rates by a factor of more than two. Total ACP volumes for the entire 2006 period were expected to exceed 2005 levels by 150,000 mt. Almost all of this new volume, 140,000 mt, had been sold by ACP suppliers out of quota and under the MFN tariff, which had clearly demonstrated how unnecessary the current preferences were. The EC licensing system data confirmed that in January 2007 ACP volumes were already 35 per cent higher than in January 2006. Even if the 2007 ACP volumes were to increase by 20 per cent instead of 35 per cent in relation to 2006 levels, such growth would still mean increases in ACP volume of at least 340,000 mt in relation to 2005 levels. Statistics confirmed that developing country MFN suppliers could not aspire to maintain access in the face of ACP volume increases of this magnitude. In 2006, traditional MFN suppliers had lost 3 per cent of their market share and saw the value of their imports to fall by more than US$650 million. The fall in the value of imports from Panama was expected to exceed US$70 million in 2006. Under current ACP growth rates, all or almost all MFN suppliers would experience greater losses in 2007 than in 2006, and it was likely that such losses would escalate out of control in 2008, when ACP countries gained unlimited and duty-free access to the EC. It was for that reason that Panama had participated in the ongoing Article 21.5 proceedings with a view to bringing this unnecessary and ever-increasing injury to an end before it was too late.

36. The representative of Brazil said that her country thanked Honduras, Nicaragua and Panama for raising this matter once again. Brazil was particularly concerned about the systemic implications of this situation that the WTO faced regarding the so-called "bananas dispute". Although a new tariff level for MFN bananas had been provisionally defined and applied by the EC, for the moment, no definitive tariff regime for MFN bananas had been established. The tariff applied by the EC had not been rebound yet. This created a situation of uncertainty and unpredictability for MFN suppliers.

Brazil was not challenging preferential schemes granted by the EC to other banana exporting Members. However, the MFN suppliers were entitled to a clear and transparent set of rules that would allow for predictability concerning market access conditions to the EC. In this regard, Brazil urged the EC to take the necessary actions in order to rebind a definitive tariff only regime for bananas.

37. The representative of the European Communities said that the EC wished to refer to its prior statements on why this matter was not an "implementation issue" covered by Article 21 of the DSU. 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. Those 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 was committed to maintaining MFN access to the EC market. According to the statistics available thus far, such access had increased as compared to access in previous years (by 8.7 per cent as compared to 2005, and 6.3 per cent if compared to 2003-2005). The EC commitments did not include a commitment to "guarantee specific market shares" but only equivalent market access. The EC had always favoured and remained to favour a negotiated solution with interested MFN suppliers on the import regime for bananas, including on the question of rebinding. The EC still hoped that MFN suppliers opted for continued exploration of an agreed solution that would address the interests of all suppliers involved.

38. 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

39. 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.

40. 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 eleven months 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.

41. The representative of the European Communities said that the EC was still waiting for a convincing explanation as to how the United States could claim to have taken all steps to implement the DSB's ruling in this dispute while continuing to distribute to its industry the collected anti-dumping and countervailing duties. In November 2006, the United States had distributed more than US$380 million to its industry. This was the highest amount distributed thus far under the CDSOA and this even though anti-dumping and countervailing duties collected on goods from Canada and Mexico were no longer distributed. It brought the total amount distributed since the enactment of the legislation at more than US$1.6 billion. These transfers of duties to US industry were WTO-incompatible and should have stopped by 27 December 2003. As long as these 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, again asked 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 implementation reports in this dispute.

42. The representative of Japan said that his country had to reiterate its disappointment that the United States, once again, had not submitted a status report this month regardless of Japan's statements made at the previous DSB meetings. Despite the enactment of the Deficit Reduction Act of 2005, the United States continued distributions under the CDSOA and, more disturbingly, the total amount of the latest distribution made only a few months ago had much increased from the previous year. In light of the DSB's discussions thus far, WTO Members except for the United States shared the view that, as long as this situation did not change, the United States had not fully implemented the DSB's recommendations and rulings. The United States had to immediately stop illegal distribution under the CDSOA regardless of the sources of duties collected. Japan urged the United States to provide its status report and comply fully with the DSB's recommendations and rulings as soon as possible. Japan reserved all the rights under the DSU until full implementation by the United States.

43. The representative of Brazil said that his country was grateful to Canada, the EC and Japan for raising this issue again. At the previous regular DSB meeting in December 2006, Brazil had posed a question to the United States. Brazil was and continued to be truly interested, as were many other WTO Members, in obtaining a reasoned explanation from the United States on why WTO-inconsistent disbursements under the Byrd Amendment would become WTO-compatible immediately upon the entering into force of the Deficit Reduction Omnibus Reconciliation Act almost one year ago. He recalled that this legislation, among other provisions, had established a prospective repeal for the Byrd Amendment with no real effect before late 2007. In December 2006, as had been the case before, the United States had simply stated that "[it] ha[d] taken all actions necessary to implement the DSB's recommendations and rulings in these disputes". It was clear that this answer was, to say the least, insufficient, in particular for Members, like Brazil, that had gone through protracted, costly and burdensome litigation with the United States on this illegal measure. At a minimum, the United States should provide a far more elaborate view on the reasons that should make Members believe that compliance had been achieved in February 2006. Brazil, once again, urged the United States to, at least, explain in sufficient detail the rationale behind its statement of compliance.

44. The representative of Thailand said that, first, his country thanked Canada, the EC, and Japan for once again bringing this matter before the DSB. As stated during previous DSB meetings, Thailand strongly viewed that the United States' continued disbursement of funds under the CDSOA meant that the United States had not taken the actions necessary to implement the rulings and recommendations in this dispute. In other words, Thailand did not believe that the United States had brought itself into conformity with its obligations under the Anti-Dumping Agreement and the Subsidies Agreement. 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 had been taken and this matter had been fully resolved.

45. The representative of India said that his country thanked Canada, the EC and Japan for raising this issue at the DSB yet again. In spite of India's exhortations at previous meetings, India was still to receive a response from the United States to its long-standing question as to how they squared up their compliance obligations with the continued disbursement of collected anti-dumping and countervailing duties to their industry, almost fours years after they should have stopped. The latest data available in the CDSOA Annual Report of the US Customs and Border Protection for the fiscal year 2006 had only proved India's point that the United States was not in compliance with its WTO 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 reiterated its request that the United States resume submitting status reports in this dispute.

46. The representative of China said that his country thanked and supported Canada, the EC and Japan for raising this matter at the present meeting. China shared the views expressed by previous speakers that the implementation issue had not been resolved in this dispute within the framework of Article 21 of the DSU. China believed that full and prompt implementation was critically important to the credibility and efficiency of the dispute settlement system. Should the prospective repeal of a WTO-inconsistent measure be treated as equal to immediate compliance, the legal requirements of the DSU on compliance with the DSB's recommendations and rulings would be greatly undermined. Therefore, China wished to join previous speakers in urging the United States to comply fully and promptly with the DSB's rulings.

47. The representative of the United States said that, as the United States 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. 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 further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings. In response to the question whether it was the position of the United States that it had already implemented the DSB's recommendations and rulings in these disputes, the United States was clear on this point: with the enactment into law, on 8 February 2006, of the Deficit Reduction Act, the United States had taken all actions necessary to implement the DSB's recommendations and rulings. Finally, the United States was surprised by the assertion that the United States would not have implemented the DSB's recommendations and rulings until the last CDSOA distribution had been made. Of course, such questions were for panels to decide.

48. The DSB took note of the statements.

4. Statement by Ecuador regarding the European Communities' regime for the importation, sale and distribution of bananas

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

50. The representative of Ecuador recalled that, on 28 November 2006, his country had requested consultations under Article 21.5 of the DSU with the EC regarding its regime for the importation, sale and distribution of bananas. Although, in Ecuador's view, recourse to Article 21.5 of the DSU did not require prior consultations, Ecuador had requested such consultations pursuant to Article 4 of the DSU and Article XXII of the GATT 1994 with a view to securing a negotiated and mutually satisfactory solution by means of this process – a process which could not, in any case, be protracted indefinitely. Ever since late 1991 when the first consultations on the establishment of the Common Market Organization for Bananas had been held, Ecuador had called for realistic and pragmatic free trade and competition conditions, which would take into account the interests of all parties concerned. Ecuador had, therefore, considered that there were important elements, such as those taken into consideration during the "good offices" process conducted by the Norwegian Minister of Foreign Affairs, Mr Støre, which needed to be addressed if a solution were to be found to this issue. Furthermore, the parties involved in this dispute, which had been ongoing for more than a decade

now, must make a constructive contribution in the form of real and objective proposals, which would enable a satisfactory outcome to all. In the same constructive spirit as that which had prevailed at the first meeting between parties and third parties in Geneva on 14 December 2006 and in order to maintain transparency in this process, Ecuador had requested that this item be included on the agenda of the present meeting in order to reiterate its commitment to securing a prompt negotiated solution to its legal concerns with regard to the current EC's regime for the importation, sale and distribution of bananas.

51. The representative of the European Communities said that the EC welcomed Ecuador's willingness to continue exploring a negotiated solution to this dispute. The EC was ready to resume discussions at the earliest opportunity. The EC hoped that other MFN suppliers would follow suit.

52. The representative Brazil said that his country thanked Ecuador for bringing this issue to the attention of the DSB once again. As Brazil had stated at a previous DSB meeting, the statements made on the implementation by the EC in the bananas disputes confirmed the importance of this matter not only for the Members directly involved, but also for the WTO Membership as a whole. All Members would benefit from a thorough discussion of the issues raised by those disputes. Therefore, Brazil would follow all new developments on this matter, hoping that a mutually satisfactory and definitive solution to the banana disputes would be reached.

53. The representative of the United States said that this was, unfortunately, the longest-running dispute in the history of the WTO. In 2001, 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 on bananas, the United States had looked forward to the dispute finally being resolved at the start of the previous year. The United States had heard assertions that the data shown that things were going fine, at least for some. But, the United States also continued to hear reports that the new regime had caused significant difficulty for MFN suppliers and market conditions for some were worsening. The United States believed the path to resolution of this long-standing dispute was through negotiations. The United States urged the EC and all interested Members to engage in a meaningful dialogue towards that end.

54. The DSB took note of the statements.

5. United States – Anti-Dumping Act of 1916: Implementation of the recommendations adopted by the DSB

(a) Statement by Japan

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

56. The representative of Japan said that his country had requested the inclusion of this item on the agenda of the present meeting, because Japan wished to draw the DSB's attention to the regrettable consequence of the United States' partial compliance with the DSB's recommendations in this dispute. He recalled that in September 2000, the DSB had adopted the Reports of the Panel and the Appellate Body that had found the 1916 Anti-Dumping Act to be inconsistent with the WTO Agreements. The United States had repealed the Act in December 2004, three years after the expiry of the reasonable period of time. The repeal was prospective only. In the meantime, a lawsuit had been filed against a Japanese company under the Act in the United States. Eventually, as a result, the Japanese company had been forced to pay more than US$35.7 million under the 1916 Anti-Dumping Act.

57. As Japan had mentioned in July 2006, this story demonstrated that, as a result of the grandfather clause, the United States' implementation of the DSB's recommendations was partial and actually caused the nullification or impairment of benefits accruing to Japan despite the United States' alleged completion of its implementation. In response, the Japanese company had sought to recover its damages attributed to the illegal 1916 Anti-Dumping Act by filing a lawsuit in Japan under a Japanese municipal law. However, the adversary party had made yet another legal move to file a motion for preliminary and permanent anti-suit injunctions in a US District Court. The District Court had granted this motion as it related to a preliminary injunction. The Japanese company had appealed, and this case was now before the Circuit Court. Thus, instead of recovering the damage caused by the illegal 1916 Anti-Dumping Act, the Japanese company had been dragged into further litigation in the United States. All the inconveniences caused to the Japanese company had originated from the US partial compliance with the DSB's recommendations. As Japan had recalled in July 2006, Article 3.7 of the DSU provided that "[t]he aim of the dispute settlement mechanism was to "secure positive solution to a dispute". The current situation for Japan relating to this case was far from such a "positive solution". Japan reiterated its call on the United States to take appropriate action in good faith in order to secure a positive or satisfactory solution under the WTO dispute settlement system including in this case.

58. The representative of the European Communities said that the EC had also brought a WTO dispute against the Anti-Dumping Act of 1916 and had also expressed its concerns at the DSB meetings on 24 November 2004 and on 19 July 2006 on the incomplete implementation of the DSB's ruling condemning the US legislation. It had always been and it was still the EC's position that a proper solution to the dispute on the 1916 Anti-Dumping Act had called for a repeal of the Act and a termination of the on-going court cases. It was now more than five years after the expiry of the implementation deadline but the United States was still taking WTO incompatible actions in application of the 1916 Anti-Dumping Act. He said that the EC fully supported Japan's position.

59. The representative of the United States said that his delegation noted Japan's statement and would refer Japan's comments to its authorities. For now, the United States wished to reiterate several facts regarding the US court litigation to which Japan had referred. First, the court litigation in question was not itself covered by Japan's "as-such" challenge. Moreover, it predated the DSB's recommendations and rulings in this dispute. Second, the court proceeding had revealed that the Japanese company in question had not only engaged in dumping, it had, in the words of the 1916 Act, done so with "the intent of destroying or injuring an industry in the United States." The company's US competitor had been forced to close plants and lay off employees during this period – and a manager for the Japanese company had stated that he was "very pleased" with that outcome. Third, the court litigation had also revealed that the Japanese company in question had engaged in very troubling activity. For example, to make it appear as if it was not engaged in dumping, the company had created secret rebates on its sales in the United States. The company's lawyer had recognized that putting the rebate in writing would be "incriminating" and had urged the company's US subsidiary to falsify and destroy its business records to conceal the secret rebates, advice which the company had followed. The United States noted that the US court's decision to enjoin the Japanese company from taking advantage of Japan's "claw-back" law was not related to the recommendations and rulings adopted in this dispute. Finally, the repeal of the 1916 Act ensured that no new cases could be filed under the Act. The United States of course would be pleased to confer with Japan with respect to any questions or concerns it had.

60. The DSB took note of the statements.

6. Mexico – Definitive countervailing measures on olive oil from the European Communities

(a) Request for the establishment of a panel by the European Communities (WT/DS341/2)

61. The Chairman recalled that the DSB had considered this matter at its meeting on 19 December 2006 and had agreed to revert to it. He then drew attention to the communication from the European Communities contained in document WT/DS341/2, and invited the representative of the European Communities to speak.

62. The representative of the European Communities said that, as it had been stated at the previous meeting, the EC had serious concerns about the full WTO compatibility of the countervailing measures imposed by Mexico on EC exports of olive oil. In view of economic and systemic significance of this case for the EC, and since there was no movement on the Mexican side, despite repeated attempts to arrive at a mutually satisfactory solution, the EC saw no other option than to take the next step and ask, for the second time, that a panel be established.

63. The representative of Mexico said that his country regretted that the EC had taken the decision to request the establishment of a panel. However, Mexico wished to reiterate that it was open to continue working together to try to find a solution to this dispute.

64. 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.

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

7. Korea – Anti-dumping duties on imports of certain paper from Indonesia

(a) Recourse to Article 21.5 of the DSU by Indonesia: Request for the establishment of a panel (WT/DS312/9)

66. The Chairman drew attention to the communication from Indonesia contained in document WT/DS312/9, and invited the representative of Indonesia to speak.

67. The representative of Indonesia said that his country's request for the establishment of an Article 21.5 panel had been circulated to Members in document WT/DS312/9. Indonesia very much regretted that this dispute had been unnecessarily prolonged and that it had been forced to request the establishment of an Article 21.5 panel due to Korea's complete failure to implement properly the DSB's rulings. Rather than implementing the rulings properly, Korea appeared to have been concerned only with maintaining a WTO-inconsistent anti-dumping measure in place for as long as possible. Indonesia was deeply disappointed that Korea, an exporting country that was frequently subject to anti-dumping measures, had shown so little interest in implementing the Panel's rulings in a meaningful manner. Because the continued imposition of this WTO-inconsistent measure imposed a significant commercial burden on an important export industry, Indonesia had no choice, but to request further panel proceedings in this matter.

68. Although Indonesia had a number of concerns with Korea's implementation of the DSB's rulings and recommendations, it had limited its claims to the key issues in the dispute. The primary issue before the compliance panel would be the manner in which Korea had implemented the DSB's rulings concerning the calculation, as part of the determination of normal value, of certain sales-related expenses incurred by an affiliated reseller of the largest Indonesian exporter. Had Korea properly implemented the Panel's findings and otherwise acted consistently with the Anti-Dumping

Agreement on this issue, the result would have been *de minimis* dumping margins and hence termination of the measure for that exporter. Nevertheless, or perhaps it was more correct to say because of this, Korea had effectively left its determination on this issue untouched. Again, Indonesia strongly regretted that Korea had chosen this approach, but was confident that the compliance panel would rule that Korea had failed to implement properly the DSB's rulings and recommendations and had acted inconsistently with the Anti-Dumping Agreement regarding this and the other issues raised in Indonesia's panel request.

69. The representative of Korea said that his country was disappointed to learn that Indonesia had decided to request the establishment of a panel under Article 21.5 of the DSU in this matter. As Korea had explained previously, the Korean Trade Commission ("KTC") had undertaken a thorough process to implement the Panel's decision. Korea was confident that any panel reviewing the KTC's implementation would find that there was no basis for claiming that the KTC's implementation was in any way inconsistent with Korea's obligations under the WTO Agreements. On 17 August 2006, Korea and Indonesia had entered into an understanding concerning the procedures for considering claims that might be raised by Indonesia under Article 21.5 of the DSU. Paragraph 2 of that understanding provided that, "at the first DSB meeting at which Indonesia's request for the establishment of an Article 21.5 panel appears on the agenda, Korea shall accept the establishment of that panel." In accordance with that understanding, Korea accepted the establishment of the panel to consider Indonesia's request, subject to the proviso that Korea reserved its rights to challenge the form, contents and sufficiency of Indonesia's request and any or all of the individual claims stated therein.

70. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Indonesia in document WT/DS312/9. The Panel would have standard terms of reference.

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

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

(a) Report of the Appellate Body (WT/DS322/AB/R) and Report of the Panel (WT/DS322/R)

72. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS322/14 transmitting the Appellate Body Report on: "United States – Measures Relating to Zeroing and Sunset Reviews", which had been circulated on 9 January 2007 in document WT/DS322/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He noted that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

73. The representative of the United States said that his country welcomed the Panel Report being adopted at the present meeting. The Panel had correctly noted its obligation to undertake an objective assessment of the matter before it and not to add to or diminish the rights and obligations in the covered agreements – even where this involved disagreeing with the Appellate Body. The United States commended the Panel for its careful analysis of the text of the Agreement, read in its context. In a comprehensive analysis, the Panel had looked at the issue of so-called "zeroing" in a number of contexts in anti-dumping proceedings. The Panel had concluded that only in one particular narrow context could the Anti-Dumping Agreement be read to require a Member to offset dumping by

an exporter or producer against non-dumped transactions. In light of the Panel's thorough examination, the United States was deeply troubled by the Appellate Body's reasoning in this latest report, which had rejected the Panel's interpretation, but based on inferences rather than on the text of the Anti-Dumping Agreement. Eight out of the nine anti-dumping experts who had served as panelists in recent "zeroing" disputes had concluded that the Anti-Dumping Agreement did not prohibit zeroing outside the average-to-average context in investigations, and had so concluded on the basis of thoughtful and comprehensive reasoning.

74. Regrettably, the Appellate Body had rejected this analysis, without fully addressing its logic. Most importantly, in finding that zeroing was prohibited in all contexts, the Appellate Body had found that the findings of these experts did not even reflect a permissible interpretation of the Anti-Dumping Agreement, a conclusion difficult to credit, given not only the expertise of the panelists, but the fact that numerous Members had organized their anti-dumping regimes on the basis of these interpretations, a fact the United States would allude to further. The United States would not detail the flaws in the Appellate Body's analysis here, but would be providing Members with a written critique of the report. As an initial matter, however, the United States wished to make several observations. First, in extending its zeroing findings beyond the context of average-to-average comparisons in investigations, the Appellate Body had departed from agreement language and instead had relied on shifting, mutually contradictory rationales. The Appellate Body's reliance on the phrase "product as a whole" in the EC's case on zeroing had given way to a reliance on alleged requirements relating to "multiple comparisons" in Canada's case. None of these phrases appeared in the Anti-Dumping Agreement, and to the extent they had been used in the past by the Appellate Body in interpreting specific agreement language, that was in the context of the phrase "all comparable export transactions," which appeared only in connection with average-to-average comparisons in investigations. The Panel in this dispute had already identified this flaw in the Appellate Body's reasoning, noting that "the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms 'dumping' and 'margins of dumping' cannot apply to a sub-group of a product logically leads to the broader conclusion that Members may not distinguish between transactions in which export prices are less than normal value and *transactions* in which export prices exceed normal value" (Panel Report, para. 7.101). Despite having this concern called to its attention in the very report it was reviewing, the Appellate Body had again declined to explain its leap of logic.

75. Second, when it had demonstrated that a prohibition of zeroing in the targeted dumping context would render that methodology identical in outcome to that of the average-to-average methodology, the Appellate Body's response was one that many Members might find alarming. The Appellate Body had avoided this mathematical equivalence by concluding that authorities may calculate margins under the "targeted dumping" provision of Article 2.4.2 based on a subset of export transactions. The United States was not aware of any Member's authorities that had taken this position. The United States had also noted the contradiction between the use of a subset of transactions in "targeted dumping" with the Appellate Body's conclusion that the terms "dumping" and "product" meant that all transactions must be considered in average-to-average and transaction-to-transaction comparisons.

76. Third, when faced with the fact that prohibiting the calculation of margins on a transaction-specific basis in assessment reviews would appear to require wholesale changes not only to retrospective duty systems, but also to prospective normal value systems, the Appellate Body had simply accepted that implication. The United States noted in this connection that the Appellate Body's reasoning called into question how a number of other Members, not limited to those with prospective normal value systems, were currently conducting anti-dumping proceedings. Finally, the United States noted that the sum total of the Appellate Body's findings on the zeroing issue over the past several years called into question whether the major users of the anti-dumping remedy began breaching that Agreement the very day it had gone into effect in 1995. This was a surprising result. Presumably the Members who had negotiated the Agreement understood its meaning. As already

noted, the United States would have further comments on the Report, which it would be providing in writing.

77. The representative of Japan said that, at the outset, his country wished to express its sincere appreciation for the time and efforts devoted to this case by the Appellate Body and the Secretariat. This case involved technical discussions of how to calculate the margin of dumping and how to levy the anti-dumping duties. But at its very core, this case was about the dispute over the fundamental notion of "dumping" that defined the entire operations of the Anti-Dumping Agreement. The Appellate Body had resolved this dispute by finding that the Anti-Dumping Agreement had been designed and structured so that: (i) "the concept of 'dumping' and 'margin of dumping' pertained to a 'product' and to an exporter or foreign producer"; (ii) "'dumping' and 'dumping margins' must be determined in respect of each known exporter or foreign producer" "because dumping is the result of pricing behaviour of individual exporters or foreign producers"; (iii) "anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry"; and (iv) the margin of dumping established for each exporter or foreign producer operated as a ceiling for the total amount of anti-dumping duties that could be levied.

78. The Appellate Body had maintained that these concepts did not vary throughout the Anti-Dumping Agreement, and had held that "dumping" could be found to exist only for the "product", not for a type, model, category, or an individual transaction of the "product". Thus these findings of the Appellate Body, together with its findings in other previous zeroing cases, left little ambiguity with respect to the fundamental concepts of "dumping" and "margins of dumping" and would provide "security and predictability" in the interpretations and implementation of the Anti-Dumping Agreement. Building on these findings and after carefully examining the arguments the parties had made, the Appellate Body had reached the conclusion that the zeroing procedures were as such WTO-inconsistent (i) in original investigations in the context of the 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 Japan challenged were also WTO-inconsistent.

79. Japan noted that the Appellate Body had further observed in this report that the "targeted dumping" method contemplated in the Anti-Dumping Agreement could "unmask" such exceptional dumping by limiting its application to the prices of export transactions falling within the pattern of such "targeted dumping". This meant that "targeted dumping" method would work to address such dumping without zeroing, suggesting that the general prohibition on zeroing would also cover these exceptional circumstances. In short, the Appellate Body had completed works left unfinished in the previous zeroing cases and had decided that zeroing was prohibited in all circumstances whenever calculating the "margins of dumping". While the Appellate Body had based its analysis on the definition of "dumping" set forth in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, it had also stated that these definitional provisions, "read in isolation, do not impose independent obligations". Japan had some reservations in this observation. Japan strongly supported the adoption by the DSB of the Appellate Body Report and the Panel Report, as modified by the Appellate Body.

80. 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 the Members to "comply immediately with the recommendations and rulings" (Article 21.3 of the DSU). Japan also recalled that the DSU recognized that "all Members will engage in [the dispute settlement] procedures in good faith in an effort to resolve the dispute"(Article 3.10). The United States continued to apply zeroing in a variety of anti-dumping proceedings including periodic reviews, which had practical, commercial consequences in the real world of international trade. Because the Appellate Body had spoken, 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 these measures immediately to resolve this dispute once and for all.

81. The representative of Norway said that his country welcomed the adoption of the Panel and the Appellate Body Reports in the case: "United States – Measures Relating to Zeroing and Sunset Reviews". Norway had participated as a third party in this case and wished to offer the following comments on the Appellate Body Report. The issue of zeroing created a long-running conflict in the WTO. Members had seen many reports on this issue, starting with the "EC – Bed Linen" report and continuing with a number of cases against the United States. It had long been clear that zeroing was prohibited *per se* in "weighted-average-to-weighted-average" comparisons in original investigations, something which the Panel had set out in no uncertain terms. The Appellate Body Report before the DSB at the present meeting would, hopefully, settle once and for all the issue of zeroing by setting out that zeroing was also prohibited *per se* in "transaction-to-transaction" comparisons[2] and in "weighted-average-to-transaction" comparisons.[3] The prohibition of zeroing was not just applicable to original investigations. As held by the Appellate Body in this case, the prohibition related to all instances where an investigating authority calculated or relied upon a dumping margin, be it in original investigations, periodic reviews ("assessment proceedings")[4], new shipper reviews[5] and in sunset reviews.[6] Although "changed circumstances reviews" had not been directly addressed, the reasoning employed by the Appellate Body to condemn zeroing was equally applicable to such reviews. While Norway was in general very satisfied with the Report of the Appellate Body, and supported its adoption, it wished to register its concern regarding one element of the Report. He referred to paragraph 140 of the Report, where the Appellate Body made a statement – not a finding – that: "...Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. [...] [A]rticle 2.1 and Article VI:1, *read in isolation*, do not impose independent obligations." Norway disagreed with this *obiter dicta* of the Appellate Body, to the extent that it sought to present a general interpretation of the reach of the two Articles. While both provisions did provide a definition of dumping, Norway considered that they did more than just that. Both provisions stated that a product "is to be considered" as being dumped where certain conditions were met. The language "is *to be* considered" imposed substantive requirements on investigating authorities by setting forth the conditions that must be established before the authorities could treat a product as dumped. Continuing the language of obligation, Article VI:1 also stated that due allowance "shall be made" for certain things when the authorities compared export price and normal value. Indeed, unless GATT Article VI:1 contained independent obligations, there would be no obligations regarding the determination of dumping, and margins of dumping, in the GATT itself – a proposition that was both illogical and contrary to previous findings by panels and the Appellate Body.[7]

82. Furthermore, with respect to Article 2.1 of the Anti-Dumping Agreement, the Appellate Body stated in the "US – Hot-Rolled Steel" case: "The text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be 'in the ordinary course of trade'; second, it must be of the 'like product'; third, the product must be 'destined for consumption in the exporting country'; and, fourth, the price must be 'comparable.'"[8] The Appellate Body had gone on to find that the United States' measure "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade,'" in violation of

[2] Appellate Body Report: "US – Zeroing and Sunset", WT/DS322/AB/R, para 137.
[3] Ibid. paras. 133-135.
[4] Ibid. paras. 166 and 169.
[5] Ibid.
[6] Ibid. para. 186.
[7] For an example of a panel that found a separate violation of Article VI:1 of the GATT 1994 see Panel Report: "US – 1916 Act" (EC), para. 6.228. This finding was upheld by the Appellate Body.
[8] Appellate Body Report: "US – Hot Rolled Steel", para. 165.

Article 2.1.[9] In this report, the Appellate Body had interpreted Article 2.1 "in isolation", and had found no violation of any other provisions. It was thus clear from the findings of the Appellate Body in "US – Hot Rolled Steel" case that Article 2.1 did, indeed, impose independent obligations.

83. The Appellate Body had made no reference to its previous report in paragraph 140 of this Report. This might, perhaps, be explained by the fact that paragraph 140 dealt with a very particular issue, namely whether Article 2.1 and Article VI:1 imposed independent obligations, in addition to those in Articles 2.4 and 2.4.2, regarding "simple zeroing" in "transaction-to-transaction comparisons" in original investigations. In fact, after making its statement on Article 2.1 and Article VI:1, the Appellate Body had formally declined to address this issue. No doubt, the meaning of Article 2.1 and Article VI:1 would be clarified in future cases dealing with the requirements of these provisions.

84. The representative of Hong Kong, China said that her delegation thanked the Appellate Body, the Panel and the Secretariat for their hard work on this very important case. As Members were aware, this case concerned the practice of zeroing, which was one of the most contentious and frequently raised issues in anti-dumping disputes. Hong Kong, China's stance on zeroing was well known and long standing. Hong Kong, China considered that zeroing practice, irrespective of the comparison methodologies adopted, was inconsistent with the Anti-Dumping Agreement, whether it was used in the original investigations and subsequent reviews. Hong Kong, China had participated in the proceedings of this case as a third party. Hong Kong, China welcomed the comprehensive and final decision of the Appellate Body. She noted that the Appellate Body had reaffirmed the interpretations and reasoning of its previous zeroing decisions in relation to original investigations and periodic reviews. In addition, the clear rulings of the Appellate Body to outlaw zeroing in new shipper reviews and sunset reviews, which were new in the WTO jurisprudence, would certainly provide guidance to future cases. The "fundamental disciplines" and "concepts" set out by the Appellate Body in para. 107-116 of the Appellate Body Report were particularly helpful in explaining why an across-the-board and coherent discipline on zeroing was both necessary and justified. By now, there should not be any doubt left of the WTO-inconsistency of the zeroing practice, and all remaining disputes should be put to rest. This development was welcome, and conducive to enhancing the stability and predictability of the multilateral trading system. With these observations and comments, Hong Kong, China supported the adoption of the Report of the Appellate Body, and that of the Panel, as modified by the Appellate Body. Hong Kong, China looked forward to a smooth and expeditious implementation of the recommendations of the DSB.

85. The representative of the European Communities said that the EC had a direct interest in this matter, as indeed many other Members, as it was now awaiting US implementation of the rulings of its own Zeroing case (DS294) against the US. In addition, another 40 measures where the United States had employed zeroing were part in the DS350 consultation request. The EC was grateful to the Appellate Body not only for having reversed the Panel's controversial findings, but also for a very comprehensive report which should once and for all solve the problem of zeroing in the calculation of margins of dumping. The Appellate Body had maintained a consistent and coherent line on this issue, confirming on several occasions 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.

86. To the EC, these earlier decisions had already made clear that the practice of zeroing whether in original investigations or in reviews, whether in transaction-to-transaction comparisons or in weighted-average-to-weighted-average comparisons was *per se* WTO-incompatible. And, it was regrettable that unlike the EC after the ruling in the "Bed Linen" case, the United States had refused the draw the inevitable consequences of these earlier decisions.

[9] Appellate Body Report: "US – Hot Rolled Steel", paras. 140, 158 and 240(d).

87. The Panel and the Appellate Body had now rightly found that zeroing was one and the same practice regardless of the comparison methodology used or of the type of investigation conducted. The Appellate Body had reasserted that this one and the same practice breached core obligations of the Anti-Dumping Agreement. The EC trusted that the outcome of this case would make it crystal clear to the United States that "the game is up" as regards zeroing, and that the only way of meeting its WTO obligations was to abandon this practice in both original investigations and reviews.

88. The representative of Brazil said that although Brazil had not been a third party to this dispute, systemic interests compelled his delegation to say a few words. First, he wished to express Brazil's great satisfaction with the conclusions arrived at by the Appellate Body. Brazil very much welcomed the reversal of the Panel's findings that allowed for the use of "zeroing" in various anti-dumping procedures. Brazil had had the opportunity, in the context of other disputes on "zeroing", to manifest its expectation that panels would deal with the matter in a manner that would prevent the United States from resorting to moving-target tactics in the implementation of the relevant DSB's rulings and recommendations. Unfortunately, panels – to different degrees – had fallen short of Brazil's hopes. As a consequence, Members were regrettably forced to engage in unnecessary litigation with the United States. At the present meeting, however, with the adoption of the comprehensive conclusions of the Appellate Body, the DSB told the United States that the room for manoeuvring to maintain the illegal "zeroing" methodology did not exist any longer, if it had once existed.

89. As Brazil had argued many times before, it was clear under the Anti-Dumping Agreement that "zeroing" was never permissible. Paraphrasing the Appellate Body's many decisions on this issue, Brazil noted that "zeroing": (i) inflated the margin of dumping for the product as a whole, (ii) might lead to an affirmative determination that dumping existed where no dumping would have been established in the absence of "zeroing", and (iii) this methodology enclosed an inherent bias that tainted any investigation or review. "Zeroing" was, by definition, the denial of the parameters of objectivity and fairness that permeated the whole Anti-Dumping Agreement and were expressly referred to in Article 17.6 thereof. By resorting to "zeroing", an investigating authority's assessment of the facts could not be "unbiased and objective", thus rendering the results of the investigation or review inconsistent with the WTO rules. Brazil was glad to note that this rationale underlay the Appellate Body Report that the DSB would adopt at the present meeting. To conclude, Brazil believed that, in good-faith and for the sake of the dispute settlement system's proper functioning, the United States should implement the recommendations in this dispute in the broadest way possible and in the most expedited time-frame benefiting the whole Membership.

90. The representative of Chile said that almost three years ago, the United States had stated before the DSB that "the US method, which took into account non-dumped transactions, ensured that the amount of duties collected equalled the actual dumping practiced". Panel Reports had, however, repeatedly concluded that this was not the case and that the "zeroing" methodology used by the US Department of Commerce was inconsistent with the Anti-Dumping Agreement. The result of this practice was that it allowed dumping to be "found" where none existed and margins which did exist to be inflated. The Appellate Body Report before the DSB at the present meeting would put an end to this discussion by categorically and definitively ruling that zeroing procedures were WTO-inconsistent irrespective of the comparison methodology and at all stages of an anti-dumping proceeding, including periodic and sunset reviews. Chile had long supported this position, given that not only did it have a systemic interest in the proper implementation of the Anti-Dumping Agreement, but also because it had been directly and adversely affected by such practices. Chile hoped that the United States would adopt as soon as possible the necessary measures to prevent the US Department of Commerce from continuing to employ these procedures. This final blow should, moreover, lead the United States to join the consensus in the negotiations on Rules with regard to the establishment of a specific prohibition in the Anti-Dumping Agreement on the use of zeroing methodologies, as proposed by Chile and other Members.

91. The representative of Thailand expressed his country's appreciation and thanked the Panel, the Appellate Body and the Secretariat for their work on this case. Thailand warmly welcomed the findings and conclusions of the Appellate Body Report. Thailand had participated as a third party in this dispute due to its long-standing concern about the use of the zeroing methodology in anti-dumping proceedings. In Thailand's view, the use of the zeroing methodology in any circumstances was inconsistent with both the spirit and the substance of GATT Article VI and the Anti-Dumping Agreement. Thailand, therefore, fully agreed with the Appellate Body's findings and conclusions in this dispute. It noted that this was the third report in the past year in which the Appellate Body had reiterated that zeroing in any fashion was not permitted under the Anti-Dumping Agreement. The three Reports of the Appellate Body, and in particular the one to be adopted at the present meeting, provided a thorough and coherent explanation of why this was so. In Thailand's view, the Appellate Body had fully addressed all of the arguments of the United States, not just in the proceedings before the Appellate Body but also in its statements before the DSB. Thailand trusted that the United States would fully implement the DSB's recommendations and rulings by completely abandoning the use of zeroing in all circumstances in its anti-dumping determinations.

92. The representative of China thanked the Panel and the Appellate Body as well as the respective Secretariats for their work towards resolving the dispute concerning the zeroing practice of the United States in anti-dumping determination. China was pleased to note that findings of the Appellate Body in this case. They brought additional clarity and certainty to the interpretation of the provisions of the Anti-Dumping Agreement. Through compelling analysis, the Appellate Body had rightly confirmed that in determining margins of dumping in an anti-dumping investigation, the use of zeroing in the transaction-to-transaction methodology, in periodic reviews, in new shipper reviews, and in the sunset reviews was inconsistent with a Member's obligations under the Anti-Dumping Agreement. Thus, China strongly supported the adoption by the DSB of the Appellate Body Report.

93. The representative of Korea said that first of all, his country wished to thank the Panel, the Appellate Body, and the Secretariat for their time and efforts dedicated to the resolution of this dispute. Korea deeply appreciated the correct judgment of the Appellate Body that had rectified the problematic findings of the Panel in this highly contentious and repeated issue of zeroing. Korea hoped that the Appellate Body Report would be remembered and referenced as a landmark judgment that had put an end to a series of disputes surrounding the egregious practice called "zeroing". The Appellate Body Report to be adopted at the present meeting was a clear and stern message that the practice of zeroing must cease to exist and Members who had practiced it must respect the letter and the spirit of the GATT and the Anti-Dumping Agreement. To constitute a practice of dumping as defined in the Agreement, all incidents, high or low, advantageous or not, must be considered and counted. Since the inception of GATT Article VI Members had agreed to resort to the trade restrictive measure only if such a concept was respected. Unfortunately, this fundamental concept had long been neglected by some Members, and now, owing to the Appellate Body's finding, fairness and justice had been restored to the system. Korea welcomed this. The Appellate Body Report contained unequivocal messages regarding this fundamental aspect of the system. Its brevity stood for its clarity and firmness. Any attempt to circumvent the Appellate Body's finding or to replace the existing practice of zeroing by a new one with a similar effect must be denounced. As long as the concept of dumping established by the Appellate Body stood firm, a distortion in a finding of dumping should not be allowed any more, no matter what type it was.

94. Korea also noted that the Appellate Body had made a clear distinction between the duty collection system that might vary among Members and the calculation of dumping margin that should observe Article 2 of the Anti-Dumping Agreement in all procedures of all Members. From that milestone, the zeroing practice which was inconsistent with the said Article and must stop once and for all. In this regard, Korea wished to share the frustration of Japan and Norway that the Appellate Body had declined to make any findings whether zeroing was condemned by Article 2 of the Anti-Dumping Agreement. The Appellate Body had refused to do so on the basis that Article 2 of the

Anti-Dumping Agreement was a definition clause, but since this clause was the very core element of the Anti-Dumping Agreement and zeroing was the concept definition of anti-dumping, Korea strongly believed that the Appellate Body should have found that the practice of zeroing was not consistent with Article 2 of the Anti-Dumping Agreement. Korea believed that the Appellate Body had restored judicial consistency in the dispute settlement system of the WTO by correcting the misinterpretation of the Panel in this case. The Appellate Body had established a clear discipline with respect to the matter at issue. Korea expected that all pending cases that dealt with the same issue would conclude in the same way as guided by the Appellate Body.

95. The representative of Mexico said that his country welcomed the Report of the Appellate Body and hoped that the United States would take the necessary measures to abandon its zeroing practice. This would enable WTO Members not to spend their resources in order to defend specific measures each time the United States had applied zeroing. He noted that Mexico was currently participating in a dispute that involved such a practice, notwithstanding previous decisions adopted by the DSB, which had already established that zeroing was a practice that ran counter to the WTO Agreements.

96. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS322/AB/R and the Panel Report contained in WT/DS322/R, as modified by the Appellate Body Report.